

MORTGAGE LENDING

COMPLIANCE ALERT

NEWS & ANALYSIS ON LEGISLATION, REGULATION, LITIGATION & ENFORCEMENT



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Go From Zero To eClosing Superhero In 5 Steps

Save the day with eRecording, eNotarization, and eNotes—and help from industry partners

The benefits of eClosings are faster liquidity in the secondary market, cost savings, and increased data quality, according to **Fannie Mae** and **Freddie Mac**. As a result, many of you may have already taken the first step toward these improvements by serving customers with an electronic Loan Estimate and Closing Disclosure. (For more on that initial step, see part one of our eClosing series, “Increase Efficiencies, Make Borrowers Happy With eClosings,” *MLCA*, Vol, 16, No.7.)

The next step in the eClosing process—recordable documents and the promissory note—is a bit more complex in a paperless world. But the benefits are even more pronounced. Here’s how to take the plunge—and overcome today’s technology hang-ups.

1. Lock documents in an eVault

Before you schedule a final eClosing, be sure that all documents up to that point have been updated and stored in an eVault. Doing so ensures a complete audit trail that can be tracked and reported—which is more important than ever due to the **Consumer Finance Protection Bureau’s** (CFPB) new timeline for delivering the Closing Disclosure and other requirements for electronic evidence of compliance.

With an eVault, you’re not only storing a PDF image but also: the source data used to generate the document and every version of it, a date-time stamp of compliance events, the legal eSignature (when applicable), and a tamper evident seal to ensure data and document security and integrity, explains **Tim Anderson**, eServices director for compliance technology company **DocMagic**.

Important: You’ll also want to work with your vendors, or developers, to implement the new intelligent versions of the electronic Loan Estimate and Closing Disclosure that adhere to the MISMO 3.3 data standards. (The **Mortgage Industry Standards Maintenance Organization** (MISMO) maintains a common language for the exchange of information across the residential finance industry.)

Example: MISMO SMART Docs stored in an eVault can embed data on what was sent to whom and when. When

done right, your eVault can track and pinpoint exactly when important milestones in the life of a loan occur, including gaining intent to proceed and documenting timelines for initial and closing disclosures.

Bonus: The Uniform Mortgage Data Program (UMDP) and its component, the Uniform Closing Dataset (UCD), are Fannie and Freddie’s effort to provide a common dataset across the industry to convey information on the new TRID Closing Disclosure. The UCD must be in MISMO 3.3 and will be mandatory for delivery to Fannie and Freddie in 2017. If you’re currently providing a Closing Disclosure electronically that adheres to MISMO standards, you’re largely prepared for this big move.

Warning: The **Electronic Signatures in Global and National Commerce Act** (ESIGN) and **Uniform Electronic Transactions Act** (UETA) make it possible to sign and store documents electronically, but both laws

From the Managing Editor’s desk

Dear Reader,

Unlike most of the glut of industry information out there, the pages of *Mortgage Lending Compliance Alert* are designed for you and you alone. We answer to no one—not the feds, not regulatory talking heads, not industry analysts, and certainly not advertisers. We have no agenda but to help you, the lending professional working in the trenches, do your very best job.

Our singular goal is to provide the timely information, analysis, and insiders’ understanding you need to succeed. If we aren’t living up to that promise, we want to know. Have a question or idea for an article, a resource to tout, a best-practice compliance strategy to share? Please get in touch. Welcome to *Mortgage Lending Compliance Alert!* We’re so glad to have you on board.

Sincerely,

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require that electronic processes meet specific standards for information presentation, signature execution, record retention, printing, and delivery. Both you and your vendors need to be aware of—and follow—these standards to the letter.

2. Bypass the lack of an eRecording standard with a smart partnership

Now that you've reached closing, you'll need to sign and record the deed and security instrument, i.e., the mortgage or deed of trust, electronically.

Problem: The current difficulty with eRecording is the county recorders' uncertainty about whether they are permitted by law to accept an electronic signature, explains **Margo H.K. Tank**, a partner at **BuckleySandler LLP**. "They point to the signature requirements in recording statutes and believe they mean a wet signature."

"While 1,488 counties are now eRecording, there is no unitary standard for how you eRecord, or what an eRecorded document needs to look like, or what protocols need to be followed to get it to the recording office," **David Whitaker**, senior counsel at **BuckleySandler LLP**, further clarifies.

Tank and Whitaker are quick to point out, however, that the industry is rolling out services that address these challenges.

Solution: Vendors, such as **Simplifile**, **DocMagic**, and **eOriginal** (via partners), exist to take over part of the process of coordinating with settlement agents on closing documents *and* sending the recordable documents to county recorders.

For instance, with Simplifile, the settlement agent scans the document and then submits that electronic version—the image and some data—to the county through Simplifile. The county works from the electronic version, does their recording, and sends back the updated image with the recording data through Simplifile.

Future perks: Right now, almost everyone who is eRecording is signing and scanning a paper copy of the deed and security instrument and sending those scanned documents to the county recorder, says **Mark Ladd**, president of Regulatory and Industry Affairs at **Simplifile** and president of **Property Records Industry Association** (PRIA). Other efficiencies may be worked into the eClosing process when those

documents are available to read, review, sign, and then record electronically.

3. Check your state's stance on the 'ceremony' of eNotarization, or forego it for now

Another point of inconsistency is electronic notarization.

With eNotarization, a notary, who is in the same room with the signer, checks the signer's identity, witnesses the eSigning, and then notarizes the signed electronic documents. Most industry experts say eNotarization can be done. But acceptance of eNotarization is state by state, and not all states have overtly allowed and/or provided rules for it.

Another way: "Remote notarization" is electronic notarization performed by video, such as over **Skype**. Only a couple of states—e.g., Virginia—explicitly allow remote notarization. With this version of notarization, "You'd have your completely bunny slipper, no-touch closing," says Tank

For now: Despite these forays into 21st century notarization, most lenders will continue to rely on a traditional, in-person notarization for the time being—but not primarily because of a legal or technological requirements. Rather, the ceremony associated with mortgage lending still provides psychological value to the borrower, says Ladd. There's something to be said for a face-to-face meeting to make sure the borrower fully understands what he or she is signing, he explains.

4. Invest in an eNotes transfer system

Your electronic promissory notes (eNotes) won't meet the requirements of e-commerce laws if you aren't using "a decently sophisticated system ... with respect to how to sign and handle the eNote," Tank cautions.

Why? Besides the necessity of adhering to the principles of ESIGN and UETA and protecting your investment, you'll also need to consider the secondary market. "If I, as a lender, use System A to execute my eNote, that doesn't necessarily mean that the investor who acquires the eNote can handle it," Whitaker points out.

That means you need a system that can create an eNote, protect it, store it in an eVault, transfer control of it, and create an audit trail for the transaction to prove its chain of custody.

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Good news: Tank and Whitaker emphasize that the marketplace now offers sophisticated tools to help lenders address these issues. Vendors exist to take ownership of various parts of this process. For instance, the **MERS® eRegistry** is the system of record that identifies the owner and custodian for registered eNotes. “That electronic promissory note gets registered on our system and then when the loan is transferred or sold in the secondary market, participants register those transfers on our system, and everyone comes to the MERS eRegistry to determine who is the party that’s entitled to enforce the note and has basically the equivalent rights as a holder in due course of a paper negotiable instrument,” **Bill Hultman**, vice president of legislative affairs at **MERSCORP Holdings, Inc.**, explains.

More good news: There have now been two judicial decisions confirming that the use of the MERS eRegistry, plus the maintenance of an authoritative copy of the eNote, satisfy ESIGN’s requirements. For more on these cases, see “2 Verdicts Set Precedent: eNotes Are Legally Enforceable,” in *MLCA*, Vol.16, No. 7.

COMPLIANCE

Decipher The Compliance Clues CFPB Is Sending Via ‘Regulation by Enforcement’

Also: What to expect if you end up in the agency’s crosshairs

The **Consumer Financial Protection Bureau (CFPB)** writes rules that many in the industry say are not all that precise. But, instead of providing written clarification, the agency expects you to take your compliance lessons from enforcement actions against others. The agency argues that it’s impossible to write rules that cover every unlawful situation. You just need to keep your eyes open.

Well, that’s a tall order!

Jack Konyk, a longtime industry veteran presently at **Weiner Brodsky Kider PC**, compares the CFPB’s brand of “regulation by enforcement” to a speed limit sign. Is the speed limit 25 mph, or is it whatever we decide it is when we stop you? “It’s incredibly daunting to a business to try to operate with absolutely unknown risks,” adds Konyk.

Do you have to live in fear? The short answer is “no,” though many in the industry echo the idea that

5. Reap the benefits of more transparency with regulators and customers

The legal and technological infrastructure of eClosings is all there—or almost all there. With the right processes and partners, you can do everything—or almost everything—electronically. And the potential benefits of eClosings are great.

“Combined with the need to make more money, be more efficient, have better transparency with regulators, and respond to consumer demand, companies are now saying, ‘Alright, let’s dust off that old eMortgage book. What were those rules again? What were the problems?’ And they are discovering that the path to addressing those problems exists,” Tank points out.

The best news is that it only gets better, technologically speaking, from here. “As so often happens with these things, we’ll get to a certain point where enough of the friction will have been addressed, that all at once we’re going to be moving very quickly,” Whitaker promises. ■

compliance has been challenging without a rulebook to follow.

Fallback position: Fret not, there is a way to minimize the risk of enforcement action. Take more specific don’t-do-this lessons from the “trigger points” in the CFPB’s track record thus far. We’ll show you how.

Clue #1: Double-check your partnership agreements

Since the CFPB has argued that industry professionals should turn to its published enforcement actions as a guide, those enforcement actions are the best place to start the process of minimizing risk.

Currently, there are 14 pages of enforcement actions on the CFPB website dating as far back as July 2012. Actions

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