



Online Notarization and Electronic Closings

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General Outline

- I. eClosing Overview
- II. eClosing Roadmap
- III. Online Notarization

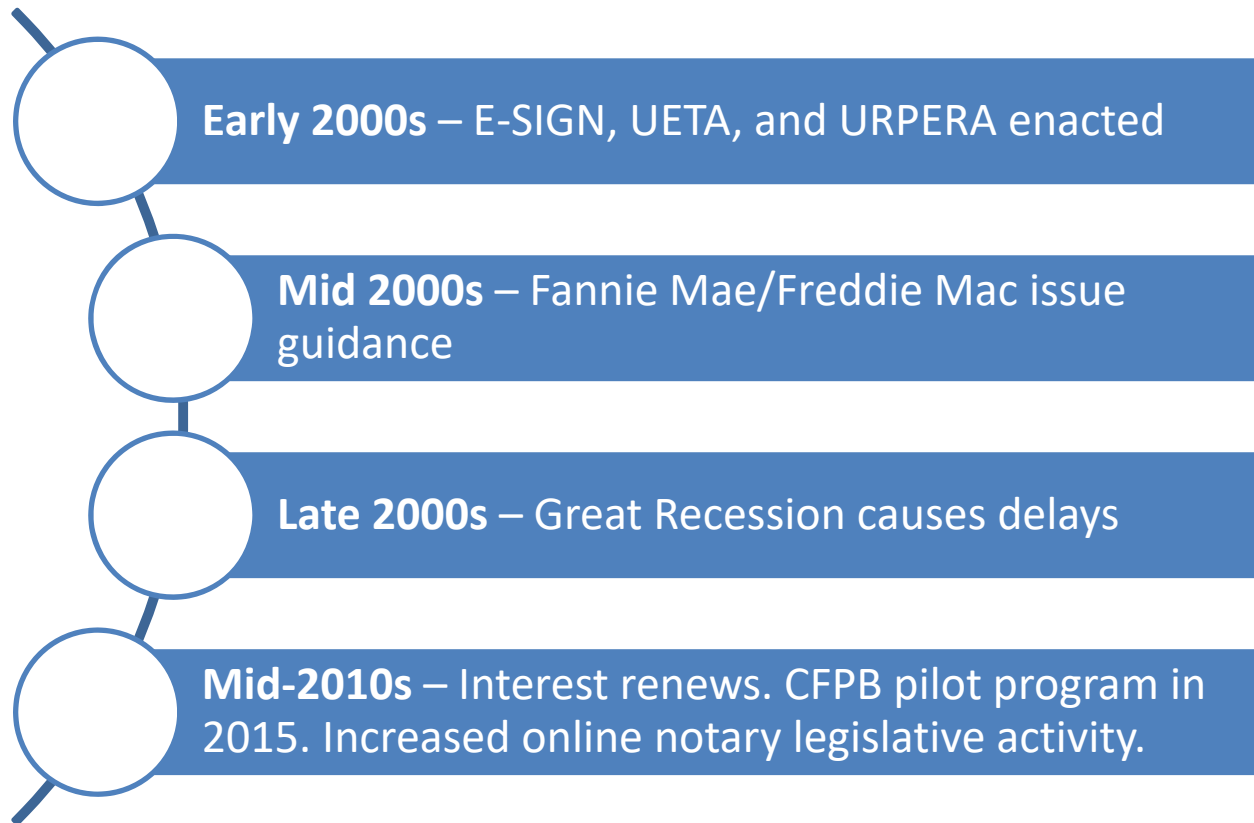


I. eClosing Overview

- eClosing = Closing a loan transaction electronically
- Potential Advantages
 - Faster liquidity in the secondary market
 - Operational efficiencies
 - Quicker warehouse inventory turn times
 - Increased data quality
 - Increased consistency and accuracy in the closing process
 - Better collateral control (can't lose paper notes)
 - Improved risk management and security
 - Environmentally friendly
 - Reduced courier, physical notary, and shipping fees



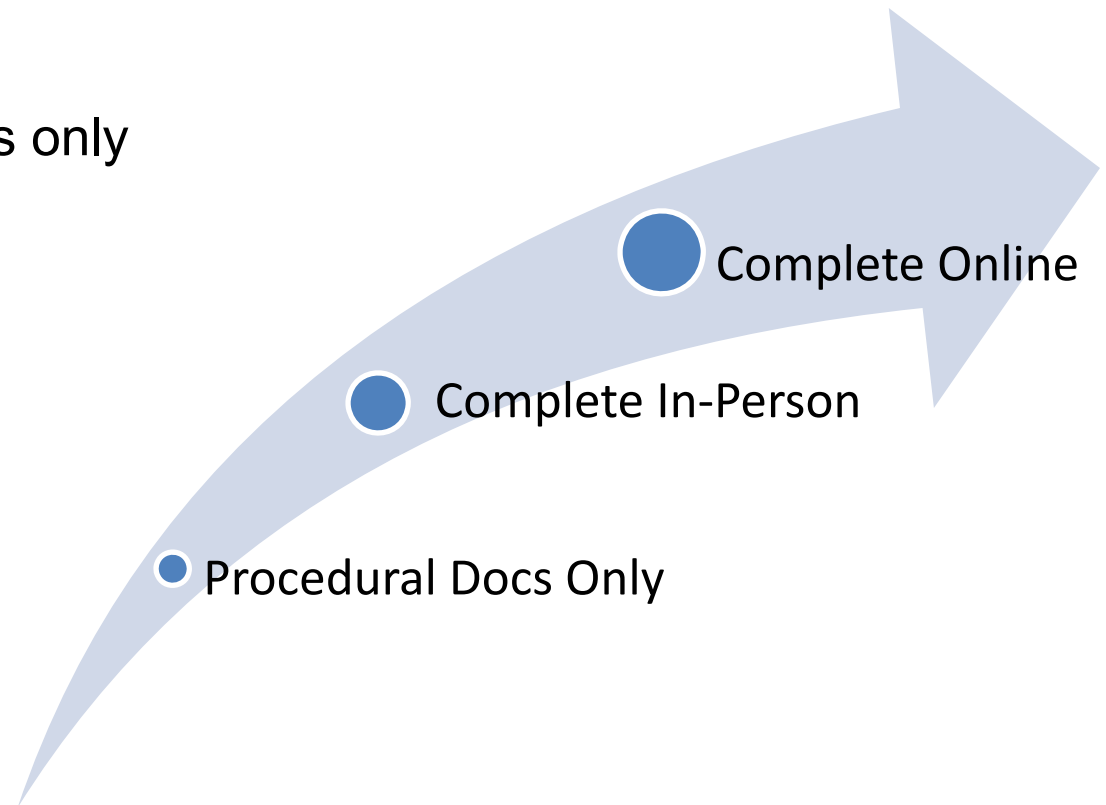
History of eClosing



eClosing Levels and Components

- 3 basic levels
 - Procedural documents only
 - Complete in-person
 - Complete Online

- 3 basic components
 - Recorded: Yes or No
 - Notarized: Yes or No
 - Online: Yes or No



1. Procedural Documents Only

- Documents: “procedural” only (loan disclosures, settlement statements, etc.)
- Sometimes called a “hybrid closing.”
- Components:
 - Recorded: No (and not title-insured)
 - Notarized: No
 - Online: Yes
- Hurdles:
 - Different technology platforms inhibit capital investment. VHS or Beta problem
 - Lack of standard security protocols to satisfy regulatory and market requirements

Procedural Docs Only

- Recorded
- Notarized
- Online



2. Complete In-Person

- Documents: All documents
- Components:
 - Recorded: Yes
 - Notarized: Yes
 - Online: No
- Additional Hurdles
 - County must have e-recording capability for “native digital documents” (never was a piece of paper).
 - Over 3000 counties in the U.S.! Wide variance in technological capability, budgets, and desire/appetite.

Complete In-Person

- Recorded
- Notarized
- Online

3. Complete Online

- Documents: All documents
- Components:
 - Recorded: Yes
 - Notarized: Yes
 - Online: Yes
- Additional Hurdles
 - Authentication, attribution, & anti-repudiation problems associated with “remote presence,” particularly identity fraud and capacity issues.
 - Legal uncertainties about online notarization.

Complete Remote

- Recorded
- Notarized
- Online



eClosing Chart

Procedural Docs Only

- Recorded
- Notarized
- Online

Complete In-Person

- Recorded
- Notarized
- Online

Complete Remote

- Recorded
- Notarized
- Online

Complete Online is the dream

II. eClosing Roadmap

We must have legality, technological capability, and cultural willingness to use and accept each of:

- Electronic Documents
- Electronic Signatures
- Electronic Notaries
- Electronic Recording



II. eClosing Roadmap (cont.)

In other words, we must answer three questions:

1. Legality – Does the law legitimize the use of electronic documents, signatures, notarizations (in-person and online), and recording in the relevant state and county?
2. Capability –
 - a) Does technology exist to allow parties to take advantage of electronic means? (mostly yes)
 - b) Is the relevant county recorder capable of accepting electronic documents with electronic signatures and notarizations for electronic recording?
3. Willingness – Is the relevant county recorder willing to accept electronic documents with electronic signatures and notarizations for electronic recording? (entirely a recording issue)

a. Documents and Signatures

Legality

- *In general*, eSignatures and eDocuments are legally valid *as contracts*. But contract law is not the end of the matter...
- **State law:** In 1999, the Uniform Law Commission (ULC) promulgated the Uniform Electronic Transaction Act (UETA).
 - 47 states and the DC have adopted UETA (but some carved out real estate transactions)
 - NY, IL, and WA have are outliers, but presumably E-SIGN preempts?
- **Federal law:** In 2000, Congress adopted the Electronic Signatures in Global and National Commerce Act (E-SIGN)
 - Speed up adoption of UETA and plug regulatory hole in the interim.
 - Preempts state law UNLESS state adopts UETA and specifies alternative procedures or requirements for use/acceptance of electronic records or signatures.
- However, an electronic signature on a contract can still be challenged for other traditional reasons (lack of capacity, fraud, etc.).



a. Documents and Signatures (cont.)

E-SIGN: 15 U.S.C. § 7001(a)(1)

(a) In general. Notwithstanding any statute, regulation, or other rule of law...with respect to any transaction in or affecting interstate or foreign commerce —

(1) **a signature, contract, or other record** relating to such transaction may not be denied legal effect, validity, or enforceability **solely because it is in electronic form**; and

(2) **a contract** relating to such transaction may not be denied legal effect, validity, or enforceability **solely because an electronic signature or electronic record was used in its formation**.



a. Documents and Signatures (cont.)

UETA Section 7

- (a) A **record** or **signature** may not be denied legal effect or enforceability **solely because it is in electronic form.**
- (b) A **contract** may not be denied legal effect or enforceability **solely because an electronic record was used in its formation.**
- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law.

UETA Section 13

In a proceeding, evidence of a **record** or **signature** may not be excluded **solely because it is in electronic form.**



a. Documents and Signatures (cont.)

Capability and Willingness

- Safe to say that the technology is available to utilize eSignatures and eDocuments throughout the U.S., but good technology with appropriate safeguards is key.
- Capability and willingness of the county recorder to accept eDocuments with eSignatures is the real issue here.

a. Documents and Signatures (cont.)

Electronic Signature vs. Digital Signature

- Electronic signature: an electronic sound, symbol or process that is 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.
- Digital signature: technology that uses cryptography to attribute an e-signature to a specific person.
- All Digital Signatures are Electronic Signatures, but not all Electronic Signatures are Digital Signatures.

b. Notarization



Legality

- eNotarization appears to be permitted by E-SIGN, UETA, and URPERA (and RULONA), but is only active in 17 states (See PRIA).
- ALSO NOTE: electronic notarization ≠ online notarization
 - Electronic: in-person notarization done with electronic documents and electronic signatures on an iPad or similar device.
 - Online: involves a “remote appearance” using communication technology instead of a physical appearance in the same room.
 - Very few states permit online notarization at this point.

Capability and Willingness

- Largely the same as eSignatures and eDocuments.
 - Technology is available, but appropriate safeguards are key.
 - Capability and willingness of the county recorder to accept is the real issue.

c. Recording



Legality

- *Arguably* legal under UETA and E-SIGN.
- In 2004, the ULC promulgated the Uniform Real Property Electronic Recording Act (URPERA) to specifically address eRecording.
 - Many states have enacted URPERA or similar laws.
 - But, beware of conflict. Esp. watch for “original” document requirements.

Capability and Willingness

- Even if permissible under state law, the county recorder must be capable/willing to record eDocuments. (e.g. requiring holographic signatures, notary seals to “look like paper.”)
- Few states offer eRecording across all counties (AZ, CO, and HI being exceptions).
- Note that some eRecording vendor contracts require representations and warranties that the submitter possesses wet-ink signed original.

c. Recording (cont.)

PRIA Models

- Property Records Industry Association (PRIA) has categorized documents into 3 models.
 - Model 1: Traditional paper document
 - Model 2: Scanned/digitized version of paper document
 - Model 3: Native digital document (never was a piece of paper)
- Jurisdictions capable of accepting Model 3 filings can accept all electronic documents.
- Jurisdictions that are incapable of accepting electronic filings, or only capable of accepting Models 1 and 2, may not be able to accept a paper printout of an electronic document for “hybrid closing.”
- Note that some jurisdictions have different rules for which documents can be “native digital.” (e.g. CA “type one” documents (deeds, mortgages) “type two” documents (assignments, releases)).



Roadmap Summary

Legal

- eDocuments, eSignatures, eNotarizations, and eRecording is/are legal in many states.
- Online notarization is only legal in a few states.

Capable

- County recorder capability to accept eRecording varies widely across 3000 U.S. counties.

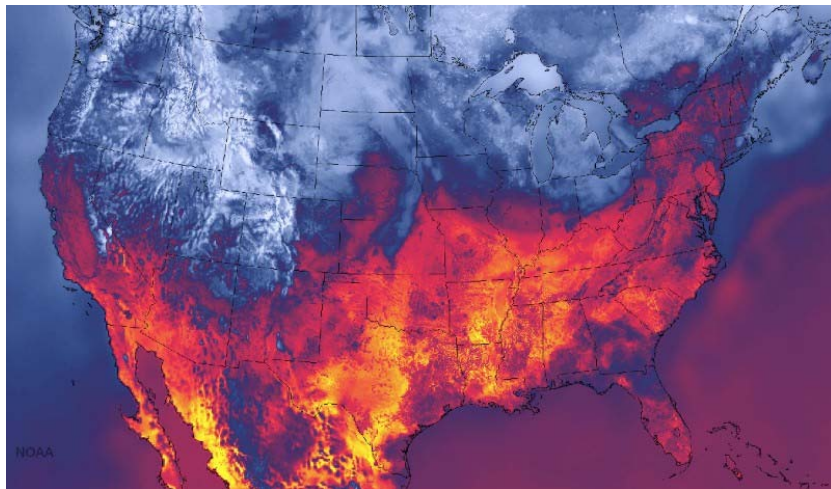
Willing

- County recorder willingness to accept eRecording varies greatly.



III. Online Notarization

The Rise of Online Notarization



- Virginia kicked things off with the first remote notary law in 2011.
 - Purports to allow VA notaries to act anywhere in the world.
 - Does not require disclosure.
- Montana followed suit in 2015.
 - Limits notaries to MT property and MT residents.
 - Requires disclosure.
- Texas and Nevada joined the party in 2017.
 - Silent on interstate recognition.
 - Requires disclosure.
- Ohio – exceedingly vague

The Rise of Online Notarization (cont.)

- Other states are considering online notarization:
 - California, Florida, Indiana, Tennessee, Pennsylvania...
- Meanwhile, some states have rejected the “remote appearance” concept. Examples:
 - West Virginia Code § 39-4-6
 - Utah: Code § 46-1-6(2)
 - Iowa: Code § 9B.2(10)



Traditional Definition & Purpose

- What is notarization? Generally, a notarial act is the process (done by physical appearance) by which a notary:
 - Confirms the principal is who they claim to be,
 - Witnesses the execution or acknowledgment by the principal,
 - Certifies the document by signing and sealing it, and
 - Stores information about the notarial act in the notary's official journal.
- What is its purpose?
 - Intended to prevent fraud and provide assurance that the signatures on the notarized document are authentic, reliable, and done by someone “in their right mind.”
- Historically, focus was on documents themselves.
- Today, focus is transitioning to identity / capacity of signer.

Title Challenges

- Broad Concerns:
 1. Technical – how do we determine compliance with online notary laws?
 2. Underwriting – Will the online notary procedure withstand legal attack, especially in out-of-state context?
- Specific Challenges:
 1. Interstate recognition.
 2. Determining when a document was notarized online.
 3. Fraud, undue influence, and the ability of the notary to analyze the identity and capacity of the principal.
 4. Ability to record native digital documents.



1. Interstate Recognition

- Title issue: Without interstate recognition, transaction is exposed to bankruptcy trustee & foreclosure defenses.
- Bankruptcy risk
 - Trustee's strong arm power to take free of mortgage with defective notarization.
 - Online notarial acts of sister states' notaries may not comply with this state's recording laws.
- Foreclosure risk
 - Borrowers may challenge their own signatures to stop foreclosure.



1. Interstate Recognition (cont.)

- Full Faith and Credit clause of the US Constitution?
 - No known case holds that states *must* recognize other’s notarial acts.
 - See Br. of Amicus Nat’l Notary Assoc. in Apsey v. Mem. Hosp., 730 N.W.2d 695 (Mich. 2007) (citing cases...elastically...).
 - Limits and “the land taboo”
 - See William L. Reynolds, The Iron Law of Full Faith and Credit, 53 Maryland Law Review 412, 430-33 (1994).
 - Interstate Recognition of Notarizations (IRON) Act of 2010 (vetoed).
 - Would have been unnecessary if FF&C clause already settled things!
- Dormant Commerce clause?
 - Prohibits economic protectionism by states, but permits legitimate local purposes that cannot be served by other means.
 - Preserving integrity of public records seems like a legitimate local purpose.
 - Otherwise innocuous state laws, but for the invention of new technology.



1. Interstate Recognition (cont.)

- State notarial reciprocity statutes?
 - Nearly all states have laws recognizing and providing for acceptance of documents notarized by notaries “*in*” other states, but those laws may not apply to documents notarized online. *Where did something happen when it happened online?*
 - The idea of “personal appearance” via a “remote appearance” overturns centuries of legal and commercial tradition.



2. Online Notarization Disclosure

- Title issue: Need to know whether document was notarized online.
- Unfortunately, you may not be able to tell from the face of the document.
 - Montana, Texas, and Nevada law require open disclosure.
 - Virginia does not. Documents notarized by VA electronic notaries require further analysis.
 - Ohio is even more vague than Virginia. Presumably does not require disclosure, either.

Honesty

3. Fraud and Undue Influence

- Title issue: Documents are subject to being set aside for fraud and undue influence.
- Notaries are the only ones in a position to detect.
- Identity proofing – process of confirming that someone presenting a credential or making an identity assertion is who they claim to be.
 - E.g. Knowledge-based authentication (KBA), biometric, etc.
- Credential analysis – process of confirming that credential (driver’s license, passport, etc.) presented is valid.



3. Fraud and Undue Influence (cont.)

- These issues could potentially be solved through development of a common set of national standards & practices regarding authentication, security, etc., but...
 - Will a national consensus emerge?
 - Who will create the standards?
 - Will they be voluntary or mandatory?
 - Who will verify compliance and how?

THESE ARE ALL UNKNOWN AT THIS POINT,
BUT THERE IS POTENTIAL!

4. Recording native digital documents

- Title issue: Lack of clarity may jeopardize constructive notice.
- Does state law allow recording “native digital” documents?
- If so, do counties have the technological ability to accept such documents?
- If so, are counties *willing* to accept such documents?



Potential Solutions

Partnership is the key!

1. Interstate recognition
 - Get all states to adopt online notary laws. Texas serves as the model.
 - Wider availability of online notarization means principal should be able to use an online notary from same state where property is located.
2. Online notary disclosure
 - Encourage legislative fix in Virginia and Ohio. Texas serves as the model.
 - Encourage vendors to disclose. Fannie requires this.
3. Fraud, identity and capacity
 - Partner with interested parties to develop national standards and best practices. Certification program?
4. Recording native digital documents
 - Partner with interested parties to encourage legislative fix and encourage counties to move into the digital age.





QUESTIONS?