FROM HYBRID TO FULL eCLOSING: MOVING THE TITLE & SETTLEMENT INDUSTRY TOWARD A PAPERLESS REAL ESTATE CLOSING

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INTRODUCTION

The title and settlement industry should start preparing now for a totally paperless closing (an “eClosing”) where the loan, title, and settlement documents, including the promissory note, will be executed electronically. Even though we may not be able to do a full electronic closing in every state, it is time to start thinking about what we can do now. Why?

Consumer and real estate professional acceptance is changing as more people sign leases, buy cars, and purchase other goods and services all electronically. In today’s environment, consumers are able to search for homes online and sign Listing Agreements and Purchase Contracts using electronic signature technology. The marketplace reality is that consumers expect a digital solution to improve their home buying experience. Consumers also do not want a closing fraught with problems. They do not want to see a stack of paper or wait in the lobby for a lender’s closing package to arrive. Many do not want to take time off from work or deal with finding childcare to attend a closing. This is no longer simply an expectation – they want a different experience and we are already interacting with the latest web and mobile applications, phones, tablets and technologies daily.

Lenders are also focused on efficiency and on the consumer experience viewing digital solutions as a competitive advantage due to new products in the marketplace, i.e., Rocket, Roostify, Blend, etc. The mortgage banking industry through the Mortgage Industry Standards Maintenance Organization (MISMO) has worked to standardize electronic data, and published industry standards in its “eMortgage Closing Guide” dated April 27, 2006, to assist mortgage lenders. Finally, both Fannie Mae and Freddie Mac accept electronic signatures on closing documents and have adopted standards for acceptance of these documents. The Federal Housing Administration (FHA) also accepts electronic signatures on several FHA mortgage documents. Fannie Mae, Freddie Mac, mortgage lenders, and investors will all have different requirements that are not considered here. Our industry’s approach will change as we learn of these requirements.

The title and settlement industry has a unique opportunity to transform the consumer closing experience and our business by moving into this space without sacrificing compliance or best practices. This series will discuss the potential for a paperless real estate closing under current electronic signature and notary laws. It will discuss the risks and challenges, which need to be resolved before the industry is able to move toward a full eClosing in the real estate transaction. This series concludes that a hybrid approach to eClosing would allow the title and settlement industry to begin some form of eClosing today.

eSIGNATURE LAWS & THE VALIDITY OF ELECTRONIC SIGNATURES

One of the perceived risks of an eClosing is that electronic signatures are not legal, binding, or defensible in court. However, electronic signatures are valid and enforceable under the Uniform Electronic Transactions Act (UETA) completed in 1999. Forty-seven (47) states plus the District of Columbia, Puerto Rico, and the U.S. Virgin Islands have adopted UETA, which creates equal status between electronic signatures and electronic documents and those which involve paper. Under state UETA laws, a signature or contract “may not be denied legal effect” or enforceability solely because it is in electronic form. Illinois, New York, and Washington have not adopted UETA, but have state electronic signature laws and regulations that apply. Exceptions under UETA and state electronic signature laws vary by state and include things like wills, codicils, trusts, and certain notices related to real estate leases and foreclosure. Most of the exceptions are not really considered exceptions since most loan, title, and settlement documents related to the real estate transaction are not excluded from electronic signature, except in Kentucky which does not allow for electronic signature on deeds and security instruments.

The Electronic Signatures in Global and National Commerce Act enacted into law in 2000 (ESign Act), 15 U.S. Chapter 96 §§7001 et seq., also provides a general rule that contracts and signatures, including electronic signatures to real estate finance documents, may not be “denied legal effect, validity, or enforceability” because they are in electronic form for transactions affecting interstate or foreign commerce. ESign, which applies to disclosures and promissory notes, is the federal baseline and pre-empts inconsistent state laws.

Both ESign and UETA are technology neutral. While the courts have become very active in supporting electronic records and electronic signatures, settlement agents must still use electronic signatures in compliance with your state eSignature law, ESign, and in compliance with the rules and laws that govern your local real estate transaction.
COMPLIANCE & THE CONSENT AND OPT-OUT REQUIREMENTS

Under both state and federal law, an electronic signature is only valid if the signer intends to sign a document. For example, a signer may use a signature to simply confirm receipt or review of a document, or it may be to bind the signer contractually to the document’s terms. If the signer disputes the signature, the burden of proving intent to sign is on the person attempting to enforce the signature. As a result, title and settlement agents will want evidence that the person signing the documents reasonably believes the signature is for a specific purpose.

State UETA and electronic signature laws only apply to transactions where the parties give consent to conduct the transaction by electronic means. Under some state laws, the parties must be given the option to opt-out and choose to physically wet-sign all documents. Title and settlement agents should consider including express consent provisions in the electronic record to conduct the real estate transaction electronically signed by all of the parties. This may include one or more documents that are acknowledged by a notary in the real estate transaction in order to establish intent to be bound by the electronic signature.

ATTRIBUTION, AUTHENTICATION, AND RECORD RETENTION

Are the right people signing the right documents? While UETA and ESign address the question of a valid signature, neither law addresses the level of authentication required to identify the signer or the question of “is it your signature?” There are many types of eSignatures which allow the signer to sign the document and authenticate the signer. Any eSignature technology should provide levels of authentication to access the system which identify and verify the signer created the electronic signature. Title and settlement agents may want to require a more advanced level of authentication such as personal information (i.e., driver’s license or I.D. check or Social Security I.D.) rather than only an access code before the parties can access, view and sign documents to improve the risks related to identity of the signer. Title insurance underwriters and lenders may also have guidelines regarding authentication levels for certain types of documents because of the risk of fraud, forgery and duress, etc.

Any eSignature technology should also link the signer’s signature to the signer’s identity and to the actual document at the time it is signed to prove the electronically signed document and its contents are genuine. This is known as “attribution” which prevents legal challenge and signer repudiation (i.e., a signer either alters a document or attempts to avoid being bound by its terms once they have electronically signed it). It is also important to ask eSignature vendors about tamper evidence, which seals or uses other techniques to protect an electronic signature from unauthorized access or tampering. Finally, the eSignature technology should also include a robust record of events that, along with high data security standards, will withstand scrutiny in court.

Any technology should record all important signature activities and create a secure record of evidence that the signature used was not tampered with in any way which might invalidate the electronic signature. Tamper-sealed or encrypted certificates are used to record the date, time stamp and other signature activities to create an audit trail to prove ownership and information about the signer’s identity. It is also important to ask any vendor under consideration about a Certificate.

To be valid and enforceable, UETA also requires that electronic records must be in a format that is capable of being retained and accurately reproduced for later reference by all the parties who are entitled to access the contract or record. Any eSignature technology vendor must ensure a record of the electronic transaction and the electronic signatures remains accessible as required by any statute, regulation, or rule of law. Title and settlement agents should consider whether a vendor can preserve evidence of the transaction by providing assurance that its storage system includes high data security standards, as well as privacy safeguards consistent with industry best practices.

HYBRID VS A FULL eCLOSING

A common misunderstanding is that technology and the title and settlement industry must be capable of a full eClosing before we can provide this option and flexibility to our customers and the consumer. What is meant by eClosing? One type of eClosing is a process that is a fully electronic eClosing, i.e., where all loan, title, settlement and closing documents are signed, notarized and recorded electronically. The other type of eClosing is a “hybrid” process, in which some documents will be signed in an electronic form if allowed by the lender, and the other documents are wet or ink signed on paper. In the hybrid eClosing process, key loan documents, such
as the note and the security instrument, are typically still wet signed and notarized on paper. The tools exist today to improve the consumer’s experience in the real estate closing using a hybrid approach, while the law evolves and the industry sorts through the challenges and risks which may prevent a full eClosing today. So, it is time to consider a digital transformation to your real estate closing business.

WHAT ARE THE CHALLENGES AND RISKS OF A FULL eCLOSING?

One of the perceived risks of eClosing is that the technology is not safe and secure. Technology is now available for electronic signature that includes accuracy of signatures and advanced authentication levels including personal information based on public records. Tools such as video conferencing, are now simple, secure and provide high levels of engagement allowing the closing attorney and escrow officer to present the documents to the consumer and see everything that is going on, unlike today’s mail-away closings. There are a number of technology pioneers in this area, all of whom are doing various types of eClosing safely and securely.

In addition, there are other challenges and risks to overcome.

Challenge #1 Electronic Notarization

One of the perceived risks of an eClosing is electronic notarization of real estate documents. Electronic notarization, also known as eNotarization, is the process where a notary, together with, and in the presence of, the consumer, has the consumer e-Sign documents and then the notary also e-Signs and performs an eNotarization on the document. A notary applies an electronic signature and notary seal to an electronic document. Not all states allow eNotarization. States that do permit it use a variety of different state statutes and regulatory rules to authorize electronic notarization for their notaries including the UETA, the Revised Uniform Law on Notarial Acts (1982) (“RULONA”) and state specific laws and rules. Twenty-eight (28) states and the District of Columbia have not specifically authorized their notaries to perform eNotarization, although UETA and ESIGN authorize electronic notarization without further state action. UETA also eliminates the stamp/seal requirement, but it does preserve requirements in state notary law for personal appearance, proper identification, awareness of signer, freedom from duress, and notarial acknowledgment and record. There is risk in relying on UETA and ESIGN to authorize electronic notarization without further state action since there is no legal precedent, i.e., court decisions addressing electronic notarization. Also, some notaries may be unwilling to perform electronic notarization without guidance from their state. While seventeen (17) states enable their notaries to perform electronic notarization, some have gone dormant, and the rules and requirements vary including mandatory enrollment and specific authority to e-notarize. Regulations are currently being looked at in a number of states which have adopted electronic notarization statutes. State statutory law continues to evolve around eNotarization across the nation.

In addition, state notary law requirements (i.e., personal appearance, certification of identity, awareness and capacity, notary acknowledgment or witness, notary certification, and notary seal) must still be satisfied in the electronic realm. Technology platforms need to evolve to comply with state legal requirements. For example, technology may not allow a notary to imbed a notary seal or acknowledgment in a document uploaded for electronic signature. Without the ability of technology to provide a platform for full eNotarization, county recorders are likely to reject electronic documents that do not meet state legal and notarial requirements for paper-based notarial acts.

Until electronic notarization is fully developed, a hybrid approach to paperless eClosing is necessary for the real estate transaction which excludes notarization documents. In the meantime, there are options which include adding a separate page containing the notary’s seal and acknowledgment which could be uploaded and attached to the document for recording under a hybrid approach. Where states require an ink or embossed seal or wet ink notarization, a separate page containing the physical seal and wet acknowledgment could be attached and sent to the recorder. The parties may also continue to wet “ink” sign documents as they do today in most real estate transactions.

Challenge #2 Remote Notarization

Another of the perceived risks of an eClosing is remote notarization of real estate documents. Remote notarization is the process where a notary uses Skype and/or other similar technology to notarize electronic signatures and perform notarial acts. The use of remote notarization is controversial in most states; state laws need to evolve to support an eClosing where remote notarization is employed by the notary.
To date, only Montana and Virginia authorize the use of remote notarization provided it’s conducted within strict regulatory guidelines. Also, there are twenty-five (25) states’ laws that require a notary to be in the consumer’s presence, i.e., must be able to physically touch the consumer; many of these states’ Secretaries of State have advised that remote notarization is not permitted. Unfortunately, other states have provided no guidance and these notaries are unlikely to agree to perform electronic notarization without state action. In addition, there is no legal precedent on the legal effects of remote notarization. Further, there is disagreement over states’ Full Faith and Credit Clauses as it applies to remote notary. The consensus is that most states will not give “full faith and credit” (meaning will not honor or accept) to notarial acts performed unless the state where the land is located has specifically authorized such type of remote notarial act.

Without statutory or legal precedent in support of remote notarization, title insurers may be unsuccessful in defending claims in state courts where the notaries licensed in another state do not follow state deed and security instrument form requirements or where the state does not specifically authorize remote notaries for its in-state notaries. While the National Conference of Commissioners on Uniform State Laws is currently working on revisions to RULONA to reconcile these concerns, it may be some time before these revisions are published and adopted by the states. Until remote notarization laws fully develop, a hybrid approach to paperless eClosing is necessary for the real estate transaction which excludes remote notarization.

**Challenge #3 Title Insurance Underwriters’ Concerns and eRecording**

Another perceived risk is that title insurance products do not cover electronic signatures. Title insurance provides coverage for the validity, priority, and enforceability of an insured mortgage against the insured land. Loan policy coverage remains the same regardless of whether execution of the note or mortgage occurs by a wet “ink” signature or electronic signature and notarization. The 2006 ALTA Loan policy contemplates eClosing by including insurance against title defects caused by “failure to perform those acts necessary to create a valid electronic document authorized by law” and for “documents not properly filed, recorded or indexed in the Public Records including failure to perform those acts by electronic means authorized by law.” This coverage insures against the invalidity of the insured mortgage because of failure of the promissory note or mortgage to be created in accordance with applicable electronic transaction laws. Additionally, title insurers have already insured electronic mortgages and allow electronic delivery of title policies as long as traditional legal and underwriting requirements can still be satisfied.

Notwithstanding the coverage provided under the policy of title insurance, title insurance underwriters are concerned with the recording risks associated with electronically signed and notarized instruments. One of the perceived risks of eClosing is the local county clerk will not record these documents. The county recorder must accept and record the specific instruments to be insured by title insurers, i.e., deed and security instruments. Over half of all U.S. states, the District of Columbia and U.S. Virgin Islands have enacted some form of the Uniform Real Property Electronic Recording Act (URPERA), which authorizes a recorder to accept electronic documents for recording and to index and store those documents, including recordation of instruments affecting real estate. eRecording is the process where a document, i.e., a deed, security instrument, etc., is recorded with the appropriate county recorder electronically.

Currently, eRecording is used in 30% of recording jurisdictions which cover 50% of the U.S. population. In counties that do not eRecord, clerks and recorders may reject documents that do not contain an ink signature and embossed or “ink” seal. In the counties that accept eRecording, the following criteria must be satisfied to ensure that electronic documents are accepted for recording and establish necessary constructive notice: (1) the documents must be created in accordance with, and enforceable under, state law requirements; (2) where required, signatures must be and/or “look” like an actual signature not a selected “font” as in most e-Sign programs; (3) notary acknowledgment, and stamp/seal, where applicable, must comply with state law requirements; and (4) witness attestation requirements must be satisfied pursuant to state law. In both scenarios, title and settlement agents may be left with “clean-up” work requiring possible re-execution of instruments before county clerks would accept for recording and title insurance underwriters would agree to insure the transaction. Finally, title insurance underwriters may continue to require that specific types of documents, such as Powers of Attorney, and certain types of transactions, such as sales out of a decedent’s estate, be excluded from electronic signing because of the heightened risk of fraud, forgery, duress, etc. The industry’s approach to paperless eClosing will change as we learn of these requirements.
The form of the electronic signature may also present challenges for recording real estate instruments. While electronic signatures take many forms in e-commerce, it is important for title and settlement agents to consider the format of the electronic signature used to sign documents in the real estate transaction. ESign and UETA define an electronic signature as 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.” ESign and UETA give no further guidance, and the parties are responsible for adopting a method of electronically signing documents (e.g., required disclosures, level of authentication, security, storage, etc.) that is most appropriate for the intended use. Whether the technology uses a signature pad or “click” signature, the document itself must display a signature that looks like what clerks and recorders expect to see, or title and settlement agents run the risk of rejection of instruments for recording even in counties that do eRecord. An electronic signature “stamp” on the document is also very likely to be rejected for recording at the county level. Additionally, some technology is unable to perform a full eClosing with electronic notary stamp, electronic notary certification, and electronic witness requirements sufficient to ensure state and local recorder will accept the instrument. Until technology is able to ensure that the recorded instruments meet state form and notarial requirements, the title and settlement industry runs the risk of rejection of instruments for recording, which are not “wet” ink signed and notarized. Depending on the county where the transaction is located and the technology used by title and settlement agents, a hybrid approach to paperless eClosing is necessary for the real estate transaction which excludes recordable instruments, recognizing there are some counties where this may be possible now or in the near future.

**Challenge #4 The Promissory Note**

In the lending and title industry, promissory notes continue to be the one document that lenders almost unanimously require to have a wet signature, even though the federal ESign provides that signatures and contracts may not be denied legal effect, validity or enforceability because they exist or are signed in electronic form. For the limited occasions where electronically signed promissory notes are permissible, another challenge is ensuring the note remains electronic, i.e., eVaulting, must be utilized. eVaulting also requires successful and seamless transfers from lender to investor. Currently, there are very few available eVault providers in the marketplace. A hybrid approach to paperless eClosing is necessary for the real estate transaction which excludes promissory notes until the industry learns more about lender requirements in this area.

**SOLUTION**

The title, closing and settlement industry could adopt a hybrid approach to electronic closings (eClosing) in order to mitigate the existing risks and challenges associated with conducting full eClosings. Upon written consent of the parties to the transaction, the hybrid eClosing approach may include the electronic signature of the consumer on escrow documents and allowable lender documents not requiring notarization and recording. The consumer would continue to wet sign documents such as the promissory note, security instrument, notarized documents, recordable documents, and other documents specifically excluded by the lender.

**BENEFITS OF A HYBRID eCLOSING**

One benefit of eClosing is efficiency and a convenient process for realtors, sellers, lenders, closing agents, and other industry stakeholders. Lenders can process and fund loans faster and correct errors more quickly. Lenders will also have easier access to an audit trail of dated and time-stamped disclosures. They will be able to show when borrowers viewed and electronically signed specific documents, while safeguarding them from the liability and costs of data and disclosure errors. **Settlement agents can also reduce costs, such as courier and shipping fees, and limit the use of paper.** Buyers, sellers, and borrowers can review and receive their documents online and download them. This reduces the chances of a document being separated from the pack or lost through the passage of time. In addition, lenders and settlement agents will be able to digitally store these documents safely, without the need to pay for expensive storage space in an office or warehouse.

Another benefit of eClosing is a more transparent, customer friendly experience for consumers. Consumers can see what stage the loan process is in, as well have the ability to review disclosure documents more easily by using tools to understand the mortgage and real estate terms mentioned within these documents. **Borrowers can review documents at a slower pace at their convenience, prior to digital and in-person signing so they have more time to understand the financial transaction before signing the documents.** A hybrid digital closing
improves customer understanding and empowers customers to ask right questions and play a more active role. Tracking the stages of the transaction and key milestones increases transparency, which empowers consumers to ask questions and be more active by keeping them informed. It instills consumer confidence and increases customer satisfaction.

Finally, regulators are behind eClosing. CFPB believes it is important! The CFPB published its study “Leveraging technology to empower mortgage consumers at closing” dated August 2015 on electronic mortgage closings, finding that consumers can benefit from electronic closings through better consumer understanding, a more efficient process, and a greater feeling of consumer empowerment.

**TITLE AND SETTLEMENT AGENT CONSIDERATIONS**

In selecting a provider for electronic signatures, you should consider these points:

1. Title and settlement agents should consider the use of electronic signatures in compliance with your state eSignature laws and in compliance with the rules and laws that govern your local real estate transaction.

2. Title and settlement agents should ensure any electronic signature technology has sufficient audit capability and full compliance with ESign and UETA. It is important to review any technology solution for technical compliance with industry best practice standards as well as state and federal law compliance.

3. Title and settlement agents will want evidence that the person signing the documents reasonably believes he or she is signing a document for a specific purpose. This should include an express acknowledgment by the parties that they intend to proceed with the real estate transaction by electronic means. Any eSignature technology should allow for the capture of the consumer consent to the electronic transaction and allow for withdrawal of that consent. Any technology should also preserve evidence that the consumer did give consent and did not withdraw it at the time of the transaction.

4. Title and settlement agents should consider the use and the levels of authentication required in any technology under consideration. Any eSignature technology should accommodate at least one reliable form of attribution linking the individual to the signature using a unique identifier, such as an email address or user ID. This should be captured and retained by the system. It is important to ask a digital signature provider about tamper evidence which seals, marks or uses other techniques to protect an electronic signature and instrument from unauthorized access or tampering as well as how technology links the electronic instrument with the user authentication to avoid future signer repudiation.

5. Title and settlement agents should consider whether the technology uses a signature pad or “click” signature and whether the electronic signature will be accepted for recording locally. eSignature technology should also allow you to designate specific places in the document to be signed, and require the consumer to sign in specific places before moving to the next designated signature.

6. Title and settlement agents should consider whether a vendor can preserve evidence of the transaction by providing assurance that its storage system complies with high data security standards and controls. Any eSignature vendor should ensure a record of the electronic transaction and the electronic signatures remains accessible as required by law. Technology should also include a robust record of events that, in combination with high data security standards, will withstand scrutiny in court.

7. Title and settlement agents should consider the following: (1) are the form of electronic documents produced by any technology suitable for recording and enforceability under state law; (2) does your title insurance underwriter have any requirements; and (3) do the lender and investor have any requirements.

8. Some state laws are catching up to the technology, but it is still important to make sure the technology vendor you choose can do what the law (and your title insurance underwriter) currently requires in your state for the notarization and recording of documents. For example, some technology is unable to perform a full eClosing with electronic notary stamp, electronic notary certification, and electronic witness requirements sufficient to ensure state and local recorder accept the instrument. A demonstration of the technology by any vendor under consideration is essential.
9. Title and settlement agents should be familiar with Fannie Mae’s “How to Implement eMortgages” and Freddie Mac’s “eMortgage Guide” as these are useful tools when preparing for lender requirements.

10. Title and settlement agents should ensure any technology used is consistent with specific state requirements for the eNotary and Remote Notary, if allowed by state law. These requirements may include specific hardware and technical requirements as well as separate registration and education with the Secretary of State or state agency which regulates and licenses the notary.

CONCLUSION

eClosing in the real estate transaction is the future of everything, as technology is a big motivator to the next generation of underwriters and customers. Our customers are demanding choices and demanding to do business electronically. As title insurance underwriters and settlement agents, we risk becoming obsolete if we are not a part of this future. We must meet our customer needs and problem-solve a solution that allows real estate transactions to close electronically. A hybrid approach to eClosing would allow the title and settlement industry to begin some form of eClosings today while working with technology providers, Secretaries of State, county recorders and state legislatures to move the industry toward a full eClosing in the near future. By digitizing the home buying process, we can deliver the products and services the way customers want it, enabling consumer choice and a better experience for homebuyers of all ages.

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WORKS CITED

- Uniform Real Property Electronic Recording Act (2005), National Conference of Commissioners on Uniform State Laws.
- Uniform Electronic Transactions Act (1999), National Conference of Commissioners on Uniform State Laws. See also UETA § 4.
- Washington: Residents of Washington State are protected by the state’s Electronic Authentication Act, which was enacted in 1997 as a way to “facilitate commerce by means of reliable electronic messages.” This act was especially important because it was the first of its kind in the U.S.
- Illinois: In the state of Illinois, the Electronic Commerce Security Act went into effect on July 1, 1999. The law was intended to eliminate uncertainty over the legal requirements for secure electronic signatures and records; however it refrained from offering any strict definitions with regard to which technologies or platforms should be used.
- New York: New York State adopted the State Technology Law Article 3: Electronic Signatures and Records Act, which ensures that electronic signatures are just as legally binding as those written in pen and gives the government authority to archive records electronically versus in paper format.
- Kentucky: KRS 369.101 to 369.120 Uniform Electronic Transactions Act; Section 369.103 excludes law governing the conveyance of interest in real estate located in Kentucky.
- See Montana Code Annotated §1-5-603 and Montana Administrative Rules for Remote Notarization, Rule 44.15.108.
- See Code of Virginia (Chapter §47.1 et seq.) and Secretary of the Commonwealth Handbook for Virginia Notaries Public dated July 1, 2011.
- Fannie Mae accepts e-signed sales contracts and plans to accept electronic signatures on all mortgage documents in the future. Refer to Selling Guide sections A2-5.1-03 (Electronic Records, Signature, and Transactions) and A2-5.1-04 (Lender’s or Document Custodians Electronic Transactions with Third Parties).
- Freddie Mac guidelines for electronic transactions and documents are outlined in Chapter 1401 of the Single-Family Seller/Servicer Guide (Guide). However, an additional set of requirements apply for eMortgages as described in the eMortgage Guide [PDF].