

Will the Future of Real Estate Include eClosings?



THWOMP! The mortgage lender's counsel drops a five-inch stack of paper in front of an unsuspecting homebuyer fidgeting nervously at a closing table. Two to three hours later, the shell-shocked borrower emerges after scrawling their signature over and over on page after page, their cramped, limp hand now smeared with ink. The purchase of a home or refinance of a loan are usually happy times for the homebuyer/borrower. But nobody would miss the seemingly endless paperwork at the closing table. Which leads to another possibility: the eClosing.

An eClosing is the act of closing a mortgage loan electronically. The eClosing process occurs in a secure electronic environment where some or all closing documents are accessed and executed over the Internet. For now, creating an electronic mortgage loan is typically a hybrid process in which certain key documents (the note, the security interest) are printed onto paper and physically—or “wet”—signed while other documents are signed electronically.

The eClosing process has numerous benefits. The process helps lenders, even if the lender opts for a hybrid process in which the note and security instrument are wet-signed paper documents. A hybrid eClosing procedure still enables lenders to realize operational efficiency and improve the borrower experience by reducing the number of physical signings and the time spent at the actual closing table. eClosings offer tremendous benefits for the environment, as well, by reducing paper usage to save trees and reducing CO2 emissions by eliminating the shipment of physical documents.

eClosings could also improve privacy and protection of private borrower information. For example, right now title companies and closers handle multiple documents that contain Social Security numbers, birthdates, employment information, phone numbers and other private data. These paper copies are then shipped and handled by people at all levels of the process. With an eClosing, documents containing detailed personal information—such as the 1003, IRS 4506 and W9—could be accessed by the borrowers through a secure interface, keeping this information between the lender and the borrower without any need for third parties to obtain or store this information. Moreover, software can maintain an audit trail of those who access the information and restrict information to those who have a bona fide need to view it.

The barriers to the goal—a completely paperless closing process—are mainly legal and regulatory, not technological. For example, laws, regulations and policies will need to consistently accept eNotarized and eRecorded security instruments. The technological hurdles are generally minor or even immaterial, such as access to a high-speed, secure Internet connection and a secure laptop.

The regulatory and legal landscape varies widely by state and even county or municipality. Approximately 60 percent of U.S. households are within an eRecording-enabled jurisdiction. ENotarization capabilities vary significantly by state. An eNotarization is a notarization in which the documents being notarized and the notarial certificate are in electronic form, allowing the signer and the Notary to both sign electronically. All 50 states have adopted some form of eSign statute or law. Three states—including New York—have adopted their own statutes to address electronic signatures. New York's is the Electronic Signatures and Records Act (ESRA). The other 47 states have adopted either the Uniform Electronic Transactions Act (UETA) approved by the Uniform Law Commission or a modified version. In 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act, which creates legal certainty for the use of electronic signatures and records under federal law.

To be a completely paperless process, the mortgage must be electronically notarized prior to recording. Many states have implemented programs that govern the electronic notarization process and the notaries that are performing it. New York is one of two states (the other is Washington) that permits eNotarization for land records only. The eNotarization process enables a certified notary to affix an electronic signature and notary seal using a secure Public key to an electronic document (such as a PDF). This includes the use of a digital signature and digital notary seal to notarize digital documents and validate with a digital certificate. Once affixed to the electronic document, the document is rendered tamper evident; unauthorized attempts to alter the document will be evident to relying parties. The Electronic Notary also must keep an electronic register of each act performed.

Despite the advances, electronic notarization does not mean that the notary can perform the electronic notarizations remotely. In nearly all locations, the notary and the signer must still be in the same physical location.

The next horizon—remote (or “webcam”) notarization—either electronic or paper—satisfies the signer's personal appearance requirement via the Internet using a webcam. With remote notarization, the signers can ostensibly be located anywhere in the world and appear before the notary by means of a live, two-way video conference. The notary keeps a recording of the meeting.

Remote notarization, however, remains the rare exception. Most states still require the signatory to be physically present with the notary at the time of signing. New York's ESRA regulation, §540.7 Electronic recording of instruments affecting real property part (e), states that, "A notary shall perform a notarization of an instrument affecting real property that exists as an electronic record only where the signatory appears in person before the notary at the time of notarization to execute the record or to affirm a prior execution, as permitted by New York State law." Virginia and Montana are the rare exceptions. As of 2012, in Virginia, certified notaries can use live, two-way video conferencing to notarize documents remotely. And since 2015, Montana has allowed for remote notarization to conduct both traditional and electronic notarizations. Conversely, webcam eNotarization bills failed in both Texas and Maryland.

For an added layer of security, some remote eNotarization technology uses "knowledge based authentication" (KBA), which uses third-party databases (typically credit bureaus) to verify the identity of the signatory. For example, the signer may have to provide his Social Security number, which then triggers the KBA to generate questions related to the signer's personal history that third parties are unlikely to know, such as previous addresses. Government agencies and financial institutions already rely on KBA (e.g., VitalChek) to verify people's identities. A legal issue is whether KBA essentially shifts the burden of identifying the signatory from the notary to the technology provider. The limitations of the KBA technology are that it only works for people with established credit histories from the United States, Canada and certain western European countries.

In contrast, the in-person notary is merely looking at a government-issued ID but not verifying it. A notary who meets with a signer in a web conference cannot scrutinize the ID to make sure it's authentic (hologram, texture etc.). The notary also wouldn't be able to make a firm determination as to whether the signatory is under duress or otherwise willing and able from an awareness or competency standpoint to sign. Supporters of remote notarization believe that the video recording the notary is required to keep greatly increases the security of the transaction and deters identity theft. Opponents are concerned with the increasing ease with which a video can be edited and manipulated.

Regardless, states must consider issues of validity of remotely eNotarized documents across state lines. In April 2016, the National Association of Secretaries of State (NASS, the office that oversees notaries at the state level) announced that it has established a Remote Notarization Task Force. The task force will review technologies that facilitate remote notarizations, track state activity and develop possible proposals for NASS consideration. Currently, the biggest obstacle to the technology is acceptance by mortgage lenders and government regulators of the mortgage industry. Until lenders are certain that remote eNotarization will not hinder a loan's sale on the secondary market, acceptance will be limited. To overcome the obstacle, proponents must prove that all aspects of the eClosing—particularly remote eNotarization—are secure and reliable.

A true eClosing with remote eNotarization would completely change the way real estate transactions take place. With less paper to print and handle and less travel to appear physically at closing tables, overall operational costs could shrink considerably. EClosings could also enable notaries to work from one place on multiple transactions.

State progress in adapting existing laws and regulations to conform to 21st century technology and make paperless eClosings a reality remains uneven. Virginia catalyzed these changes in 2011 with its adoption of remote eNotarization. The realization that these mechanisms make transactions easier for U.S. citizens living abroad—including persons in the armed forces—is also a driving force behind the proponents' arguments for the adoption of this technology. Only recently has the hardware and software become both sufficiently affordable and sufficiently sophisticated from a security and reliability standpoint, to be considered a realistic solution for notary and closing services. With the technology barrier lifted, the focus will likely shift to regulatory and legal changes.

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<http://www.law.com/sites/almstaff/2016/11/29/will-the-future-of-real-estate-include-eclosings/?slreturn=20161030101329>