

Navigating Digitized Mortgage Processes During COVID-19

By **Valerie Hletko and Edward Somers** (April 28, 2020)

The risks presented by the coronavirus pandemic have forced innovation in executing consumer contracts — and fast. Not least affected is the mortgage industry, which typically relies on in-person interactions for document execution to satisfy legal requirements and investor guidelines.

Office closures and social distancing has made the industry virtually dependent on electronic alternatives. Lenders and servicers adjusting to the new normal should evaluate their digital processes for compliance gaps that can cause enforcement and liability headaches. Whether those processes were in place prior to the pandemic, rolled out recently under immediate need, or are still in a planning phase, close scrutiny later is likely.

Some lenders and servicers are well-positioned to deploy mobile and web-based solutions to facilitate transactions, while others may need to rely on simple email exchanges. In either case, a transition to electronic records and signatures requires care in process design and implementation to address the patchwork of laws and guidelines that govern the mortgage industry.

While exchange of emails may suffice for some functions, others require more elaborate protocols to ensure that customer authentication, integrity controls, and record retention satisfy applicable law and manage risk.

Three broad areas merit consideration: (1) requirements and best practices under the laws authorizing the substitution of electronic records and signatures, (2) the status of and changes to the growing area of remote online notarizations, and (3) investor requirements unique to the use of electronic records and signatures in a mortgage context.

General Principles and Best Practices under ESIGN, the UETA and Case Law

The Electronic Signatures in Global and National Commerce Act^[1] and its state law analogue, the Universal Electronic Transactions Act, make electronic records and signatures the legal equivalent of their paper and wet-ink counterparts. Each of these laws generally are technology-neutral, giving businesses wide latitude in substituting electronic processes for paper ones, as long as the requirements of those statutes are followed.

For any lender or servicer considering whether electronic methods can substitute for paper, the answer generally is yes. But while simple electronic solutions can be rolled out quickly, risk mitigation should include planning to ensure the validity and enforceability of electronic substitutes — particularly over subsequent consumer objection.

In deciding disputes over enforceability, courts look to:

- The manner in which documents and information were presented to the consumer, with particular scrutiny of hyperlinks to disclosures and other information;



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- How the consumer assented to the agreement and whether the mechanism was adequate (and adequately conspicuous) to form an agreement to the terms;
- Whether the process used authenticates and attributes an electronic signature to the consumer, particularly where the consumer repudiates it;
- The sufficiency and reliability of evidentiary records created and maintained by the signature and document delivery system; and
- Whether the consumer received specific disclosures required under ESIGN (and some enactments of UETA) and provided affirmative consent to deal electronically, before an electronic record was substituted for a document the consumer had a right to receive on paper.

Careful document presentation and execution system design involves, among other things, (1) smart use of digital real estate to ensure that information is conveyed and labeled for consumers clearly and conspicuously, while maintaining a positive user experience; (2) clear mechanisms that rely on deliberate individual acts by signer to manifest assent to agreements, such as checkboxes coupled with “accept” buttons; (3) well-documented processes for authenticating the consumer and attributing each signatory act or receipt of a disclosure to the consumer; and (4) comprehensive audit trails and other system records sufficient to prove up the document delivery and signing process in a courtroom.

Remote Online Notarization

Transactions that require notarization face some of the toughest challenges in adapting procedures to social distancing requirements. At least a partial solution can be found in conducting notarizations electronically and remotely (remote online notarization, or RON). Remote online notarization allows a notary in one physical location to use electronic tools — video conferencing — to notarize documents while the signatory is physically located somewhere else.

Almost half the states have enacted laws authorizing the use of RON. Many features and requirements are unique to each state, such as requirements for how the signer is authenticated by the notary and the records that must be generated and maintained. Some states without RON statutes recognize the validity of out-of-state notarial acts performed in compliance with the law of the notary’s commissioning.

However, relying on statutes conceived with a paper paradigm in an electronic context is inherently risky. Several state legislatures and executives recently have taken emergency measures to allow electronic signatures, and in some cases remote online notarization, in at least the short-term. Legislation in the U.S. Senate would authorize notaries in any state to perform remote online notarizations, but its passage is not certain.[2]

Considerations Unique to Mortgage Lending

While ESIGN, UETA and state RON statutes provide a general framework for the validity of electronic records and signatures, mortgage origination and servicing industries must recognize other considerations, including guidelines promulgated by government-sponsored enterprises, or GSEs.

Electronic records and signatures are often acceptable to the GSEs, but they may limit documents allowed to be in electronic format, and may require more rigorous systems to collect electronic signatures and store electronic records. For example, both Fannie Mae and Freddie Mac restrict the circumstances under which the note may be executed electronically, allowing only lenders who meet certain criteria to originate electronic notes.

The GSEs similarly limit the types of electronic signatures that which may be used; place minimum requirements on systems used to create and store electronic records, including requirements for document and signature integrity; and restrict the use of RON to certain circumstances.[3]

The GSEs published bulletins on March 31 relaxing existing electronic notarization requirements found in Fannie Mae's guide for sellers and Freddie Mac's guide for sellers and servicers.[4] The updated guidance also clarifies the conditions under which — and states in which — Fannie and Freddie will accept RON of loans sold to them. Among other things, the bulletins establish:

- Minimum requirements for authentication of signatories;
- Security and document integrity requirements;
- Restrictions on the physical location of the notary performing the notarial act;
- Requirements to comply with certain aspects of ESIGN and UETA;
- Specific representations and warranties of the lender; and
- A list of states in which lenders may sell loans to the GSEs with RON.

Clarification that they will accept remotely notarized documents meeting the new requirements in any state that, subsequent to the publication of the bulletins, adopts a law that permits the use of RONs or accepts out-of-state RONs.

On April 10, the GSEs provided additional guidance clarifying that lenders may use remote notaries to sign and notarize wet-ink signed documents — not just electronically signed documents — where permitted by law.[5] Each provided further details regarding their expectations for the notarization process.

Notwithstanding the easing of RON requirements and guidance from the GSEs regarding remote notarization of wet-signed documents, lenders must otherwise comply with the provisions in the guides regarding the use of electronic records and signatures — as well as ESIGN, UETA and other state law requirements.

Lenders must also be aware of various state restrictions that could limit the use of RON under state law, as Fannie and Freddie guidelines do not override state law requirements, which may differ from the GSE guidelines.

As lenders and servicers continue to adapt to developments, electronic substitutes can minimize disruption — as long as they implement these new measures carefully.

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[1] 15 U.S.C. § 7001, et seq.

[2] See S.B. 3533, available online at <https://www.congress.gov/bill/116th-congress/senate-bill/3533?q=%7B%22search%22%3A%5B%223533%22%5D%7D&s=2&r=4> (last visited 04/21/2020).

[3] See, e.g. Fannie Mae Selling Guide A2-5.1-03; Freddie Mac Single-Family Seller/Service Guide at Ch. 1401.

[4] Fannie Mae Lender Letter 2020-03, available online at <https://singlefamily.fanniemae.com/media/22316/display> (last checked 04/01/2020); Freddie Mac Bulletin 2020-8, available online at <https://guide.freddiemac.com/app/guide/bulletin/2020-8> (last checked 04/01/2020).

[5] Freddie Mac COVID-19 Selling-related Frequently Asked Questions (FAQs), available online at <https://sf.freddiemac.com/faqs/covid-19-selling-faqs#title-closing-and-notarization> (last checked 04/21/2020); Fannie Mae COVID-19 Frequently Asked Questions – Selling, available online at <https://singlefamily.fanniemae.com/media/22326/display> (last checked 04/21/2020).