

The Banking Law Journal

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Electronic Closings: Key Issues for Banks

*Michael J. Heller**

The COVID-19 pandemic has led to a tremendous increase in closings relying on electronic means. This article discusses the most important issues for banks to keep in mind when using technology to close loans and other transactions.

Electronic signatures and even closings relying on electronic means (“electronic closings”) are not new.¹ Since the COVID-19 pandemic, however, the use of technology by banks to close loans and other transactions has escalated as federal, state, and local government officials have required or recommended that nonessential employees work from home and that individuals engage in social distancing. The need, or the desire, for electronic closings may not be completely eliminated when the coronavirus crisis has run its course and limitations on in-person interactions are lifted. As a result, electronic closings are likely to continue in the future.

This article discusses some of the most important issues that banks should consider when facing requests for electronic closings by their staff or their customers, or as required by government authorities.

NOTARIZATION

All banks recognize the requirement that they “know” their customer. This is no more important than when they extend credit to an individual or corporate borrower – banks literally must know to whom they are lending money.

Notarization is one of the most common methods to ensure the validity of a person’s signature and, therefore, of his or her identity. Of course, that

* Michael J. Heller, a member of the Banking, Corporate, and Real Estate Practice Groups at Rivkin Radler LLP and a member of the Board of Editors of *The Banking Law Journal*, works extensively with bank clients on complex commercial loans, including Industrial Development Agency and Small Business Administration matters, and with private clients in real estate development and corporate transactions. He may be reached at michael.heller@rivkin.com.

¹ See, e.g., Uniform Law Commission, “Law on Notarial Acts, Revised,” available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=8acec8a5-123b-4724-b131-e5ca8cc6323e>. The uniform law allows electronic notarization using technologies approved by the enacting state’s regulatory body. A 2018 amendment allows remote online notarization through the use of audio-visual recording and identity-proofing technology. In addition, the National Association of Secretaries of State (“NASS”) has issued standards for electronic records that can be adopted by an enacting state’s regulatory agency.

generally occurs in person. COVID-19, social distancing, and government orders have made those meetings difficult, if not impossible, to take place.

Fortunately, governments have responded.

Consider the executive order issued on March 19, 2020 by New York Governor Andrew M. Cuomo.² Among other things, this executive order authorized any notarial act required under New York State law to be performed using audio-video technology under the following conditions:

- The person seeking the notary's services, if not personally known to the notary, must present a valid photo identification to the notary during the video conference, not merely transmit the identification prior to or after the video conference;
- The video conference must allow for direct interaction between the person and the notary (thus, pre-recorded videos of the person signing are not permitted);
- The person must affirmatively represent that he or she is physically situated in the State of New York;
- The person must transmit by fax or electronic means a legible copy of the signed document directly to the notary on the same day it was signed;
- The notary may notarize the transmitted copy of the document and transmit the same back to the person; and
- The notary may repeat the notarization of the original signed document as of the date of execution provided the notary receives the original signed document together with the electronically notarized copy within 30 days after the date of execution.³

² New York Governor Andrew M. Cuomo, Executive Order 202.7, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency" (March 19, 2020), *available at* <https://www.governor.ny.gov/news/no-2027-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>. *See, also*, N.Y. State Department of State, "Guidance to Notaries Concerning Executive Order 202.7," *available at* https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf.

³ As of this writing, Executive Order 202.7 has already been extended and may very well be extended again. *See* New York Governor Andrew M. Cuomo, Executive Order 202.38, "Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency" (June 6, 2020), *available at* <https://www.governor.ny.gov/news/no-20238-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

Other states also have taken action to allow remote notarizations. The National Notary Association has a comprehensive tracker summarizing these state actions.⁴

REMOTE ONLINE NOTARIZATION

The concept colloquially referred to as “remote online notarization” (“RON”) has become much more accepted – and much more often used – since the COVID-19 closings began. Indeed, a growing number of title insurers have adopted RON procedures as part of their embracing of electronic closings.

For example, First American Title Insurance Company has a web page dedicated to electronic closings.⁵ Explaining that real estate settlements are “going digital to create a better closing experience while reducing risks for all parties,” First American describes four different kinds of electronic closings.

The first, “In-Person Electronic Notarization” (“IPEN”), involves electronic documents that are electronically signed and notarized in person, usually on a tablet shared by the signer and the notary.

The second, “Remote Ink-Signed Notarization” (“RIN”), occurs when paper documents are signed in ink while a notary witnesses the signatures via a webcam. First American points out that the ink-signed documents then are mailed to the notary for final ink notarization. RIN typically has been authorized on a temporary basis since the COVID-19 epidemic.

RON, as described by First American, is a “fully digital process” where electronic documents are electronically signed and notarized once the signer’s identity is verified with the notary in a remote location via a webcam.

Finally, First American explains that there is a hybrid signing and notarization process, including any combination of the other three kinds of closings. Typically, First American says, this means ink-signing recordable or notarized documents and electronic signing of the rest of the closing documents.

The First American website also contains a “State-by-State Guide to Remote Online Closing,” with state updates as well as a list of frequently asked questions.

Title insurers are not alone in supporting and advocating for electronic signatures and closings. For example, Fannie Mae has launched an interactive

⁴ See National Notary Association, “States Take Emergency Action On Remote Notarization And Signers’ ID.”

Available at https://www.nationalnotary.org/notary-bulletin/blog/2020/03/states-emergency-action-remote-notarization?_sm_au_=iVVfNfjJsWVj62QJ8MfKK7vWLCsW.

⁵ <https://www.firstam.com/title/eclosing/>.

website that details the benefits of electronic mortgages.⁶ As Fannie Mae explains, electronic mortgages are “faster, offer improved data quality, [and] can be cheaper to execute than traditional mortgages.” Moreover, Fannie Mae notes, they are “experiencing massive growth.”

ACTION IN CONGRESS

It should be pointed out that some members of Congress have taken an interest in RON. Earlier this year, U.S. Senators Kevin Cramer (R-ND) and Mark Warner (D-VA) introduced S. 3533, the “Securing and Enabling Commerce Using Remote and Electronic (‘SECURE’) Notarization Act of 2020.”⁷ The bill would permit the immediate nationwide use of electronic notarization where the notary and signer are in different physical locations.

The bill, which is endorsed by endorsed by the American Land Title Association (“ALTA”), the Mortgage Bankers Association (“MBA”), and the National Association of Realtors (“NAR”), takes a two-pronged approach to continue and expand access to remote online notarizations. First, it permits immediate nationwide use of RON, with minimum standards. Second, it provides certainty for the interstate recognition of RON.

The bill, if enacted into law, would:

- Authorize every notary in the United States to perform RON;
- Require tamper-evident technology in electronic notarizations;
- Use multifactor authentication for identity confirmation and audio-visual recordings of the notarial act in an effort to limit fraud;
- Allow signers outside the United States, such as military personnel and their families, to easily have their documents notarized;
- Complement existing state laws, while allowing states the ability to implement their own RON standards;
- Build on the foundations of the Interstate Recognition of Notarizations Act (the “IRON Act of 2011”);
- Follow a similar structure of complementary state/federal legislation, such as the Electronic Signatures in Global and National Commerce

⁶ <https://www.fanniemae.com/deliveremortgage/explore/index.html>.

⁷ <https://www.congress.gov/bill/116th-congress/senate-bill/3533>. See, also, H.R. 6364, “Securing and Enabling Commerce Using Remote and Electronic Notarization Act of 2020,” available at <https://www.congress.gov/bill/116th-congress/house-bill/6364?q=%7B%22search%22%3A%5B%22notarization%22%5D%7D&ts=1&r=2>.

Act (the “ESIGN Act”) and the Uniform Electronic Transactions Act (the “UETA”);⁸ and

- Implement 2018 Treasury Report recommendations that Congress consider legislation to provide a minimum uniform national standard for electronic and remote online notarizations.

CLOSING DOCUMENTS

In many instances, banks are adding language to their own documents to help to make sure that all parties agree to an electronic closing and to help facilitate such a closing. Such a provision could provide, for example, that:

This [agreement] may be executed in counterparts, each of which will be deemed to be an original copy of this [agreement] and, when taken together, will be deemed to constitute one and the same [agreement]. Facsimile signatures, scanned .pdf signatures, or other electronic signature pages shall be binding on the Parties to the terms and conditions of this [agreement]. All Parties shall tender and exchange original signature page(s) promptly after tendering any facsimile, scanned .pdf signature, or other electronic signature pages to Lender’s counsel; provided, however, the failure of any Party to tender such original signature page(s) after tendering any facsimile, scanned .pdf, or other electronic signature page(s) shall not affect the enforceability of this [agreement].

OTHER ISSUES

Electronic or “contact-free” closings also present other concerns for banks to consider. For example, will electronically signed documents be easily accepted for recordation by local officials? Are limited – or no – property appraisals acceptable?⁹ How can public records be searched, and how can loan and mortgage documents be filed, while government offices are closed or served by a limited staff with limited hours? Some of the solutions include delivering original documents to the title company to be recorded.

Another issue is that some title companies are including an exception to the loan policy that reads in sum and substance as follows:

⁸ Several states have adopted their own electronic signature laws. *See, e.g.*, New York Electronic Signatures and Records Act (“ESRA”), N.Y. State Tech L. §§ 301 *et seq.*

⁹ Fannie Mae, for example, has permitted appraisal waivers in certain instances. *See* <https://singlefamily.fanniemae.com/originating-underwriting/appraisal-waivers>.

To the extent that continuation searches are unavailable, policy excepts all matters that may affect title from and after the original effective date of the title report or the last date of any continuation search as typed on the title report.

This is unacceptable to lenders and their counsel, and most lenders will not close with such an exception. This provision usually is removed by the borrower or its principals, who provide an affidavit to the title company in its place.

Electronic or “contact-free” closings also have raised issues with wire transfers such as the risks of the interception of wire information and wire fraud. It is very important that banks have strict verification policies in place to verbally or otherwise confirm wire instructions with both the sending and receiving parties, for example by using phone numbers from a known source and not the email containing the wire instructions. It is also important to password protect or encrypt any emails or attachments containing wire instructions and related information to help prevent interception or changing of the terms. Fraudsters are very crafty and if a fraud occurs, the lost or misdirected funds could be out of the country by the time it is discovered.

As a practical matter, once all documents have been e-signed and properly notarized, knowledgeable counsel should be able to handle these other issues.

CONCLUSION

As the economy continues to open up in New York and across the country, the need for electronic closings may dissipate, at least to some extent. However, the benefits of using technology for electronic closings, and the possibility of further business closings in the future, suggest that electronic closings will remain an acceptable – and perhaps even preferred – method of doing business for quite some time to come. More and more people are expecting that technology will enable them to act digitally.

Significantly, the ESIGN Act already supports the use of electronic signatures in all 50 states, and over 85 percent of the U.S. population lives in a jurisdiction with electronic recording capabilities. Forty-seven states have adopted the UETA, creating standards to help determine the legality of electronic signatures and records. By the end of 2020, RON will be effective in at least 22 states, and other states continue to explore their own RON legislation.¹⁰

Banks that understand the legal requirements and that adopt best practices are likely to benefit the most from electronic closings.

¹⁰ See Henry Cason, “The Digital Reinvention of the Mortgage,” *available at* <https://www.fanniema.com/portal/research-insights/perspectives/2020/mortgages-digital-age-cason.html>.