

Remote Lending in the Time of COVID-19

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As we quickly adapt to the reality of COVID-19, financial institutions and lenders (“lenders”) are in the unique position of helping consumers and businesses maintain access to credit. Inevitably, borrowers will also need to defer, extend, and modify existing loans. However, given the current national and local restrictions, such as shelter-in-place orders and social distancing measures, most transactions, if not all, will require use of one or more “remote channels” from origination to closing; for example, lenders may need to turn to email, mail, or an electronic signature platform to deliver and obtain signatures on documents, and make use of remote online notarization to close a transaction. Even for lenders who have the infrastructure to increase use of remote lending channels, there are both practical and legal considerations, addressed below, that may affect your practices.

Electronic signatures

First, if you are considering using electronic signatures or increasing use of electronic signatures for certain loan types, you should consider the following:

1. Are electronic signatures lawful?

Yes, electronic signatures are generally legal and enforceable pursuant to the Electronic Signatures in Global and National Commerce Act (E-Sign), governing consumer and commercial transactions, and state laws adopted from the Uniform Electronic Transactions Act (UETA) or similar state electronic signature laws, which govern commercial transactions. There are, however, exceptions to this general principle. Many of those exceptions—such as laws governing wills, codicils, or testamentary trusts—are not relevant in the consumer or commercial financial law context. However, some noteworthy exceptions are as follows:

Uniform Commercial Code (UCC). E-Sign and UETA do not apply to contracts governed by the UCC other than Articles 2 and 2A (Sales). However, the UCC has been amended to accept electronic signatures where they are excluded from coverage. The importance of this is that electronic signatures are permissible under relevant provisions of the UCC. Lenders should confirm that this is consistent with state-adopted versions of the UCC and UETA where operating.

E-Sign and some state versions of UETA (Wisconsin, for example) do not apply to notices of default, acceleration, foreclosure, eviction, of the right to cure under a credit agreement secured by an individual's primary residence to the extent such notices are required by law. In other words, a right to cure notice *could not* be sent to a borrower electronically if the loan was secured by a primary residence. Lenders should consult their state's UETA or electronic signature law for any applicable restrictions.

2. If I want to begin using electronic signatures, do borrowers have to consent to conduct transactions electronically? If so, how do I obtain consent?

Yes, lenders must obtain the appropriate level of consent from the borrower before conducting the transaction electronically. The level of consent required depends upon whether your borrower is a business or a consumer. If you are originating a commercial transaction, consent is driven by UETA (or similar state electronic signature law). Under UETA, the parties must agree to conduct the transaction electronically. Whether there has been agreement to conduct the transaction electronically is determined from the context and surrounding circumstances, including the parties' conduct. In practice, consent could occur by simply asking the business customer whether they would like to receive their documents via email or by conducting business via email. Alternatively, lenders can obtain consent from business customers, which is typically the case when using an electronic signature platform.

If your customer is a consumer, the customer must have affirmatively consented to conduct the transaction electronically (without withdrawing consent) and, prior to such consent, must be provided with disclosures. Disclosures are required and must be made pursuant to E-Sign, 15 U.S.C. § 7001(c)(1). These disclosures are available in electronic signature platforms and may also be provided by your document vendor or loan origination system provider.

3. What documents can be signed via electronic signatures – for example, can the Promissory Note and Mortgage be signed electronically?

Generally speaking, all documents are valid when signed electronically, unless specifically excluded by E-Sign (as described above) or under your state's version of UETA or similar electronic signature law. This includes loan modifications, Promissory Notes and recordable instruments. However, as it relates to the Promissory Note and recordable instruments, such as a mortgage, we suggest lenders continue to obtain a wet signature for the reasons described below. This may result in a bifurcated approach obtaining signatures on documents. For example, you may be capable of using electronic means to send and obtain signatures on documents prior to closing. At closing, however, lenders should consider obtaining wet signatures.

The Promissory Note

Nothing in E-Sign or state versions of UETA or similar state electronic signature laws prohibit use of an electronic signature on a promissory note. However, because paper promissory notes are “negotiable instruments” under the UCC, having “possession” of the “original” signed note is legally significant. In order to create parity in an electronic world, E-Sign and UETA set forth special rules as it relates to electronic promissory notes. Specifically, the note must be considered a “transferrable record” in order to be considered a negotiable instrument. If the note is a “transferrable record,” the person identified as in “control” of the record becomes the equivalent of a “holder” under the Uniform Commercial Code. In order to be considered a “transferrable record,” the Note must meet certain criteria, which in part requires “a single authoritative copy of the transferrable record” and that each copy of the authoritative copy and any copy of a copy be readily identifiable as a copy.

This has led to a number of court cases, especially foreclosure cases during the Great Recession, where lenders were unsuccessful due to their inability to “produce the original note” (aka the “authoritative copy”). Furthermore, in certain states such as Colorado, lenders must produce the original note to foreclose or obtain judgment. As a result, given this significant risk, many lenders require a wet signature on the Note or, alternatively, Notes over a certain dollar threshold in order to minimize this risk. However, to the extent that a lender is using an electronic signature platform to obtain a signature on a Note, the robust signature evidence now contained in certain platforms—providing the date and time of signature, along with the IP address of the signatory, among other things, in both the Note itself and accompanying certification— may serve to reduce the level of risk.

During COVID-19, lenders may wish to consider relaxing wet signature requirements on promissory notes to that the extent that risk tolerance allows (see “practical considerations” below), while redoubling efforts to ensure a high level of documentation standards. However, we cannot say that courts will exercise any leniency at the time of enforcement.

Recordable instruments/real property documents

Whether or not recordable instruments can be signed electronically is a matter of state law. Furthermore, even if permissible under state law, counties' register of deeds offices may further restrict use of electronic signatures. For example, Wisconsin permits use of electronic signatures on recordable instruments under general UETA authority; however, counties may choose whether or not to accept electronic signatures on recordable instruments. This results in significant variability in acceptance, rendering it nearly impossible for lenders engaged in transactions involving real property to accept electronic signatures on recordable instruments.

As a result, lenders may reasonably require wet signatures on Notes and recordable instruments, both of which are signed at closing. As a result, for many lenders it will make sense to obtain wet signatures on all closing documents.

Electronic filing/electronic recording, recorders offices and title companies

The concept of electronic signatures should not be confused with electronic recording. Electronic recording (or "e-recording") permits lenders to electronically submit recordable instruments for recording, whether documents are signed using an electronic signature (if permitted) or a wet signature. Many states permit the submission of recordable instruments electronically. During the COVID-19 response, however, closure or modified operating hours of recorders' offices may limit the acceptance of recordable documents, including e-recorded documents. The American Land Title Association is tracking the operating status of each recording jurisdiction. Furthermore, if recorders' offices are closed or operating on a modified basis, this raises significant title insurance issues. For example, title companies may not be able or willing to issue title policies if the recorders' offices and/or governmental offices required for title searches are closed. We suggest working with each title company individually to determine how to navigate these challenges.

4. Are there other relevant considerations?

Yes, there are certain practical considerations that may impact a lender's ability to obtain an electronic signature and should be considered and weighed with your risk tolerance in these unique times.

Investors and institutional lenders

If you sell or pledge your loans to investors or institutional lenders, you must adhere to their requirements. We are aware of several investors and institutional lenders—including Fannie Mae, Freddie Mac, and the Federal Home Loan Bank—which restrict, to some extent, the documents on

which an electronic signature can be used. For example, a wet signature on a note and a mortgage is likely required. While these are unique times calling for flexibility, it is not clear whether such parties will relax their requirements in the wake of the COVID-19 response measures. We suggest reaching out to investors and institutional lenders with which you do business for guidance.

Notary requirements

For loan documents requiring notarization, you may be limited in the ability to execute a document electronically. State laws govern the acceptance of electronic or remote notarizations. It's important to understand the difference between "electronic" and "remote" notarizations. A remote notarization allows borrowers and notaries to be connected via webcam. In a remote notarization, some states require use of electronic signatures on electronic documents (called "Remote Online Notarization"), while some states allow a borrower and notary to use wet signatures (requiring the scanning of documents for the notary to sign after borrower signs). In contrast, in an electronic notarization, physical (in-person) presence is required, but the borrower and notary may sign electronically. During the COVID-19 response measures, electronic notarization will not prove incredibly useful – lenders should consider, instead, whether the state or states in which they operate permit remote notarization and to what extent.

A number of states in the last several years have passed legislation authorizing remote online notarization, bringing the total to nearly half of all states. However, some states are still in the process of implementing rules and processes to support such notarizations. Unless and until remote notarizations are lawful and fully implemented in the state in which you do business, it may prove difficult, if not impossible, during the COVID-19 crisis (which would prevent or limit in-person notarizations from occurring, even if an electronic signature is used) to properly execute a document remotely.

To this end, states have begun issuing emergency rules to permit remote notarization, including allowing for the appearance of witnesses remotely, during the COVID-19 crisis. For example, last week Wisconsin's Department of Financial Institutions issued such emergency guidance permitting remote online notarization for real estate and non-real estate transactions. We suggest staying on top of these developments in the states in which you operate. Additionally, we understand that ALTA is working with Congress on legislation to expand availability of remote notarization to ensure real estate transactions can continue to close amid COVID-19.

Use of remote notarization will help facilitate remote closings. To the extent that your state does not permit remote notarization, or you are not comfortable with remote closings given the considerations above, we suggest you work with title companies to determine how to best execute loan documents at

closing safely during the COVID-19 crisis. According to ALTA, a number of title and settlement companies across the United States have developed protocols to ensure healthy and safe in-person closings during the pandemic. These measures include social distancing at the closing table, limiting the number of people at closing, handwashing, and sanitizing closing rooms.

5. Can Husch Blackwell create commercial loan E-Sign contracts?

Yes, absolutely. To the extent lenders are considering migrating to electronic signatures for commercial transactions, Husch Blackwell can draft loan documents to support use of electronic signatures.

Using the “wet sign, scan, and send” method

To the extent a lender is not using an electronic signature platform or is only doing so for certain loans or certain documents as part of a transaction, there are still many options to limit in-person contact.

One option is to simply make use of the mail. Another is to use email. Assuming disclosures have been provided where appropriate (e.g. non-entity consumers) consistent with E-Sign and any applicable state law, as discussed above, lenders are able to email documents to borrowers, have borrowers wet sign the documents and then scan and email them back to the lender. If a customer doesn't have a scanner available, can you get creative and allow use of a picture of the document or just the signature pages? Originals can follow thereafter, as may be required by the lender and, for any new loans, funding can occur once such originals are received (see discussion above regarding “product the original” Note). Of course, to the extent processes may vary during COVID-19, we recommend updating or addending your policies and procedures accordingly.

Conclusion

Overall, lenders should be strongly considering how to limit in-person contact and increase remote lending as a result of the COVID-19 pandemic. While there is a possibility that any declaration of a state of emergency or disaster could relax certain requirements that may impact remote lending (e.g. remote notarization), there will inevitably still be risks for a lender to consider. To stay up-to-date on federal, state, and local COVID-19 rules, orders guidance, please see Husch Blackwell's State-by-State COVID-19 Resource Center. Though it goes without saying, lenders should always exercise safe and sound lending practices during this unusual and unprecedented time.