

LEGAL ELECTRONIC NOTICE AND SIGNATURE REQUIREMENTS

**A Corporate Counsel Guide for
Factors, Asset-based Lenders & Financial Intermediaries**

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INTRODUCTION

This white paper was developed for Factors and Specialty Lenders to guide them in gaining a competitive edge by using electronic delivery methods, electronic records and electronic signatures.

A variety of businesses have adopted electronic methods to deliver, accept and store documents and legal notices. The driving force behind the decision is generally the efficiency and lower cost of utilizing electronic, instead of physical, documentation. While this trend began in high-technology and other “leading-edge” businesses with great knowledge and a high comfort level regarding electronic media, more traditional industries have transformed their businesses to rely on electronic transmission and recordkeeping, and industry software platforms have now made the transition much easier by building those market leading capabilities into their platforms.

At the same time, firms should be knowledgeable and consider potential concerns that need to be overcome before utilizing electronic delivery, acceptance and storage methods. Companies can, and should, be careful in adopting electronic media because of the potential liability in using the wrong methods. A failure can not only cause interruption into their businesses; it can also expose their operations to liability and put their businesses in jeopardy.

Among the industries that have been reluctant to enter into electronic transactions on a broad basis are factors, asset-based lenders and other specialized financial intermediaries. We explore here the concerns raised by these business models, and how reliable document delivery systems can address those.

It is certainly the case that Lenders should consider the issues that arise when moving from paper, fax, and mail to electronic delivery and electronic signatures. However, it is also the case that proper implementation of electronic record-keeping and electronic transactions can have the intended results of efficiency and efficacy.

ELECTRONIC RECORDS – LENDING DOCUMENTS

The key issue in any transaction – not just a lending transaction -- conducted using electronic delivery methods is the concern that, after the fact, the parties will discover that the delivery was defective, or if not defective, can be easily challenged and raise the cost of doing business and the likelihood of losses. For factors and other specialty lenders, whose businesses are document and fact intensive, understanding the legal implication of using electronic media for financial transactions is a particularly complex and vital endeavor.

A key element to this challenge is the essential reliance by the lending community, and in particular by factors, on chattel paper to document both a debt and a security interest in specific goods. If the documents upon which the loans are based are inaccurate or cannot be proven to be delivered as and when required, the entire loan could be at jeopardy. Confirming the accuracy of the documents, particularly when multiple drafts and voluminous correspondence is involved, is a daunting yet essential task. The parties must have a means of ensuring that any changes to the authoritative documents are readily identifiable as authorized, or unauthorized, versions. Factors are required to send official transaction notices and maintain detailed delivery records to prove that notices were sent and received, as well as confirming the time of delivery and receipt.

Factors traditionally rely on fax, courier, and certified mail to send important communications, and they retain all relevant fax confirmation slips and mail receipts to prove delivery in case of dispute. While this method is tried and true, it is also often frustrating, expensive, time-consuming and fraught with inefficiency. As the experience of recent years in the loan foreclosure process has shown, paper records are often difficult to find and easy to challenge.

There are a variety common notices and records that factors need to maintain and need to be able to prove, without question, as to the time, content, level of legal delivery, proof of electronic original, or fact of signoff, including:

- 1. Invoice delivery and start date of invoice aging;**
- 2. Notices of assignment;**
- 3. Bidding correspondence - who said what, to whom and when;**
- 4. Default notices, and**
- 5. Signoff of asset value verifications.**

For each of these records, a factor must maintain proof in a manner that is verifiable and carries significant evidential authority. When these transactions are effected using electronic media, it is particularly important that a party maintain its ability to authenticate the record so as to withstand challenges to court admissibility and to be able to reconstruct the electronic original with all necessary forensic transaction details.

IMPACT OF ESIGN, UETA AND THE UCC

Two acts, the Uniform Electronic Transaction Act (UETA) and the Federal Electronic Signatures in Global and National Commerce Act (ESIGN) were designed to facilitate electronic transactions in a business world that increasingly relies on electronic media. The UETA is adopted on a state-by-state basis, while ESIGN was adopted by the federal government to ensure that if all states did not adopt the UETA, parties could still enter into electronic transactions with the assurance that the transactions would be recognized, both throughout the United States and in the world.

One of the challenges arising out of UETA and ESIGN is that both laws have deferred to the Uniform Commercial Code (UCC) on the applicability of electronic transactions in certain areas. As a result, for factors and other secured lenders, the UCC, and in particular UCC Section 9, governing secured transactions, will be as or more important than UETA and ESIGN. While it is beyond the scope of this paper, UCC Section 9 sets out specific requirements regarding content of secured lending agreements, their timing and delivery, the remedies of secured parties and the rights of borrowers.

To create a legally defensible program for conducting factor transactions within the scope of the UCC using electronic delivery and storage facilities, the lender must consider both procedural law and substantive law to make the determination as to whether the electronic services used to record the transaction could be used for unsecured (i.e. accounts receivables) and secured (i.e. chattel paper) financial factor transactions.

Procedural Concerns. Procedurally, the delivery and record-keeping system must be acceptable under applicable rules of evidence. In other words, if a borrower was to deny having received an email notice (i.e. a notice of assignment for example), the lender would need a record that would be admissible as evidence in court. The lender would need a record that could be independently verified and authenticated as to the precise time that the notice was sent and received -- the time of sending, or

proof of sending, and meet the UCC requirements of providing notice under its notice delivery provisions, such as the "mailbox rule."¹

Substantive Law. As to substantive law, UCC Section 9 requires that a secured transaction (i.e. a transaction in which the lender takes an interest in the borrower's property as security for the loan), then not only is a record of the legal time of notice important, but also one is required to manage the transaction documents in a "control" form, assuring that the parties are able to determine the original documents, associated content, detect and tampering with those documents, and so on. The identity and location of the property securing the loan can be one of the most important facets of this relationship.

Factoring typically involves a significant number of changes in terms, such as increases or reductions in credit lines, default notices, substitutions of collateral, changes in the location of collateral, and the like. These changes are typically effected through correspondence spanning the life of the relationship, and a factor or other lender must, therefore, ensure that its trail of correspondence withstand legal challenges. This is an issue that can be addressed effectively with secure and reliable electronic delivery systems.

¹ A common law doctrine providing that an acceptance made in response to an offer is valid and forms a binding contract at the time of its dispatch, as when it is placed in the mail box, if that method of accepting is a reasonable response to the offer. The mailbox rule is codified in Sections 1-201(38) and 2-206(1) (a) of the UCC. It should be noted that receipt of email is also defined in the UETA. An email is deemed "received" under Sections 15(b) and (e) of the UETA. Section 15(b) provides that "Unless otherwise agreed between a sender and the recipient, an electronic record is received when: (1) it enters an information processing system that the recipient has designated or uses for the purpose of receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and (2) it is in a form capable of being processed by that system." Section 15(e) states that "An electronic record is received under subsection (b) even if no individual is aware of its receipt." This corresponds with the intent of the UCC discussion of the "mailbox" rule. For email, the recipient is deemed to have "received" the email, regardless of whether the recipient is aware of its receipt or retrieves the email, when it enters the recipient's "information processing system" or server, provided that the recipient has designated that system for use, uses it and can access the system. By recording the SMTP dialog, RPost's Registered Email® service documents the recipient's mail server's declaration of the email being accepted. Because all Internet email is delivered by SMTP, RPost's Registered Email® service provides proof of delivery in accordance with UETA by recording the recipient's server's receipt thereof. RPost's Registered Email® service can also provide additional proof of the content of the message and in most cases, that the recipient opened the email and, when it detects that the email has been opened, sends an acknowledgment to the sender to that effect.

WHY IS STANDARD EMAIL NOT GOOD ENOUGH?

In the Corporate Counsel Guide entitled, “Converting Legal & Contract Notices from Paper to Electronic Delivery,” authored by Stanley Gibson, a partner, Jeffer Mangels Butler & Mitchell LLP, Gibson provides a simple description as to the risks you run if you use standard email as a method of recording delivery of legal notices. He reports a summary of the most important misconceptions as:

- i. **Printed email:** A printed email (from ones sent folder, inbox, or archive) can easily be denied admission into evidence by simply challenging content authenticity, time of sending, or whether the email was delivered at all; as with a few mouse clicks, one can easily change anything in an email – or the other party can easily claim the sending party altered the email.
- ii. **Email copy:** A copy of an email sent to yourself or another person has no bearing as to whether a copy was also delivered to your intended recipient. Email systems are often configured such that internal copies never even reach the Internet and are simply moved from one file directory to another on the sender’s email server.
- iii. **Electronic archive:** Electronically stored copies of email in an archive of the sender or recipient only provide a record of what the archiving party ‘claims’ to have happened. Even if the archiving party can forensically prove the content in their archive is authentic, they will be unable to prove delivery or timing of receipt should the recipient claim not to have received it; or authenticity of the sender should the receiver claim to have received a certain email (note, it is very easy, for example, for any receiver to create a false email from any sender and send it into an archive at a specified point in time).
- iv. **Bounce notices:** Reliance on bounce notices provide a false sense of security -- most recipient servers turn off bounce notices due to “Directory Harvest Attacks” and “Backscatter Blacklisting” concerns. Therefore, if the sender does NOT receive a bounce notice, they certainly cannot rely on that to demonstrate successful delivery.
- v. **Denial of email reception:** IT departments often overlook the complexity of “packaging” ones evidence for presentation to other parties. Importantly, if there is a dispute, how does one present the information to the arbitrator, mediator, judge or jury? How does one show what has been produced is the authentic information – authentic internet records associated with precise content and uniform times of sending and receiving? Litigators can simply point to public research and claim their clients never received the email or request the sender to authenticate that the email was in fact received, what

the received content said, and when it was received. For example, Ferris Research, a leading messaging analyst, reports, “3% of non-bulk, business-to-business Internet email goes undelivered to its intended recipient.” How do you prove that your critical email notification was not within than 3%?

All these concerns lead to the demand that lenders use reliable and provable document transmission methods to protect their investments and avoid liability.

STANDARDIZED ON RPOST FOR LEGAL ELECTRONIC RECORDS OF NOTICE AND SIGNOFF

In response to these concerns, RPost® has integrated its Registered Email® services into Microsoft Outlook and web browser and mobile platforms. Both Bayside Business Solutions’ Cadence FactorSoft and FactorFox have built RPost® into their platforms; both have incorporated RPost’s Registered Email® service and RPost electronic signature services.

“RPost’s Registered Email service receipts provide admissible evidence of Registered Email message delivery, official time sent and received, and authenticity of message content. By utilizing RPost services, we would also argue, not only is the email admissible, but the authentication of its content and context may lend it greater credence than traditional receipted mail, courier, and fax alternatives,” according to attorney at Jon Neiditz, a partner at Nelson Mullins Riley & Scarborough and founder of the Firm’s Information Management Practice. “This is significant not only in adding to the weight of the evidence in general, but because in addition to proving delivery of notices, factors must exercise ‘control’ over documents such as electronic chattel paper to ensure their enforceability under Article 9 of the Uniform Commercial Code. RPost’s authentication techniques are likely to meet these ‘control’ requirements.”

WHY RPOST?

Factoring is an information-intensive industry that requires painstaking delivery and management of transaction notices associated with assignment and chattel paper, and until the advent of RPost, the industry has not been able to realize fully the efficiencies of email while being legally protected at the same time.

RPost provides a simple, inexpensive solution to the shortcomings inherent in standard email because it provides the sender with legal proof of both the content of email messages sent and the corresponding delivery status to any Internet mail destination thus providing legally verifiable evidence of the

transaction in case of a dispute after the fact. A critical convenience for factors is the pure simplicity of the Registered Email service which does not require the email recipient to sign up for the service or maintain additional user names and passwords that otherwise would render it unmanageable.

RPost resolves the operational impediments and legal issues that have worked against employing standard email for high value correspondence and permits movement to electronic in a manner that complies with industry best-practices for proof of required notifications and signoff verifications. The result? Cost savings, faster and more efficient business processes, and greater competitive advantage.

The RPost solution for factors consists of two components. The company's patented Registered Email service provides legally verifiable and court admissible proof of email delivery, message content including attachments, and official time stamp. The proof is in the form of a Registered Receipt™ email, which contains a digital snapshot of the entire email transaction and can be self-authenticated within minutes.

Factors are using RPost's Registered Email service to virtually eliminate disputes about whether or when notices (such as notices of assignment, notices of default and borrowing base certificates) were received by email. Factors also report that the service puts an end to the common "I never got the invoice" excuse for slow-paying debtors, by providing the factor with verifiable proof of when the invoice was electronically received. With the factor retaining irrefutable proof of receipt of the invoice, the start time of invoice aging is firm, empowering the factor to increase cash by collecting on late payment penalties. In providing "legal proof" of delivery, it is also critical that official time stamps be employed as computer clocks can be set to read whatever time is desirable rendering such records meaningless.

"In addition to proving delivery of notices, factors must exercise 'control' over documents such as electronic chattel paper to ensure their enforceability under UCC Article 9," comments Neiditz. "RPost's Registered Email service not only proves delivery and adds weight to email evidence, but is also likely to meet these 'control' requirements."

The other solution component is RPost's eSignOff® service, a proprietary electronic contract execution service used for sign-off on asset verifications, confirmations, and legal agreements. It enables a one-click contract-signoff-by-email with formal record of the sign-off provided to both parties that has evidential weight equal to "wet-ink" signatures on contracts. The eSignOff service minimizes administrative pain by eliminating the print/sign/scan/fax/mail signoff process, and reduces cost by

eliminating the need for FedEx and registered/certified mail. On average, the service is cutting down on signoff turnaround time from 4 days to 1 day.

“We needed a solution that could speed-up the process of transferring critical documents and more importantly protect us from debtors and clients who claim they didn’t receive a notification requesting or receiving a payment,” remarked J.W. Reed Jr., president and CEO of Jhanira Capital Funding, describing his experience using RPost. “RPost gives us legal proof of delivery of all notifications we send, so now we can spend less time on administrative tasks such as follow-up calls to ensure receipt and more time on mission critical business tasks.”

GETTING STARTED NOW

Factoring firms ranging from individually-owned businesses to large firms are now using RPost’s services to help them close business faster, reduce FedEx and certified mail cost by upwards of 60%, reduce time spent on trips to the post office, eliminate faxing, and minimize administrative time spent filling out and scanning forms and contracts.

A major convenience for factoring professionals is the pure simplicity of the RPost service, which does not require the email recipient to sign up for the service or maintain additional user names and passwords, and very low cost. In short, the service is recipient agnostic requiring nothing new on the part of the recipient who simply opens, reads and responds to the Registered Email message just like standard email. For the sender, using the service requires one click of a ‘Send Registered’ button on the regular email compose page.

In 2007, the International Factoring Association announced that it was endorsing RPost as the preferred service platform for business-critical communications with clients and debtors. As a special offer for IFA members, RPost now offers each member company a starter package of ten free Registered Email and eSignOff transactions per month. Visit: www.rpost.com/ifa

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