

# Financing Your Home.... Without Leaving It: The Potential for Remote Online Notarization to Transform the Mortgage Closing Process

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The purchase, sale, and financing of estate transactions have been conducted since time immemorial, and as if in keeping with its venerable heritage, most real estate closings in the beginning of the 21st century bear a strong resemblance to closings that took place during the last century or two. In this regard, the parties, the parties' agents, and, when necessary, a representative of the bank, can still be found seated around a table passing documents, left to right, left to right, until all are signed. Dramatic advancements in technology over the last 25 years, however, have heightened expectations that a streamlined, fully electronic closing will speed up the process while reducing transaction costs. Of late, consumers are increasingly demanding greater convenience, and lenders are increasingly assessing the benefits that they may enjoy from fully electronic closings.

## **e-Closing...A Work in (Slow) Progress...Until Now**

Admittedly, the concept of the fully electronic mortgage closing is not a new one. The industry has been working on the process in fits and starts for decades. In the years following the 2008 financial crisis, innovation by residential mortgage originators and growing consumer comfort with online transactions combined to create the right environment for investment in end-to-end electronic mortgage closings. In 2014, the Consumer Financial Protection Bureau (CFPB) announced an e-closing pilot program enlisting seven creditors to assist the CFPB in studying the digital mortgage process. Seeing regulatory support for an e-Closing as part of an entirely digital mortgage process encouraged further innovation and investment.

In 2018, the potential is very real for real estate transactions to finally evolve to the fully end-to-end digital transaction. Before that is possible, however, state law governing the notarization process may need to change. The question is whether existing state law governing licensed notary agents and notarizations covers electronic and remote electronic notarizations or whether new enabling

legislation is necessary. Either way, online notarization as part of the fully digital closing, already occurring in a few states, will almost certainly be operational in all states over the next few years. This article will look at the existing landscape for states that allow remote online notarizations (RON), the likely variations expected as more states pass legislation this year, and the potential for remote online notarizations in real estate transactions going forward.

## **The Current State of RON**

Some states and trade associations with RON experience have produced talking points and model language to assist other states in crafting enabling legislation to allow for electronic and remote online notarizations alike. Last year, Virginia, Montana, and Texas passed legislation and, in fact, RON closings are occurring in Virginia today.<sup>i</sup> In response to the growing industry interest and state level activity, the Mortgage Bankers Association (MBA) and American Land Title Association (ALTA) drafted and approved a Model Bill (MBA/ALTA Model).<sup>ii</sup> Other groups like the National Association of Secretaries of State (NASS) are also working on model legislation.<sup>iii</sup>

By and large, the MBA/ALTA Model is based largely on what succeeded in Texas. The NASS model is likely to be similar but with perhaps even more options for state officials to customize their own legislation. For instance, states looking to tackle RON must make several threshold decisions. First, states must determine which RON provisions and standards will be statutory and which can be—and should be—left for the regulations that will be promulgated pursuant to the RON statute. Second, states must determine if existing notarial licensing requirements allow for electronic notarizations and include a residency requirement for state licensed notary agents. The residency requirement is significant in that it will dictate the location requirements, if any, for the notary in a remote online session. Third, states will set forth whether the authorization is limited to residential real estate, all real estate (i.e., commercial and residential), or all potential online notarial acts. Though each state will undoubtedly have variations and local quirks creating slight operational differences state by state, the RON stakeholders have already made significant progress toward a standard framework.

### **Common Ground and Benefits Supporting a Standard Framework Permitting RON**

Although some states may prefer electronic notarization as a first step on the way to remote online notarization, the more likely outcome is to permit RON at the outset, given the flexibility provided by the model laws for the adoption of RON laws. In that regard, consumers can select the appropriate process to meet their needs—in-person, eNotarization, or RON. In addition, state authority over

real estate transactions, particularly residential real estate transactions, is not changed by RON. States will continue to establish the licensing standards for notary publics, whether adding electronic online approval to existing licenses or a separate category for electronic notary is set forth. As a result, state authority will define the term of an electronic and online notary. State authority sets minimum standards for approved technology to conduct electronic and remote online notarizations. State authority decides whether the document seal will include information about the nature of the signature session. State authority will continue to set the fee schedule for notarial acts and recordings.

The benefits of RON are many. Additional records required for RON, including the two-way real time audiovisual records, will provide all parties (buyers/borrowers/sellers/lenders and regulators) with unprecedented transparency. In that regard, some stakeholders have pointed out that RON is a more secure process, given the ability for lenders and investors to access an immediate audit trail of the closing.<sup>iv</sup> In particular, as alluded to above, the initial state laws and model laws amend the definition of “physical presence” to include real-time two-way audiovisual communication. Since this language allows the notary and principal to satisfy the presence requirement without actually being in the same room, critics suggest the remote notarization process will increase the potential for fraud. Fraud will, however, continue to be a potential risk, regardless of where the notary sits. Electronic fraud constitutes the most common type of fraud today. RON enhances the secure

transmission of data between parties by means of identity (ID) verification technology and credential analysis. Secure communication and e-signing platforms also help to address both physical and electronic security, making RON perhaps the most secure method of signing.

By way of example, RON protocols can use a variety of ID verification and credential analysis methods. The principal can be asked to hold up both sides of a government-issued ID for review. A government-issued ID can be swiped through a reader depending on the hardware associated with the platform. Secure login credentials, codes, or verification questions can be required prior to entering the signing session.

Another benefit of RON is the inherent utilization of digital records and the efficiency and cost-savings of electronic storage, such as cloud storage, as opposed to a more paper-intensive process. Lastly, because states retain the regulatory authority to set technology and security standards, RON will almost certainly generate more information than the electronic notarization sessions already occurring in most states. Accordingly, courts, regulatory agencies, and other interested parties should be able to rely more confidently on the process and records generated during a RON session than through a conventional electronic closing.

### **Variations Among States**

For the RON framework to work seamlessly across state borders, states must be able to accept remote or paper notarization from another state, as long as the signature was executed according to that state’s laws.

The benefits that support a standard framework for RON do not mean that there will be or should be no variation among the states. In the three states where RON is currently (and explicitly) enabled, there are already slight variations:

- Virginia allows the property, principal, and notary official to be located in any state at the time of the signing session, so long as the notary official is a duly licensed Virginia notary.
- Montana allows the principal, property, and notary official to be anywhere within Montana, and the principal may remotely wet sign or eSign documents during that session.
- Texas allows the principal to be anywhere during a signing session for a Texas property conducted by a Texas notary official.

Still, other states may allow for the RON process, either through the passing of a statute or an existing state law that does not explicitly prohibit it. Nevada explicitly allows for remote online notarizations of wills and trusts. The state is working on similar legislation for residential real estate closings. Ohio passed authorization of RON closings in a state bill last year but is revisiting the scope of the authorization in 2018. Different residential real estate industry participants, such as lenders, service providers, and title insurers, have varying interpretations as to the practice in these states.

### Looking Ahead to 2018

States currently debating RON legislation have the benefit of both the comparison of the three states currently embracing the practice as well as the model laws recently published. Most agree that the Texas law, which became the foundation for the MBA/ALTA Model, has the broadest support among all stakeholders. To better understand the future state, here are the key areas each state will have to consider when promulgating enabling legislation.

**Physical location.** The value of a RON session is greatest when the homeowner, property and notary public can be located anywhere. Understanding that states may seek to retain certain boundaries such as the property state and notary's residency, RON can still be a valuable service to consumers and future constituents by allowing the homeowner to be anywhere.

**Minimum authentication/security standards.** One temptation for legislators and regulators alike will be to prescribe the minimum standards for ID verification/credential analysis, security, and technology platforms. RON implementation will work best for consumers, industry, and regulators alike when minimum standards are technology and vendor neutral and incorporate, for example, an independent industry standard-setting organization or baseline without specifically identifying approved vendors.

**Recordkeeping.** As is the case today, states set out the journaling and recordkeeping requirements for state notary officials. States will have to decide how to address a notary's journal entry. Important considerations include whether an electronic journal must include a reference or acknowledgement of the existence of audio/video. Most states separate the audiovisual record from the journaling requirement. The journal entry can be electronic without containing the audiovisual file. Less certainty exists around the audiovisual record. Most industry stakeholders agree that the industry standards for recordkeeping will govern the session recording. In residential real estate, for example, this will allow lenders, title companies, and investors to establish the responsibility and liability for the retention of the audiovisual session. Most notary associations agree that the individual notaries cannot be responsible for the cost and security of storage.

**State seal.** Secretaries of State have responsibility over the seal associated with an approved notarization in that state. The state legislation or regulation will consider how, if at all, the seal should be amended to identify if the notarization occurred in person or remotely. Since authorized under state law, notarial acts carry the same legal weight whether wet signed, e-signed, or e-signed through remote session. The state can decide how to identify the various methods.

Given the foregoing safeguards, the RON process holds the prospect of providing heightened accessibility and convenience to consumers without sacrificing state authority or security standards.



## Challenges to Full Implementation

RON has been moving quickly among industry adopters and state legislators alike. The end-to-end digital mortgage process, however, will not be complete without the option for a fully online closing session. If offered in enough states to create a critical mass of consumer demand for remote online closings, other pieces of the process need to be addressed as well. Investors, such as Fannie Mae and Freddie Mac, have already piloted and began accepting residential mortgage loans closed through eClosing and web sessions. The collateral in the form of an eNote can be delivered instantaneously to the lender to be transmitted to the investor's eVault. It is not a coincidence that the success of digital collateral has shifted the focus to other areas of the closing process that are necessary for full, wide-scale implementation.

**Local Recording Offices.** First and foremost, local recording offices often are not equipped to handle digital mortgage documents. Some require the closing agent to actually turn otherwise digital documents into accessible formats like .PDF. An even smaller number may require printing an electronic document created from the digital original. Fortunately for proponents of the digital real estate process, the recording offices representing municipalities where the majority of Americans live are generally accessible via digital or electronic records.

**Smaller Institutions.** Another challenge is possible resistance by smaller institutions, including local mortgage lenders, community banks, and credit unions. Politicians and policymakers could ignore all the benefits and security of a digital signing session made possible through

RON if the perception is further competitive disadvantaging of the smaller market participants. In that regard, a multitude of technology providers and other vendors are already meeting this challenge by providing a variety of options for adoption within existing loan origination systems or as a standalone solution. The question is whether smaller institutions will embrace the strategic advantages or resist this growing trend.

**Implementation Costs.** In the short term, financial institutions must consider the cost of implementation against the certainty and uniformity in delivering a complaint, safe process.

**Evolving Regulatory Landscape.** Investors must consider the interpretations of existing state law versus the effectiveness of new state law. Notaries public must monitor evolving state law to have the right licensure and recordkeeping. Closing agents, including notaries, should also remain in close contact with lenders and financial institutions to know what rules, procedures, and technologies will be required to continue to serve clients. Regulators will have to respond quickly to enabling legislation to enact the necessary rules and regulations.<sup>vi</sup>

## Implications for Commercial Real Estate Finance

As discussed above, RON is a critical step to a fully digital closing process. While the impetus for RON stems largely from participants in the residential lending industry, the benefits of RON will not be lost on commercial mortgage industry participants. In particular, the potential for quicker execution, reduced transactional costs, and greater security will undoubtedly engender increasing interest among commercial mortgage lenders as residential lenders increasingly embrace RON.

## Conclusion

The MBA/ALTA Model is likely to provide a valuable baseline for dialogue on the key issues of RON. The areas state legislative and industry stakeholders will need to address are physical location of the participants, reciprocity between states, minimum security and technology standards, recordkeeping, and state-specific notarial agent and seal requirements. No matter what an individual state may choose to do, the momentum of 2017 will likely lead to adoption of RON legislation in several additional states before year's end. Anywhere from 8 to 16 states, in addition to Virginia, Montana, and Texas, are considering legislation or are allowing for RON closings for residential mortgage loans.<sup>vii</sup> The evolution of the fully digital closing has started off slowly, but RON is moving fast and the day of the digital closing may finally be in sight.

<sup>vi</sup>Other states like Nevada and Ohio have authorized RON closings without regulations to govern the practice. Though there are some that would still deem RON closings legal under state law at this time. "Mortgage Closings Just Took a Big Step in the Digital Age," The Wall Street Journal. August, 9, 2017. <https://www.wsj.com/articles/mortgage-closings-just-took-a-big-step-into-the-digital-age-1502287181>.

<sup>vii</sup>Remote Online Notarization. [www.mba.org/audience/state-legislative-and-regulatory-resource-center/remote-online-notarization](http://www.mba.org/audience/state-legislative-and-regulatory-resource-center/remote-online-notarization).

<sup>viii</sup>NASS Remote Online Notarization Task Force, [www.nass.org/index.php/initiatives/remote-electronic-notarization-task-force](http://www.nass.org/index.php/initiatives/remote-electronic-notarization-task-force). As of January 27, 2018.

<sup>ix</sup>VIRTUAL PRESENCE: Online Notarization and the End of Physical Appearance in the Digital Age," Timothy Reiniger and Richard Hansberger. The SciTech Lawyer, Volume 8, Number 2, 2011. American Bar Association.

<sup>x</sup>Note in Texas a licensed electronic notary must be a Texas resident.

<sup>xi</sup>Indeed, some states are considering legislative language with an effective date that includes an automatic implementation deadline should regulators fail to finalize regulations.

<sup>xii</sup>NASS tracks existing legislation, <http://www.nass.org/index.php/initiatives/remote-electronic-notarization-task-force>. "ELECTRONIC AND REMOTE NOTARIZATION LEGISLATIVE UPDATES," Pem Guerry. Law Technology Today, May 15, 2017. <http://www.lawtechnologytoday.org/2017/05/electronic-and-remote-notarization-legislative-updates/>. "Notarize and Westcor Partner to Support Online Notarization in 16 States." BusinessWire, January 11, 2018. [www.businesswire.com/news/home/20180111005806/en/Notarize-Westcor-Partner-Support-Online-Notarization-16](http://www.businesswire.com/news/home/20180111005806/en/Notarize-Westcor-Partner-Support-Online-Notarization-16).