

## **Bank Documents: When Scanned Copies are Sufficient and When Originals Must be Kept**

**I**n this electronic era, more and more transactions are being done via e-mail or other real-time mediums. Many banks have instituted, or will institute in the future, some form of electronic data storage to reduce the amount of physical paper they generate and/or store. While this venture is environmentally noble, many are asking which documents may be scanned and immediately discarded, and which documents must be kept in an original form.

The current state of the law regarding the retention of certain credit files in their original paper form (“Hard Copies”) versus electronic scanned copies (“Scanned Copies”) sheds some light on this issue. There are various overlapping, federal and state legal requirements such as the Bank Secrecy Act, the Financial Privacy Act, and various consumer lending laws, including the Truth-in-Lending Act. Each applicable law or regulation imposes different standards regarding the timing and methods of retention.

The first pertinent statute is Minn. Stat. § 46.04 subd. 3, which provides that banks may maintain their records on optical image storage systems if they meet the following requirements:

1. The storage system is a non-erasable imaging system under nationally recognized standards for permanent records that are available for retrieval for as long as applicable law requires; and
2. A backup copy of the record is created and stored at a site other than the site where the original is kept, and the copy must be preserved either on a non-erasable optical imaging system or by another reproduction method approved by the Commissioner of Commerce; and
3. All contracts for third-party maintenance and storage of those records must include assurance of access by the Commissioner of Commerce consistent with the purposes of § 46.04.

According to the above statute, a bank would comply with the requirements set forth by the commissioner if the bank has a satisfactory imaging system that complies with the above elements. Therefore, a bank may destroy their Hard Copies for purposes of complying with § 46.04.

Even though a bank may destroy its Hard Copies, a couple of questions remain: Should a bank destroy all of the Hard Copies for which there is corresponding Scanned Copies, and which Hard Copies should be retained in their original form?

The E-Sign Act at 15 U.S.C. 7001, et seq., and the Uniform Electronic Transactions Act (“UETA”) under Minn. Stat. § 325L.12(a) both state that Scanned Copies will be sufficient when a law requires a record to be retained in its original form if:

1. The [Scanned Copies] accurately reflects the information set forth in the [Hard Copies] ...; and
2. The [Scanned Copies] remain accessible for later reference.

The E-Sign Act also provides in § 7001(d)(3) that:

If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by [Scanned Copies] retained in accordance with paragraph (1) (*see also Minn. Stat. § 325L.12*).

Lastly, the E-Sign Act also provides in § 7001(a)(3) that:

[The E-Sign Act] does not apply to any contract or other record that is governed by ... the Uniform Commercial Code... (*see also Minn. Stat. § 325L.03*).

All of the Hard Copies could be destroyed so long as they are in compliance with the above elements. However, for purposes of good banking practices, banks should not destroy any Hard Copies which may be subject to a legal dispute because of the current rules regarding the admissibility of evidence. Although there is ample authority allowing the admissibility of most Scanned Copies, some courts will require additional evidence before admitting the Scanned Copies. Minnesota Statute § 600.135 allows the admission into evidence of Scanned Copies when scanned in the ordinary course of business. However, despite these statutes regarding admissibility of Scanned Copies, if the accuracy of the scanned document is brought into question by an opposing litigant, the Hard Copies may be required.

Additionally, any negotiable instruments governed by the Uniform Commercial Code (“UCC”), such as promissory notes, do not fall under the scope of the UETA or the E-Sign Act and, therefore, originals should be kept.

As such, it is recommended that banks retain Hard Copies of all documents which are or were subject to litigation and all promissory notes for seven (7) years from the conclusion of the matter.

While there is ample statutory authority encouraging electronic storage systems, it is important to make sure that the storage system chosen is adequate. Furthermore, it is important to have a system or policy in place to determine which documents may be scanned and destroyed, and which must be retained in original form.