

eNote v. pNote
Intangible v. Tangible

electronic promissory Note

Intangible



paper promissory Note

Tangible

("[Courts] are not the law-making body. They are not responsible for omissions in legislation. They are responsible for a true and fair interpretation of the written law."). [Harris County Hosp. Dist. v. TOMBALL](#), 283 SW 3d 838 - Tex: Supreme Court 2009

Enforcing the law as written is a court's safest refuge in matters of statutory construction, and we should always refrain from rewriting text that lawmakers chose, but we should be particularly unwilling to reinsert language that the Legislature has elected to delete.
- in [Entergy Gulf States, Inc. v. Summers, 2009](#)

There is a difference between a *tangible* note and an *intangible* note

eNote v. pNote
Intangible v. Tangible



Sec. 312.005. Legislative Intent. In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.

Texas Government Code

CHAPTER 312. Construction Of Laws

Subchapter A. Construction Rules For Civil Statutes

Sec. 312.001. Application. This subchapter applies to the construction of all civil statutes.

Sec. 312.002. Meaning Of Words. (a) Except as provided by Subsection (b), words shall be given their ordinary meaning.

(b) If a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art.

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Texas Government Code

Sec. 311.001. Short Title. This chapter may be cited as the Code Construction Act.

Sec. 311.002. Application. This chapter applies to:

- (1) each code enacted by the 60th or a subsequent legislature as part of the state's continuing statutory revision program;
- (2) each amendment, repeal, revision, and reenactment of a code or code provision by the 60th or a subsequent legislature;
- (3) each repeal of a statute by a code; and
- (4) each rule adopted under a code.

Subchapter B. Construction Of Words And Phrases

Sec. 311.011. Common And Technical Usage Of Words. (a) Words and phrases shall be read in context and construed according to the rules of grammar and common usage.

(b) Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.

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Texas Government Code

Reminder:

Sec. 312.005. Legislative Intent. In interpreting a statute, a court shall diligently attempt to ascertain legislative intent and shall consider at all times the old law, the evil, and the remedy.

CHAPTER 312. Construction Of Laws

Subchapter A. Construction Rules For Civil Statutes

Sec. 312.001. Application. This subchapter applies to the construction of all civil statutes.

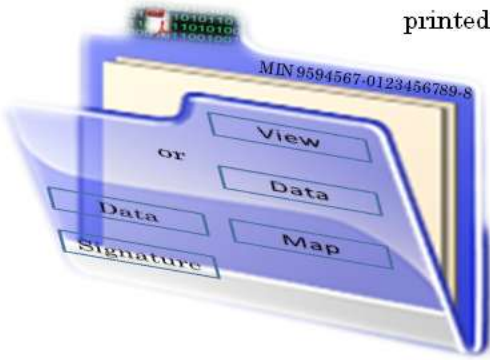
Sec. 312.006. Liberal Construction. (a) The Revised Statutes are the law of this state and shall be liberally construed to achieve their purpose and to promote justice.

(b) The common law rule requiring strict construction of statutes in derogation of the common law does not apply to the Revised Statutes.

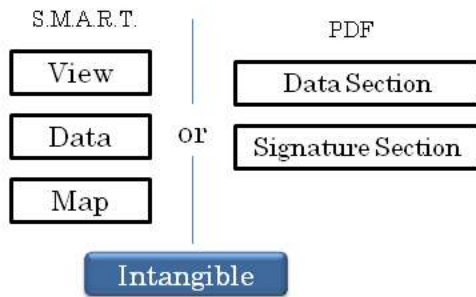
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Rules of construction: Handwritten provisions prevail over typed or printed terms. Typed terms prevail over printed terms.



Parts of the eNote.



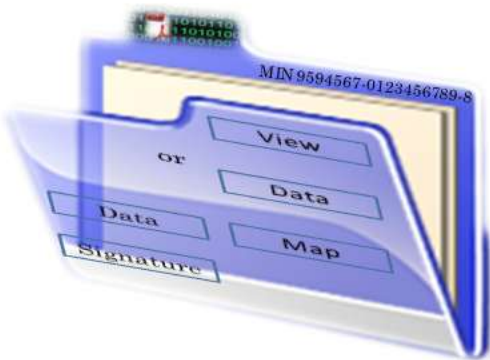
v.

Parts of the pNote.

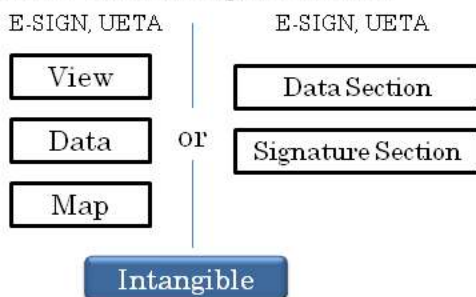


There is a difference between a tangible note and an intangible note

eNote v. pNote
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Laws Governing the eNote.



v.

Laws Governing the pNote.



There is a difference between a tangible note and an intangible note

eNote v. pNote
Intangible v. Tangible

3 major issues with Article 3, negotiable instruments

1. Is the electronic instrument negotiable?
2. Is the holder a holder in due course
3. If there is a holder in due course, are there defenses?

The requirements for negotiability

1. It is a Signed writing
2. There is an unconditional promise to pay
3. Payable to bearer or to order
4. A specified time or on demand
5. Does not contain any other conditions, agreements or undertakings.

The note is a written promise to pay

There are two parties in a note

1. The maker; and [person undertaking to pay money]
2. The Payee



Laws Governing the pNote.

Article 3, UCC, Statute of Fraud

- Amount to be Repaid
- Parties involved
- Terms of Repayment
- Provisions
- Signatures
- Tangible

There is a difference between a *tangible* note and an *intangible* note

eNote v. pNote
Intangible v. Tangible

3 major issues with Article 3, negotiable instruments

1. An indorsment must be written on the instrument or on an allonge
2. Transfer of an instrument without the necessary indorsment does not constitute as negotiation, and the transferee does not become a holder, except where the bank takes a check for collection.

A claim to a negotiable instrument is an affirmative cause action for recovery on the instrument based on superior ownership rights of the claimant.

An indorser becomes a type of surety for all prior parties and promises to pay any later holder.

Conversion is the unauthorized assumption of ownership rights over the personal property of another. Good Faith is no defense to conversion. Any wrongful taking of a negotiable instrument would be a conversion.



Laws Governing the pNote.

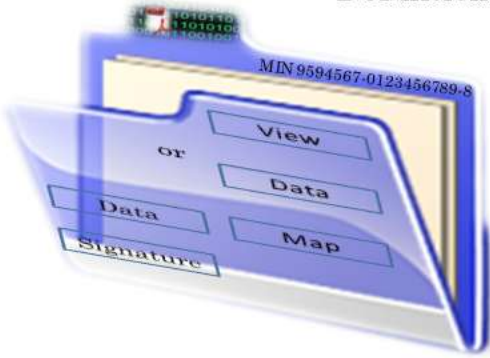
Article 3, UCC, Statute of Fraud

- Amount to be Repaid
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- Provisions
- Signatures
- Tangible

There is a difference between a *tangible* note and an *intangible* note

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Definitions for E-SIGN electronic negotiable instruments



Transferable Record (TR): An eNote issued in accordance with the provisions of Section 16 of the UETA and Title II of E-SIGN

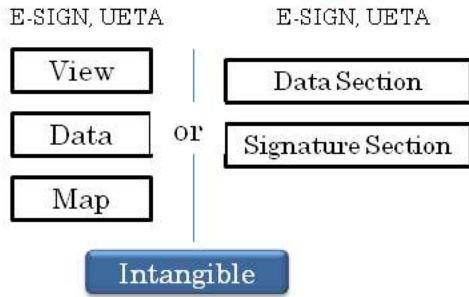
eNote: The **electronic promissory note**. For this eNote to be negotiable and transferable, it must be clearly labeled the Authoritative Copy of the electronic promissory note.

Authoritative Copy (AC): The unique, identifiable and mostly unalterable version of the eNote that (1) identifies the person asserting control as *the person to which the Transferable Record* was issued or most recently transferred, (2) ensures that “each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy” and (3) any revision of the AC is readily identifiable as authorized or unauthorized

Beneficial Rights: Ownership rights to the future cash flows of the eNote; the transfer of control of the TR evidences transfer of beneficial rights

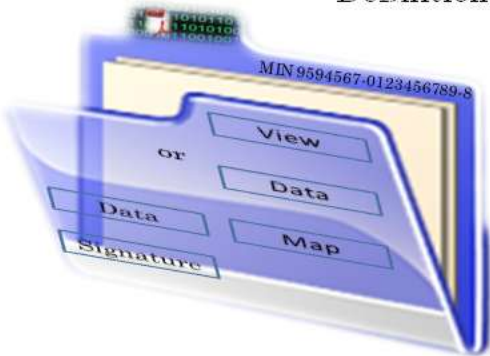
There is a difference between a tangible note and an intangible note

Laws Governing the eNote.



eNote v. pNote
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Definitions for E-SIGN electronic negotiable instruments



MIN (Mortgage Identification Number): The industry standard, unique loan numbering system maintained by Mortgage Electronic Registration Systems, Inc. (MERS).

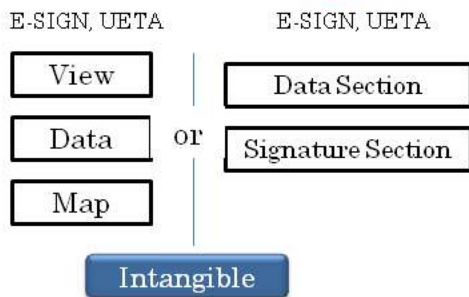
Originator/Seller: The organization that originates an eNote and sells it to the Interim Note Holder or Note Holder

Note Holder: The investor or institution that is intended to be the permanent holder (i.e. controller) of the eNote

Interim Note Holder: The investor or institution that holds (i.e. controls) the eNote for a temporary time period pending its transfer to the final Note Holder. An example might be in a loan closing where the originator has made a forward sale to an investor (GSE, large bank, etc.) but involves a warehouse lender to fund the closing. A warehouse lender could be the Interim Note Holder until the investor purchases the loan and releases the funds.

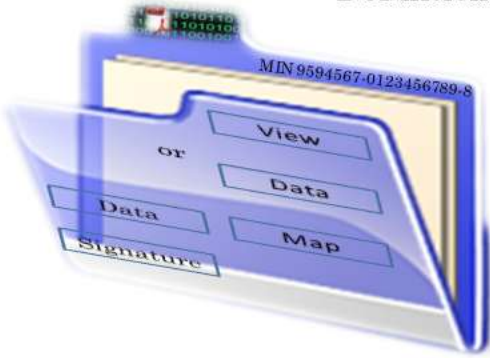
There is a difference between a tangible note and an intangible note

Laws Governing the eNote.



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Definitions for E-SIGN electronic negotiable instruments



Servicer: The party with contractual responsibility to collect payments on behalf of the **Note Holder**

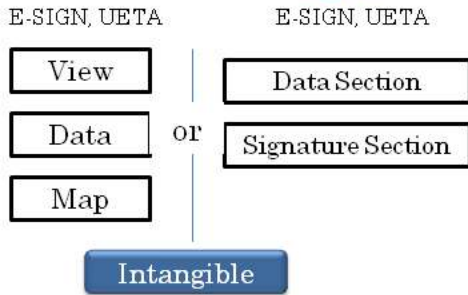
Servicing Rights: The contractual rights that can be sold in the secondary market to collect payments on behalf of the **Note Holder**

Transferor: The entity that initiates a transfer to another entity

Transferee: The entity that receives a transfer from another entity

Trusted Third Party: An entity other than the Note Holder or Servicer that is in the business of providing services intended to enhance (i) the trustworthiness of the process for signing electronic records using an electronic signature, or (ii) the integrity and reliability of the signed electronic records

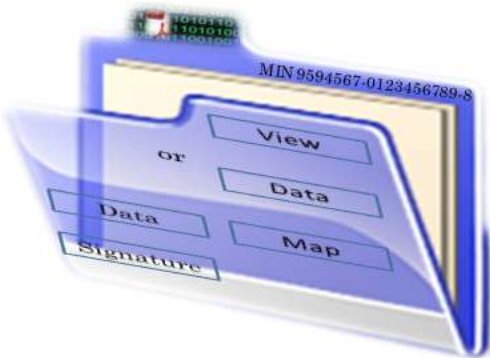
Laws Governing the eNote.



There is a difference between a *tangible* note and an *intangible* note

eNote v. pNote
Intangible v. Tangible

1 major issue with E-SIGN electronic negotiable instruments

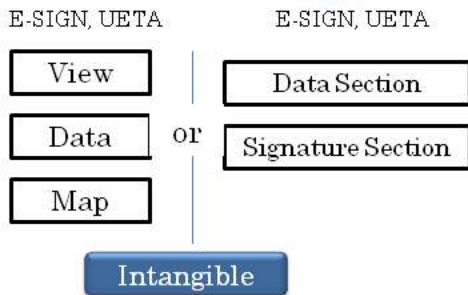


Sec. 322.016. TRANSFERABLE RECORDS.

(a) In this section, "transferable record" means an electronic record that:

- (1) would be a note under Chapter 3 or a document under Chapter 7, if the electronic record were in writing; and
- (2) the issuer of the electronic record expressly has agreed is a transferable record.

Laws Governing the eNote.



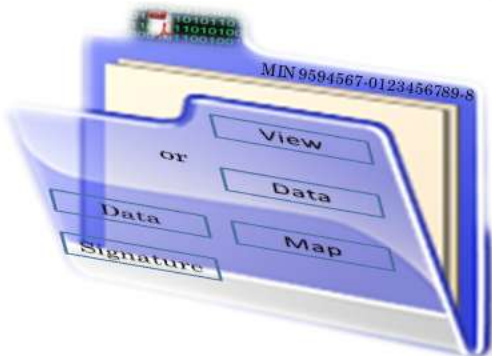
Sec. 322.003. SCOPE. (a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.

(b) This chapter does not apply to a transaction to the extent it is governed by:

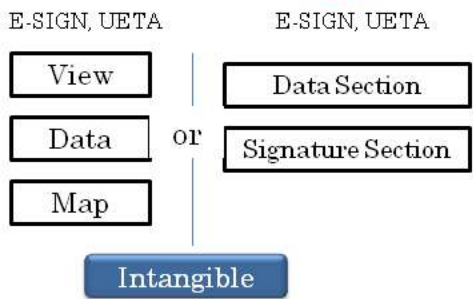
- (2) the *Uniform Commercial Code*, other than Sections 1.107 and 1.206 and Chapters 2 and 2A

There is a difference between a *tangible* note and an *intangible* note

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Laws Governing the eNote.



They knew there was a problem with electronic negotiable instruments

CUNA COMMENT LETTER

Project to Revise Articles 3 & 4 of the Uniform Commercial Code.

October 24, 2000 ← No change in UCC 3, then or now

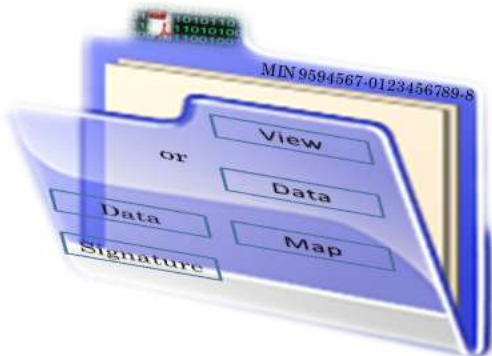
Re: Scope of Revisions to Articles 3, 4 and 4A

Dear Gentlemen:

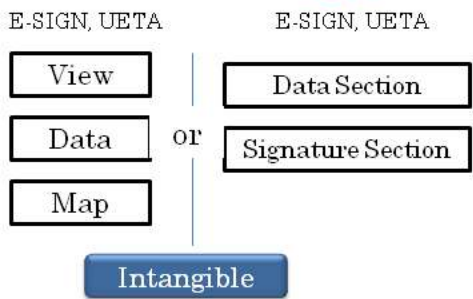
The undersigned financial institution organizations are writing to you to urge that electronic negotiable instruments be included within the scope of the National Conference of Commissioners on Uniform State Laws (NCCUSL) current effort to revise UCC Articles 3 and 4. We believe this UCC Article 3 and 4 revision project represents a unique and critical opportunity for NCCUSL to provide leadership to the states and the financial institution community on the timely and important issue of electronic negotiable instruments.

There is a difference between a tangible note and an intangible note

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Intangible v. Tangible



Laws Governing the eNote.



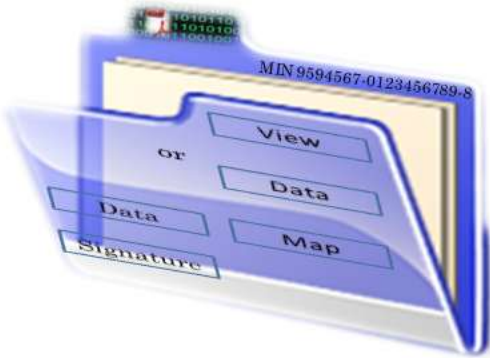
They knew there was a problem with electronic negotiable instruments

CUNA Letter [continued]

We were quite surprised by the announcement this spring that it had been preliminarily decided not to include electronic negotiable instruments within the scope of the UCC Articles 3 and 4 revision project. It had been our understanding that one of the primary motivations for NCCUSL to undertake this project was to address electronic negotiable instruments under UCC Articles 3 and 4. Indeed, the exclusion of UCC Articles 3 and 4 from the Uniform Electronic Transactions Act ("UETA") and the recently enacted federal E-Sign Act were supported based on indications from NCCUSL that electronic negotiable instruments would be addressed in the upcoming revision to UCC Articles 3 and 4. As argued by representatives of the Federal Reserve and others, we thought it was agreed that the issues raised by electronic negotiable instruments should be addressed by check law experts in the context of UCC Articles 3 and 4, rather than in the more general UETA and E-Sign Act.

There is a difference between a tangible note and an intangible note

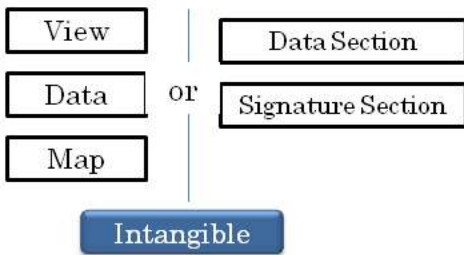
eNote v. pNote
Intangible v. Tangible



Laws Governing the eNote.

E-SIGN, UETA

E-SIGN, UETA



They knew there was a problem with electronic negotiable instruments

CUNA Letter [continued]

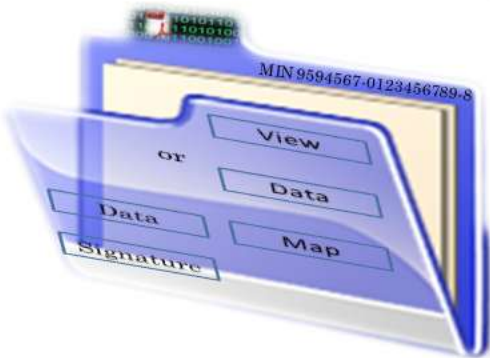
It is essential to address electronic negotiable instruments in this UCC Articles 3 and 4 revision project so that the developers and users of emerging electronic payment products can, if they so choose, utilize check law to support their products.

Absent coverage of electronic negotiable instruments under UCC Articles 3 and 4, developers and users of the emerging electronic payment products will not be able to utilize check law for these products.

It is only the UCC (or another federal or state law) that can provide a comprehensive uniform legal framework applicable to all persons potentially interested in the electronic negotiable instrument, including the drawer, payor bank, indorsers, other third party transferees and collecting banks.

There is a difference between a tangible note and an intangible note

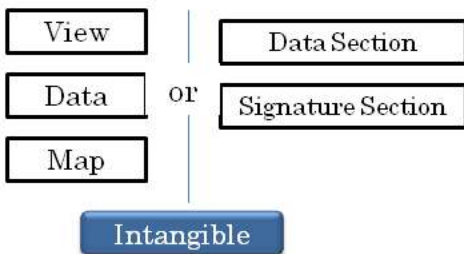
eNote v. pNote
Intangible v. Tangible



Laws Governing the eNote.

E-SIGN, UETA

E-SIGN, UETA



They knew there was a problem with electronic negotiable instruments

CUNA Letter [continued]

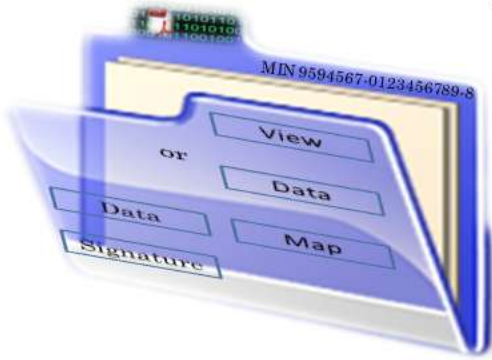
Congress and the state legislatures, through the E-Sign Act and the UETA, respectively, have established a legal framework for check law to apply to images and other electronic representations of paper checks. It is now time for NCCUSL to complete this work by extending this legal framework to electronically-initiated checks. The failure to address electronic negotiable instruments in the UCC at this time will have the effect of precluding the use of check law for these emerging electronic payment products.

For the foregoing reasons, the undersigned organizations urge the inclusion of electronic negotiable instruments within the scope of the current UCC Articles 3 and 4 revision project.

Can you say "Check 21 Act"? Look it up. In 2004, Congress somehow provided a law that checks could function lawfully in electronic form. Interesting story. But Check 21 is not for electronic negotiable instruments

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1 major issue with E-SIGN electronic negotiable instruments

1. Is the instrument negotiable according to Article 3?
2. Is the holder a holder in due course in accordance with Article 3?
3. Is there a law to support the *electronic* promissory note?

The requirements for negotiability

1. It is a *Signed* writing
2. There is an unconditional promise to pay
3. Payable to bearer or to order
4. A specified time or on demand
5. Does not contain any other conditions, agreements or undertakings.

The note is a *written* promise to pay

There are two parties in a note

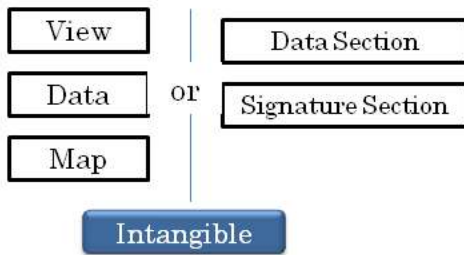
1. The maker; and [person undertaking to pay money]
2. The Payee

There is a difference between a *tangible* note and an *intangible* note

Laws Governing the eNote.

E-SIGN, UETA

E-SIGN, UETA



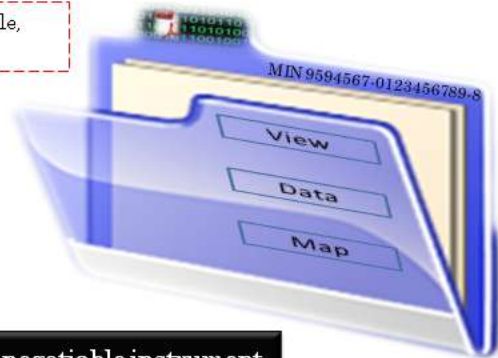
eNote v. pNote
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[MISMO S.M.A.R.T. Doc requirements](#), version 3.0

SMART is an acronym for: **S**ecurable, **M**anageable, **A**rchivable, **R**etrievable, and **T**ransferable.

eNote Core

A SMART Doc document is constructed as a MISMO Package [MPAK] with multiple contained parts, and groups which together constitute one single mortgage document.



Parts

Not the average negotiable instrument

Document Info

The Document Info part contains metadata about the SMART Doc document.

SMART Doc Core

The SMART Doc Core part contains a list of the view, data and map parts within the SMART Doc document.

Audit Trail

The Audit Trail Part contains information about the actions performed on the SMART Doc document.

Intangible

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[MISMO S.M.A.R.T. Doc requirements](#), version 3.0

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eNote Core

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Groups

Not the average negotiable instrument

View Group

The View Group contains the visual representation of the SMART Doc document.

Data Group

The Data Group contains the source data used to populate the SMART Doc view and other related data.

Map Group

The Map Group contains stylesheets for generating or populating document views based on the data parts in the Data Group.

Intangible

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MERS eRegistry PDF Guidelines April 15, 2007

SMART is an acronym for: **S**ecurable, **M**anageable, **A**rchivable, **R**etrievable, and **T**ransferable.

eNote Core

The PDF Guidelines for the MERS eRegistry provide implementation guidance for registration of electronically signed PDF documents with the MERS eRegistry.

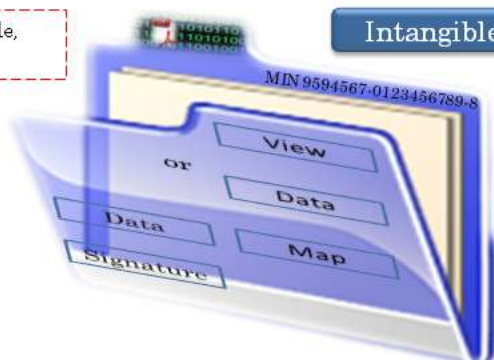
The following requirements pertain to every eNote registered on the MERS eRegistry, including PDF documents:

- Every eNote registered on the MERS eRegistry must contain a valid, unique 18-digit MIN (Mortgage Identification Number).

- In all cases, the eNote must contain legally sufficient language indicating that the MERS eRegistry is the definitive source to determine the identity of the current Controller of that eNote.

- The text of the eNote, or the Operator ID if required by the Investor, must identify the operator of the registry as **MERSCORP, Inc., a Delaware corporation.**

Intangible



At a minimum, an eNote and any associated technology (e.g., document readers), regardless of the document file format, should be capable of:

1. Being rendered consistently so that each rendering results in the same document that was viewed and signed by a borrower;
2. Capturing and retaining electronic signatures and any signature attribution information;
3. Detecting alterations to the document; and
4. Remaining accessible for any enforcement and record retention time periods.

[PowerPoint file available](#)

eNote v. pNote
Intangible v. Tangible

MERS eRegistry PDF Guidelines April 15, 2007

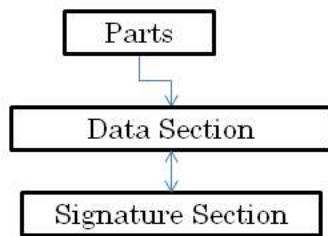
SMART is an acronym for: **S**ecurable, **M**anageable, **A**rchivable, **R**etrievable, and **T**ransferable.

eNote Core

There are two ways to register eNotes on the MERS® eRegistry. One is with the presentation of a SMART Document eNote Base64 encoded inside an eMortgage Package.



Not the average negotiable instrument



The second method is by providing the required registration data without presenting the SMART Document. This method is referred to as a Data Point Registration and is how PDF eNotes can be registered on the MERS® eRegistry.

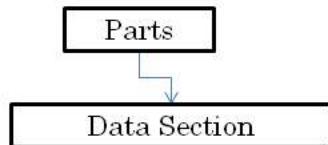
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MERS eRegistry PDF Guidelines April 15, 2007

SMART is an acronym for: **S**ecurable, **M**anageable, **A**rchivable, **R**etrievable, and **T**ransferable.

eNote Core

When an eNote registration transaction is submitted to the MERS eRegistry, the following data points (in the XML example below) are required to register the MIN. The section presented below represents the subset of the registration request where the eNote data is populated.



```

<_DATA_INFORMATION>
<DATA_VERSION _Name="" _Number="" />
</_DATA_INFORMATION>
<MERS MERS_MINNumber="123456789012345678" />
<LOAN_FEATURES LienPriorityType="FirstLien" />
<BORROWER BorrowerID="Borr01" NonPersonEntityIndicator="N"
_FirstName="John" _LastName="Doe" _MiddleName="" _SSN="123456789" />
<PROPERTY _City="Plano" _County="Collin" _PostalCode="75024"
_State="TX" _StreetAddress="">
<PARSED_STREET_ADDRESS _DirectionPrefix="" _HouseNumber="5400"
_StreetName="Legacy" _StreetType="Drive" />
</PROPERTY>
  
```

The above information constitutes data that was originally used to create the final eNote.

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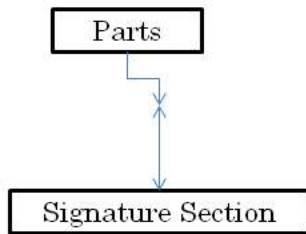
MERS eRegistry PDF Guidelines April 15, 2007

SMART is an acronym for: **S**ecurable, **M**anageable, **A**rchivable, **R**etrievable, and **T**ransferable.

eNote Core

Signature Section:

This section needs to be populated with the signature value of the PDF eNote's Tamper Evident Digital Signature. The signature value holds the Base64 encoded bytes of the actual value of the digital signature. The signature value can be extracted from the PDF with a couple of API calls.



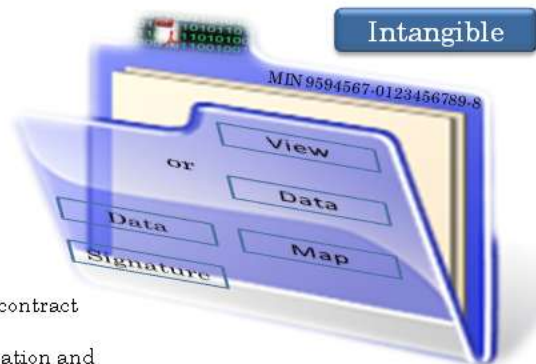
```
<REGISTRY_SIGNATURE TampersealDatetime="2006-08-23T22:02:19Z ~">
<SignatureValue>
UizRO4OTYP28ZYWomC4syb7EptNlmLGnxbtcbAPEpfyuXk
REgfnCnKQ2fgGgC7jn
3QwRXe8QWfgEOnToCHQciK5lfoOlZreJArpQetHYsQArbRd
Na7Al6pkz1RZlucoz
IUN0xxHFTYReFOap1hJ3mLYXUHPqUec5sFnNbg42xs=
<SignatureValue>
</REGISTRY_SIGNATURE>
```

That is all of the note data that is needed to register an eNote with the MERS eRegistry. The MIN and signature value will be used to uniquely identify the negotiable instrument and to verify its integrity as it moves through its lifecycle.

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Electronic promissory Notes are excluded from Article 3, UCC

No eNote Core



§ 7003. Specific exceptions

(a) Excepted requirements

The provisions of section 7001 of this title shall not apply to a contract or other record to the extent it is governed by—

- (1) a statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts;
- (2) a State statute, regulation, or other rule of law governing adoption, divorce, or other matters of family law, or
- (3) the *Uniform Commercial Code*, as in effect in any State, other than

(b) Additional exceptions

The provisions of section 7001 of this title shall not apply to—

- (1) court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings;
- (2) any notice of—
 - (A) the cancellation or termination of utility services (including water, heat, and power);
 - (B) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;
 - (C) the cancellation

eNote v. pNote
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In Texas;

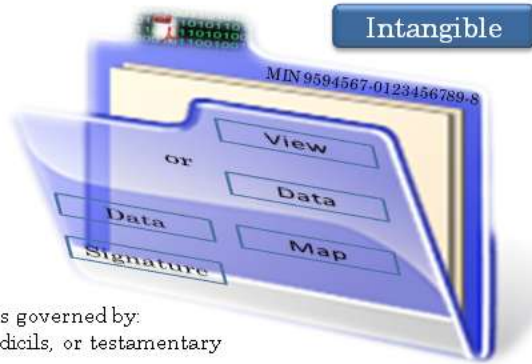
Chapter 322. Uniform Electronic Transactions Act

No eNote Core

- Sec. 322.003. SCOPE.** (a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.
- (b) This chapter does not apply to a transaction to the extent it is governed by:
- (1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or
 - (2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.
- (c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction subject to a law other than those specified in Subsection (b).
- (d) A transaction subject to this chapter is also subject to other applicable substantive law.

Sec. 322.005. Use Of Electronic Records And Electronic Signatures; Variation By Agreement.

- (b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.



eNote v. pNote
Intangible v. Tangible

In Texas;

Chapter 322. Uniform Electronic Transactions Act

Case Closed: No eNote Core

MERS members, and by their actions, have attempted to remove the *tangible* security instrument from the *tangible* paper note.

In removing the *tangible* security instrument, a *transferable record* was created using an *identical* MIN number as the MIN located on the *paper* security instrument.

The illusion of the eNote is only a distraction for the scam. In conjuring up the *notion* or *idea* that the "note follows the mortgage", as Stephen C. Porter once claimed.

Information was stripped from the paper promissory note and transferred into the *transferable* record, [electronic security instrument], a S.M.A.R.T. doc document or Portable Document Format and upon completion of *creation* of the eNote, it is registered in the MERS eRegistry as an *electronic* promise to pay. This *electronic* promise is not the *paper* promise to pay. MERS does not track that.

Failure to adhere to any laws governing either the *intangible* or the *tangible* are fatal to both the paper note and the real property security instrument

