

THE REVIEW OF
**BANKING & FINANCIAL
SERVICES**
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS
AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 37 No. 4 April 2021

PRE-PUBLICATION ISSUE

**REMOTE ONLINE NOTARIZATION
IN MORTGAGE LOAN CLOSINGS**

Remote online notarization (“RON”) provides added efficiencies and safety for parties to mortgage closings in the COVID era. In this article, the authors provide a step-by-step description of how RON works, its growing legal acceptance, and a variety of subjects in its risks, rewards, and practical changes. They conclude with the benefits of a remote online closing of a residential Florida mortgage transaction and a case study involving a challenge to the enforcement of electronic notes and loan documents.

By Joshua C. Prever and Brian J. Goodrich *

Millions of mortgages close each year and, for most, each closing involves the in-person involvement of a dutiful notary public. In many cases, the notary helps facilitate the loan closing, and sits across from the borrower as the note, mortgage/deed of trust, and other documents are executed. At the end, each party to the transaction is given paper copies of the documents evidencing the loan. The original wet-ink note — the borrower’s promise to pay — is presented to the lender or its agent for safekeeping, and a wet-ink version of the mortgage/deed of trust or a copy (where electronic recording is available) is sent to the clerk’s office for recording.

This, however, is not the only way a loan can be closed. Nor does it have to be the preferred way of

doing so. And given the digital age we have entered, and the need in some cases to provide remote options, we can tread down an alternative path that offers some important improvements on the way things have generally been done.

RON offers that alternative, allowing documents that require notarization to be done remotely and providing lenders with a completely digital record of the loan transaction. The desire to move away from paper, and the pervasive need for virtual services and operations, has cemented and accelerated the need for new solutions like RON. Importantly, RON presents potential synergies and efficiencies for all parties to loan closings, as well as market opportunities for added conveniences for business units and consumers looking to authenticate

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documents when a notary cannot, or the parties feel that it is unnecessary for the notary to be physically present.

While RON offers many advantages, current and future mortgage lenders need to have an understanding of how RON works and the landscape that it occupies. RON exists against a complicated backdrop of state laws and regulations related to notarization, electronic signatures, and document recordation.¹ In addition to the opportunities that it presents, RON presents risks — primarily in the form of the potential for fraud and practical barriers to implementation, such as limits on electronic recordation. And, as with any emerging technology in a highly regulated environment, many aspects of its implementation remains untested in the courts and by regulators.

The purpose of this article is to provide an overview of RON and how it works; the momentum behind its continued adoption by state legislatures; the risks and benefits that it presents; and the steps and controls that may be used to mitigate those risks. This article also presents a vision for a remote online mortgage closing involving RON. Ultimately, this article strives to go beyond the theoretical, posing practical solutions and considerations related to the use of RON in order to assist those familiarizing themselves with this critical tool, which is on its way to becoming an important option for mortgage closings.

I. RON: HOW WE GOT HERE

Notaries are public officers of the state, empowered to authenticate important documents that convey property, money, and rights. For decades, states commissioned notaries to conduct traditional notarial acts, where the notary and signer are face-to-face, an ID is presented, and the signer presents and then physically signs the document after the notary confirms the signer's awareness of the document. The process for RON follows almost the same step-by-step process as traditional notarization, with the key difference being that the signer and notary are located in different places

and are interacting via and confirming identity through technology.

Given that the notary and signer are in two different locations simultaneously signing the same document, RON inherently involves the need for electronic signatures. Thus, in order to understand when and how RON may be used, lenders must have a basic understanding of the laws applicable to electronic signatures.

A. *Electronic Notarization: The Precursor to RON*

In the early 2000s, some states passed legislation permitting notaries to utilize electronic signatures in connection with the notary process.² This process, called “electronic notarization” or “e-notarization,” follows a similar process to traditional notarization, the key distinction being that the notary and the signer affix their electronic signatures (and the notary his or her electronic seal) as a means of authenticating the document as opposed to signing with paper and pen at the same location.

Electronic notarization was made possible by most states' adoption of some form of the Uniform Electronic Transactions Act (“UETA”) over the last 20 years.³ In essence, UETA provides that electronic signatures carry the same legal validity as wet-ink signatures.⁴ However, each state's version of UETA identifies certain subsets of documents to which UETA's mandate does not apply.

¹ Laws and regulations governing RON are quickly evolving. This article captures the legal requirement as they exist as of 12/22/20.

² For example, in 2007 the Florida Legislature permitted electronic notarization in Florida by enacting Chapter 2007-257, later codified as Fla. Stat. § 117.021. Other states amongst the first wave of states to pass statutes permitting electronic notarization include Arizona, Minnesota, and North Carolina (all 2005). Today, almost all states permit electronic notarization.

³ In addition to states' adoption of UETA, the passage of the federal E-SIGN Act, 15 U.S.C. § 7001, *et seq.*, which provided that electronic signatures carry the same weight under federal law as wet-ink signatures, also facilitated the adoption of electronic notarization.

⁴ *See, e.g.*, TEX. Bus. & Comm. Code, Title 10, Sec. 322.007 (“(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”).

Most state UETAs contain a clause resembling the excerpt below:

Sec. 322.003. SCOPE. (a) ... [T]his chapter applies to electronic records and electronic signatures relating to a transaction. (b) *This chapter does not apply to a transaction to the extent it is governed by:* (1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or (2) the Uniform Commercial Code, other than Sections 1.107 and 1.206 and Chapters 2 and 2A.⁵

While there are many nuanced variances between the versions of UETA adopted by each state, most states' UETAs do not apply to electronic signatures on wills and other testamentary documents — including powers of attorney.

Almost all states have adopted some form of UETA. Only two states have taken different approaches: Illinois and New York. However, both states have established regimes that allow for electronic signatures. For example, in New York, electronic signatures are permitted if the consumer with whom an individual or entity is doing business consents to engage in an electronic transaction.⁶

How a state's electronic signature laws relate to RON is important; because RON typically involves the use of electronic signatures, only documents that may be electronically signed under the applicable state's UETA may be remotely notarized. In other words, in most circumstances it is a prerequisite to determine that a document may be electronically signed with the same weight as a wet signature before a user may notarize a document using RON. To continue with the example above, because the Texas UETA does not apply to laws governing the creation of wills, a Texas notary could not properly notarize a will, remotely.⁷

⁵ Tex. Bus. & Comm. Code, Title 10, § 322.007 (emphasis added).

⁶ E-Sign and New York's Electronic Signatures and Records Act ("ESRA") (New York State Technology Law Article 3).

⁷ Due to the COVID-19 pandemic, Texas has provided temporary authorization to conduct the remote notarization of wills. *See* Statement by the Governor of Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-temporarily-suspends-certain-statutes-to-allow-for-appearance-before-notary-public-via-videoconference> (permitting, temporarily, the use of RON in connection with wills, powers of attorney, and

B. The Difference Between Electronic and Digital Signatures

With the expansion of electronic notarization, technology has developed and adopted to meet industry and signers' needs. Signers may now use electronic or digital signatures to execute documents. Both electronic and digital signatures are binding, but there are critical differences between these terms.

An electronic signature is any electronic symbol attached to a contract or other record, used by a person with an intent to sign. In contrast, digital signatures guarantee that an electronic document is authentic because the signer utilizes a personalized signature that is associated with their authentic documents. In short, digital signatures embed "Personal Key Infrastructure" ("PKI") that include a code that uniquely identifies a signer. However, both the notary and signer must have a registered digital certificate from an issuing certificate authority in order to link the signer and their digital signature. Thus, while both electronic signature and digital signature are equally capable of identifying a signer and capturing legal signatures, many consumers do not have a digital certificate and are unable to provide digital signatures, unless that service is incorporated into the process.

II. DEMYSTIFYING RON: HOW IT WORKS

A. Elements of a Typical RON

The process for RON follows a similar same step-by-step process to traditional, face-to-face notarization. Below is a step-by-step breakdown of the typical process envisioned by the majority of state RON statutes.

Facilitating the Remote Notary Appointment. In many cases, the parties to the transaction use a third-party vendor that offers RON services that comply with applicable state law requirements.⁸ Some vendors allow you to schedule the signing session, while others provide on-demand services. This, however, is by no means the only way. Some lenders have, or are in the process of

footnote continued from previous column...

other testamentary documents not authorized to the notarized remotely under Texas law).

⁸ The vast majority of state RON statutes contemplate the use of a specialized and secure notary platform. They also by in large do not contemplate a notary using a generic audio-visual communication technology, such as FaceTime or Zoom, to conduct a RON.

building, their own RON programs, leveraging in-house trained notaries and building, or incorporating as necessary, the technology needed to comply with legal requirements. In doing so, these lenders gain greater control over the process, integrating the loan closing and the RON functions into a seamless process and improving the customer experience.

In either scenario, electronic copies of the documents are provided to the remote notary. In the case of a mortgage loan, and the notary is acting as the closing agent, it would be the entire suite of documents, or if the notary is only notarizing the mortgage/deed of trust, just that document. Where the transaction involves witnesses, the witnesses will receive an invite and attend the notarization session, as well.

Once the time arrives for the documents to be notarized, the notary, signer, and other necessary parties access the notary platform, the notary will appear on the screen and introduce herself. Again, there are steps that lenders and third-party vendors can take to incorporate these elements into the closing process.

Authentication. After the documents are distributed, the identity of the signer and/or witnesses must be “authenticated.” In traditional notarization, if the signer is not personally known to the notary, the signer would typically provide the notary with state-issued identification (like a driver’s license). State RON statutes allow notaries to authenticate identity through a number of techniques — some requiring more than one. For example, in Florida, unless the notary has personal knowledge of the individual’s identity, a remote notary must authenticate a signer’s identity through the remote presentation and analysis of an individual’s government-issued identification credential, combined with identity-proofing through knowledge-based authentication.⁹ Immediately below we describe the mainstream forms of authentication set forth by state RON statutes, including identity-proofing through knowledge-based authentication.

- **Knowledge-Based Authentication (“KBA”).** A majority of states have embraced knowledge-based authentication, an authentication process that uses personally identifying information about the signer derived from a combination of private (e.g., credit agencies) and public-facing databases (e.g., governmental recording offices)¹⁰ linked to that

person’s social security number.¹¹ To authenticate through this process, signers or witnesses are presented with a series of multiple choice questions about themselves that are automatically and randomly generated from these databases. The answers are likewise derived from these databases, and the signers or witnesses must answer the majority (or a set amount, e.g. four out of five) of those questions correctly on their computer, smartphone or tablet. For example, a signer may be presented with five multiple choice questions. One of the questions could list the names of five counties in Florida and ask the signer to identify which county she has owned a home in. While the signer answers these multiple choice questions, the screen is not shared with the notary, so the signer’s confidential information is protected. If the signer is unable to answer these questions correctly, then the notary may be unable to verify their identify.

- **Credential Analysis.** Some states also require signers and witnesses to present and provide credential identifying information from one or more forms of government-issued identification, such as a driver’s license or US passport, in order to authenticate their identity.¹²
- **Oath of Witnesses.** Like in traditional notarizations, some states that permit RON permit an individual’s identify to be authenticated by the one or two witnesses that will attest to the individual’s identity.¹³
- **Personal Knowledge.** If the notary is familiar with the person, then no additional authentication is

¹¹ It is worth noting that at this time, the majority of KBA databases require the signer or witness to provide a social security number to obtain the information from the private and public databases to create the necessary questions and answers. This can make it more difficult to perform a RON for a foreign national. The RON can still be conducted if the signer is known to the notary, or through a credible witness (KBA is done on that individual), where permitted under state law. And some vendors now have the ability to create KBA questions if the signer or witness have conducted business in the US. The title company should be appraised if this situation arises.

¹² See, e.g., Fla. Stat. § 117.265; Ariz. Rev. Stat. § 41-376; Iowa Stat. § 9B.7; Tex. Gov. Code § 406.110; Rev. Cod. Wash. § 42.45.050; Wis. Stat. § 140.07; Utah Code § 46-1-2(19).

¹³ See, e.g., Fla. Stat. § 117.265; 57 P.A.C.S. § 306.1; Ariz. Rev. Stat. § 41-376; Iowa Stat. § 9B.7; Rev. Cod. Wash. § 42.45.050; Wis. Stat. § 140.07; Utah Code § 46-1-2(19).

⁹ Fla. Stat. § 117.265.

¹⁰ See, e.g., Fla. Stat. § 117.265; Tex. Gov. Code § 406.110; Utah Code § 46-1-2(19); Mich. Stat. § 55.263(h).

needed.¹⁴ However, a notary/lender may still want these additional authentication methods.

Recording. The notary will make clear that the session will be recorded and indicate the purpose of the session. The vast majority of states require that the notarization process be recorded.¹⁵

Signing Ceremony. Once the signer's and witnesses' identity has been authenticated, the notary typically asks the signer to give an oath/acknowledgement and then "sign" the document that is displayed on the shared screen. Signers are typically asked to create a signature at the outset of the process. Typically, the signature can be a signature drawn with the signer's cursor, or a typed symbol, or simply their typed initials.

Sealing the Document and Making it Tamper-Evident. Next, the notary completes the certificate, and attaches his or her electronic signature and seal. A notary's digital certificate using PKI technology is also attached. Once this is done the document is rendered "tamper-evident," a RON requirement. And this is critically important, as ensuring there is a definitive "original" version of the document/agreement is necessary to show the parties' intent and to enforce contractual terms. The document will also contain an audit trail showing the history of changes made to the document, as well as details associated with its execution. Thus, any further changes made to the document will not align with those memorialized in the certificate. The signer then receives an electronic copy of the notarization document, which is typically considered the "original."

Notarial Log and Record Maintenance. Throughout the process, the remote notary will typically narrate what he or she is doing. The notary is required to record the entire notarization session, and maintain a copy of the recording typically between five to 10 years.¹⁶ Most

notaries are also required to complete an entry in their notarial log for the notarization. These records are rarely used, but they provide critical security and documentation of the notarization should the signer's identity be disputed or litigation subsequently ensue.

B. RON Model Statutes

Most states that have adopted RON follow one of two model laws developed against this backdrop, with the states that do splitting relatively equally into each camp. Some states follow the Revised Uniform Law on Notarial Acts ("RULONA"), which was promulgated by the Uniform Law Commission ("ULC"). States that based their RON statute on RULONA include, for example, Montana, Oklahoma, Iowa, Minnesota, Washington, and Maryland. The others generally follow the Model Legislation for Remote Online Notarization ("MBA/ALTA Model Act"), developed by the Mortgage Bankers Association ("MBA") and the American Land Title Association ("ALTA"). These include, for example, Texas, Arizona, Michigan and Nevada. Some states, Virginia and Vermont for example, have RON statutes that do not follow either model statute.

Key distinctions exist between the two models. For example, the MBA ALTA model statute allows the notary to authenticate the notary's identity through knowledge-based authentication ("KBA") — in addition to through a credential analysis, personal knowledge, and the oath of a witness.¹⁷ RULONA, however, does not include KBA amongst the methods that may be used to authenticate a signer's identity.¹⁸ As another example, RULONA specifically states that the recording of the notarization session must be retained for 10 years.¹⁹ While on the other hand, the MBA ALTA model statutes requires that the session be recorded, it does not specify how long the recording must be

¹⁴ See, e.g., Fla. Stat. § 117.265; 57 PA.C.S. § 306.1; Ariz. Rev. Stat. § 41-376; Iowa Stat. § 9B.7; Tex. Gov. Code § 406.110; Rev. Cod. Wash. § 42.45.050; Wis. Stat. § 140.07.

¹⁵ See, e.g., Minn. Stat. § 358.645.4; Mo. Stat. § 486.1195; Mich. Stat. § 55.286b(9); Fla. Stat. § 117.245; 1 Tex. Admin. Code § 87.54(b).

¹⁶ For example, Arizona requires that the recording be retained for five years (Ariz. Rev. Stat. § 41-374), Nevada for seven years (N.R.S. 240.1995 – 20), and Oregon for 10 years (O.R.S. § Ch. 12, § 20(6))

¹⁷ Mortgage Bankers Association – American Land Title Association, Model Legislation for Remote Online Notarization, § 8, available at <https://www.mba.org/audience/state-legislative-and-regulatory-resource-center/remote-online-notarization>.

¹⁸ Revised Uniform Law on Notarial Acts (2018), § 7, available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=aec212eb-a1e8-183a-13dd-587c7604666e&forceDialog=0>.

¹⁹ See *id.* at § 14a(f) (stating "[u]nless a different period is required by rule adopted under subsection (h)(4), the recording must be retained for a period of at least [10] years after the recording is made.").

retained, leaving that to the discretion of state legislators.²⁰

III. ACCEPTANCE OF RON

A. *Brief History of the Adoption of RON and Recent Expansion in Acceptance*

In 2011, Virginia introduced RON to the United States. Virginia's RON statute made it the first in the country to allow commissioned notaries to notarize documents online via audio-video technology. Virginia's law was an integral part of establishing some of the key principles of RON, such as the definition of "personal appearance" used in RON statutes (a definition that permits individuals to appear via audiovisual technology), how to verify the signer's identity and the location of parties, as well as best practices for digital record keeping. In some ways, however, Virginia's RON statute is a complete anomaly. For example, Virginia is the only state that permits its licensed notaries to be physically located outside of the state when conducting remote notarizations.²¹ Virginia also envisioned the use of biometrics as a method of verifying identity, which most other states have shied away from, choosing instead to rely on credential analysis and KBA questions.²²

Four years later, in 2015, came Montana. Then, in 2017, Texas and Nevada enacted RON. In 2018, five more states enacted RON statutes: Indiana, Tennessee, Vermont, Michigan, and Ohio. In 2019, a waterfall of 14 states joined the flurry of enacting remote notarization legislation: Arizona, Florida, Idaho, Iowa,

Kentucky, Maryland, Minnesota, Nebraska, North Dakota, Oklahoma, South Dakota, Utah, Washington, and Wisconsin. In 2020, seven more states enacted RON (Alaska, Pennsylvania, Hawaii, Missouri, Oregon, Louisiana, and Colorado), bringing the total number of states that have enacted RON statutes to 29. More are expected to follow suit.

B. *The Pandemic as a Catalyst*

The need for providing services virtually has accelerated the adoption of RON. So much so, that over 20 of the states that have not enacted RON statutes have temporarily permitted RON via executive order, official guidance, or statute: Alabama;²³ Arkansas;²⁴ Colorado;²⁵ Connecticut;²⁶ Delaware;²⁷ Georgia;²⁸ Hawaii;²⁹ Illinois;³⁰ Kansas;³¹ Maryland;³² Maine;³³

²³ Fourth Supplemental State of Emergency Proclamation: Coronavirus (COVID-19).

²⁴ EO 20-12: Executive Order to Amend Order 20-03 for the Purpose of Suspending Provisions Requiring In-Person Witnessing and Notarization of Legal Documents in the State of Arkansas.

²⁵ Executive Order D 2020 019: Ordering the Temporary Suspension of the Personal Appearance Requirement for Notarization Due to the Presence of COVID-19.

²⁶ Executive Order No. 7K: Protection of Public Health and Safety During COVID-19 Pandemic and Response — Remote Notarization, Suspension of Non-Critical Probate and Workers' Compensation Operations, and Various Public Health Measures.

²⁷ Delaware Eleventh Modification: State of Emergency Declaration.

²⁸ Executive Order Authorizing the Use of Real-time Audio-visual Communication Technology to Assist in Notarizing Real Estate Documents.

²⁹ Executive Order No. 20-02 and Rules Relating to Notaries Public.

³⁰ Executive Order 2020-14: Executive Order in Response to COVID-19 (COVID-19 Executive Order No. 12).

³¹ Executive Order No. 20-20.

³² Order No. 20-09-29-01: Amending the Order of March 30, 2020 Authorizing Remote Notarizations. While the Maryland legislature had previously enacted a statute permitting RON permanently, at the onset of the pandemic the new law had not yet taken effect, necessitating the need for temporary rules. On October 1, 2020 the permanent RON statute — Senate Bill 678 — became effective, meaning that RON may now be conducted in Maryland, indefinitely.

²⁰ See Mortgage Bankers Association – American Land Title Association, Model Legislation for Remote Online Notarization, at § 6 (stating only that "[t]he remote notary public shall create an audio and video copy of the performance of the notarial act.").

²¹ VA Code § 47.1-13.

²² VA Code § 47.1-2 (defining "'Satisfactory evidence of identity' as including a valid digital certificate accessed by biometric data or by use of an interoperable Personal Identity Verification card that is designed, issued, and managed in accordance with the specifications published by the National Institute of Standards and Technology in Federal Information Processing Standards Publication 201-1, 'Personal Identity Verification ("PIV") of Federal Employees and Contractors,' and supplements thereto or revisions thereof, including the specifications published by the Federal Chief Information Officers Council in 'Personal Identity Verification Interoperability for Non-Federal Issuers.'").

Massachusetts;³⁴ Mississippi;³⁵ New Hampshire;³⁶ New Jersey;³⁷ New Mexico;³⁸ New York;³⁹ North Carolina;⁴⁰ Pennsylvania;⁴¹ Rhode Island;⁴² Vermont;⁴³ West Virginia;⁴⁴ and Wyoming.⁴⁵ Additionally, some states that had already enacted RON statutes, such as Texas and Tennessee, issued executive orders relaxing statutory requirements and restrictions to facilitate the use of RON.⁴⁶

³³ An Order Temporarily Modifying Certain In-Person Notarization and Acknowledgement Requirements.

³⁴ Mass. House Bill No. 4668.

³⁵ Executive Order No. 1467.

³⁶ Emergency Order #11 Pursuant to Executive Order 2020-04: Temporary Authority to Perform Secure Remote Online Notarization.

³⁷ New Jersey Assembly Bill 3903.

³⁸ Executive Order 2020-015: Order Temporarily Permitting Notarial Acts Through Audio-Visual Technology Under Certain Conditions.

³⁹ Executive Order No. 202.7: Continuing Temporary Suspension and Modification of Laws Related to the Disaster Emergency.

⁴⁰ NC Senate Bill No. 704: An Act to Provide Aid to North Carolinians in Response to the Coronavirus Disease 2019 (COVID-19) Crisis.

⁴¹ PA Senate Bill 841.

⁴² Guidance from the Secretary of State on Remote Online Notarization, *available at* <https://www.nass.org/sites/default/files/remote%20notarization/Secretary%20Gorbea%20letter%20Ore.%20Remote%20Online%20Notarization%2004.03.20.pdf>.

⁴³ Emergency Rule 20-E18: Emergency Administrative Rules for Notaries Public and Remote Notarization. While Vermont had previously passed a bill permitting RON, RON could not yet occur prior to issuance of the emergency rules because the Secretary of State had yet to engage in rulemaking, which Vermont's RON statute is a prerequisite for RON to occur.

⁴⁴ Executive Order No. 11-20.

⁴⁵ Guidance on Temporary Remote Online Notarization, *available at* <https://soswy.state.wy.us/Services/Docs/Guidance-on-Temporary-Remote-Online-Notarization.pdf>.

⁴⁶ *See, e.g.*, Statement by the Governor of Texas, *available at* <https://gov.texas.gov/news/post/governor-abbott-temporarily-suspends-certain-statutes-to-allow-for-appearance-before-notary-public-via-videoconference> (permitting, temporarily, the use of RON in connection with wills, powers of attorney, and other testamentary documents not authorized to the notarized remotely under Texas law); Tennessee Executive Order 20-26 (same).

Many of these actions temporarily authorize RON in a similar manner to that which is authorized by permanent RON statutes, while others, such as New York, took a more modest approach that does not, for example, require KBA or credential analysis.⁴⁷ However, these temporary actions typically only last until the end of the state's declared state of emergency, or until a specific date identified in the executive order.⁴⁸ Many states have renewed the temporary authorization in line with the continuation of the pandemic states of emergency that have been declared.⁴⁹ Finally, several states — including Pennsylvania, Alaska, Missouri, and Oregon, among others — have adopted RON statutes permanently permitting RON since the onset of the pandemic.⁵⁰

Ultimately, the result of the acceleration wrought by the pandemic is that, as of the time of this writing, only three states do not permit their notaries to conduct RON: Louisiana, California, and South Carolina. Louisiana has, however, passed a statute that will permit RON beginning on February 1, 2022.⁵¹ At the outset of the pandemic, California's Secretary of State issued a statement on its website encouraging California citizens in need of notarization services to utilize RON offered by notaries certified by states that permit RON. However, after a short period of time (a matter of months), the Secretary of State removed the statement from its website and replaced the statement with one that instead encouraged California citizens to utilize mobile notaries.⁵² Mobile notaries are individual notaries who travel to a signer's location to perform notarizations.

⁴⁷ New York Executive Order No. 202.7.

⁴⁸ *See, e.g.*, Georgia Executive Order Authorizing the Use of Real-time Audio-visual Communication Technology to Assist in Notarizing Real Estate Documents (authorizing RON for the duration of the COVID-19 State of Emergency); Maine Order Temporarily Modifying Certain In-Person Notarization and Acknowledgement Requirements (permitting RON until 30 days after the termination of the COVID-19 State of Emergency); Kansas Executive Order Nos. 20-20 and 20-64 (permitting RON until January 26, 2021).

⁴⁹ *See, e.g.*, Connecticut Executive Orders Nos. 7Q and 7ZZ, extending the temporary authorization of RON initially authorized by Executive Order No. 7K).

⁵⁰ Oregon House Bill 4212; PA Senate Bill 841; AK House Bill 124; MO House Bill 1655.

⁵¹ LA House Bill No. 274, Section 7.

⁵² Notary "FAQ" issued by the Secretary of State, *available at* <https://www.sos.ca.gov/business-programs/bizfile/covid-19-frequently-asked-questions/>.

It is reasonable to expect that these temporary authorizations will continue so long as the pandemic continues. However, these temporary authorizations are forcing a larger market change. Many individuals, companies, and professionals are becoming acquainted with RON for the first time, and the added conveniences that it can bring. Additionally, these temporary authorizations have required state recording offices and other officials to accept remotely notarized documents, forcing changes in long-standing governmental practices and procedures. These changes have made a situation where now that the genie is out of the bottle, there may be no way to go back to a pure paper, ink, and in-person method of notarization.

C. Remote Ink-Signed Notarizations

As an alternative to remote notarization, several states have temporarily authorized Remote Ink-Signed Notarization (“RIN”). In general, RIN uses solutions such as GoToMeeting, Microsoft Teams, WebEx, or Zoom to satisfy the requirement that a document signer personally appear before a notary. The notary verifies the identity of the signer based on existing state notary laws or by methods specified in the temporary order. Paper documents are signed in pen and ink, and faxed or transmitted electronically between the signer and Notary.

New York issued the first authorization to conduct RIN in an executive order on March 19, 2020.⁵³ Many of the steps to perform a RIN in the temporary orders and authorizations are generally based on the New York executive order, the key elements of which are described below (though these steps vary slightly among states that permit RIN):

- The notary and signer appear before each other using a live, real-time video conference solution such as WebEx, GoToMeeting, or Microsoft Teams.
- The notary identifies the signer using the methods allowed under the state’s notary laws.
- The signer signs the document and faxes or transmits electronically the signed document to the notary during the video conference.

- The notary prints out the document received from the signer and completes the notarial certificate in pen and ink during the video conference.
- The notary faxes or transmits electronically the notarized document back to the signer, generally during, or immediately following the video conference.

New York and several other states allow the signer to physically mail the originally signed paper document to the notary within a certain number of days of the RIN. When the notary receives the document from the signer in the mail, the notary is authorized to notarize that document using the date of the original RIN and mail it back to the signer.

RIN has also been accepted by Freddie Mac and Fannie Mae when conducted in accordance with state law.⁵⁴

IV. IMPORTANT RON CONSIDERATIONS: RISKS, REWARDS, AND PRACTICAL CHANGES

As with any new technology, there are important considerations to evaluate when considering whether and how to adopt RON. RON carries risk, and changes may be required to existing protocols in order to ensure seamless use of RON, and that the risks that it presents are mitigated. Below we identify and discuss the key risks and considerations that should be front and center for any entity considering whether or how to adopt RON.

A. Ensuring Recognition of Remotely Notarized Documents

In general, the state where the notary is sitting and licensed is what governs if a RON can be done in a given situation. As shown below, this gives loan originators some intriguing options on how to leverage RON. Given the federal system, need for interstate commerce, and interaction between the states, we have over time developed a system in which documents notarized properly by a notary commissioned under the laws of one state are recognized as validly notarized

⁵³ New York Executive Order No. 202.7; Guidance to Notaries Concerning Executive Order No. 202.7 available at https://www.dos.ny.gov/licensing/notary/DOS_COVID19_RemoteNotaryGuidance.pdf; see also New York Executive Order No. 202.79 (extending Executive Order No. 202.7 to January 1, 2021).

⁵⁴ Fannie Mae, *Remote Ink-Signed Notarization (“RIN”): Job Aid for COVID-19 Temporary Flexibilities*, dated April 14, 2020, available at <https://singlefamily.fanniemae.com/media/22666/display>; Freddie Mac, *COVID-19 Selling-related Frequently Asked Questions (“FAQs”), Q1*, available at <https://sf.freddie.com/general/covid-19-selling-faq#title-closing-and-notarization>.

under other states' laws. However, each state decides under what circumstances it will accept a document notarized in another state to be valid. Some states follow the approach of the Uniform Recognition of Acknowledgements Act, which provides that "documents notarized by a notary of another state may be treated as if they were notarized here in our state; the signature and title of an out-of-state notary is sufficient evidence that the document was validly notarized in that state."⁵⁵ Other states accept a document notarized within another state if it was done compliantly under the other state's laws.⁵⁶ And some are silent on the issue.

This variety and silence presents additional risk related to the reliance and utilization of RON. A state that does not permit RON could refuse to recognize documents notarized remotely. This risk has manifested before in connection with legislation in Iowa and Georgia. In 2013, Iowa took an unprecedented step of refusing to recognize out-of-state notarizations that did not occur in-person.⁵⁷ Iowa later repealed this requirement in 2019 when it enacted a law permitting RON. The state of Georgia considered, but did not adopt, a similar prohibition to accepting notarizations done outside of the traditional physical presence of the notary in legislation considered in 2015 and 2017.⁵⁸ Currently, 22 states, as well as the District of Columbia and other U.S. territories, have yet to enact legislation related to the remote notarization of documents. If they take similar positions to what Iowa and Georgia previously proposed, then this presents a risk that a remotely notarized document may not be recognized by such states.

B Develop RON Functionalities In-house or Use a Vendor?

Institutions that regularly conduct closings (title companies, lenders, etc.) may face a choice: develop RON capabilities in house, or rely on a vendor? There

are pros and cons to each, and it is important to note that most states not only have requirements about how RON may be conducted, but also require that RON technology and platforms be approved by state regulators before use. Some states also require notaries to register with the state regulator before conducting RON.

Careful consideration should be given before a company takes on RON processes in-house. Doing so, however, gives the company greater control over the process, allows it to build it into existing platforms in a more seamless way, and has the ability to present its customers with a better experience. For example, if a loan originator brings the RON process in-house, the notary can act as the loan closer. KBA and Credential analysis can be performed at the onset, the documents can be explained, executed, and, where necessary, notarized. And the entire closing can be recorded and made part of the closing documents, including retention of the digital originals. And while in-house development of these capabilities is an exciting possibility and can leverage vendors for certain services (i.e., KBA and credential analysis), using a vendor that already has a tried-and-true method and system has its advantages as well. Among other things, RON vendors come equipped with notaries that are registered to conduct RON, and technology that may also be able to integrate well with existing loan origination platforms. And given these considerations, the end result may be that an organization chooses, at least at the onset, that using a vendor will reduce the initial burden in adopting RON.

C E-Recording: Don't Take It for Granted

Another consideration is that a governmental recording office may refuse to record a remotely notarized document. While many such offices are equipped to accept electronic filings, particularly after the onset of the COVID-19 pandemic, there still exist those that are not equipped to do so. Refusal could prevent or complicate efforts to record land conveyances and perfect security interests in property. It may also create problems with selling loans on the secondary market and with title insurance companies. Getting confirmation from the recording office early on in the process, preferably in writing, is highly recommended.

Over time it is expected that the risk that a recording office will reject a document for recording solely because it was remotely notarized will decrease. Moreover, some states' RON statutes and temporary executive orders expressly state that documents remotely notarized pursuant to the temporary authority are to be

⁵⁵ See, e.g., *First Niagara Bank, N.A. v. Pottstown Oasis*, Case No. 03770, 2017 WL 2131038 (Pa.Com.Pl. May 12, 2017)(quoting 57 Pa.C.S.A. § 311).

⁵⁶ See, e.g., *Bessenyei v. Vermillion, Inc.*, 2012 WL 5830214 (Del. Ch. Nov. 16, 2012), aff'd, 67 A.3d 1022 (Del. 2013)(refusing to accept a document notarized out of state in Pennsylvania but not in compliance with Pennsylvania law).

⁵⁷ Iowa Senate File 2265.

⁵⁸ Section 45-17-10(a), as set forth by Georgia HB 120 (2017); Section 45-17-10(a), as set forth by Georgia HB 381 of 2015.

recorded and treated by government recording officials as validly notarized.⁵⁹

Some jurisdictions, recognizing that e-recording may not be available, allow for “papering-out” of the transaction.⁶⁰ This allows the lender or lawyer to print out the electronic version of the mortgage and record the printed version.

D. Ensuring Insurance

As with other residential and commercial loans, obtaining title insurance is an important consideration. Before deciding to employ RON for the transaction, you should consult with your title company to ensure it is willing to insure the transaction.

E. The Extent of the Secondary Market’s Acceptance of RON

The secondary market has embraced RON as a result of the pandemic. Fannie Mae announced in March 2020 that it would accept delivery and servicing of loans with electronic documents, including instruments electronically notarized remotely using real-time, two-

way audio/video communication.⁶¹ Fannie Mae issued a “lender letter” in March 2020 and announced updates to its Selling Guide related to the use of RON.⁶² The updates to the Selling Guide include a checklist designed to indicate when RON may be used. These updated remote online notarization requirements became effective beginning on March 31, 2020. Fannie Mae has also issued temporary guidance endorsing and explaining how RINs may be conducted.⁶³ Given the importance of being able to sell mortgages on the secondary market, Fannie Mae’s acceptance of RON serves to reinforce that RON is a workable alternative to in-person notarizations and closing.

F. Updating Loan Documents to Acknowledge the Use of Electronic Documents and Signatures

Those that adopt RON should consider updating template loan documents to include representations and acknowledgments that the parties agree to utilize electronic documents and electronic signatures. This will mitigate the risk that a party will be able to successfully argue that the documents are unenforceable.

Specifically, documents should contain representations that all parties agree to: (1) execute the documents using electronic signatures;⁶⁴ (2) execute documents in electronic form; and (3) that such electronic signatures and electronic documents may be

⁵⁹ See, e.g., Delaware Eleventh Modification: State of Emergency Declaration (“All Delaware governmental offices (including County and municipal government offices specifically are directed to immediately waive the requirement of an “original” wet signature for documents (excluding a Last Will and Testament). A Recorder of Deeds must accept for recording any document presented that has been notarized in accordance with the order or the laws of the state in which the notarial acknowledgment was taken, including those documents notarized via remote online notarization, provided the presented document conforms with all other recording requirements. The Recorder of Deeds shall accept any document notarized according to this Modification to the State of Emergency. The fact that such a notarized document is presented to the Recorder of Deeds after the State of Emergency has been lifted does not affect the validity of the document.”).

⁶⁰ See, e.g., Fla. Stat. § 28.222(3)(h) (“The clerk of the circuit court shall record the following kinds of instruments presented to him or her for recording, upon payment of the service charges prescribed by law: ... (h) Copies of any instruments originally created and executed using an electronic signature, as defined in s. 695.27, and certified to be a true and correct paper printout by a notary public in accordance with chapter 117, if the county recorder is not prepared to accept electronic documents for recording electronically.”).

⁶¹ Fannie Mae FAQs: eClosings & eMortgages, Q7, available at <https://singlefamily.fanniemae.com/learning-center/delivering/faqs-eclosings-emortgages>.

⁶² Lender Letter (LL-2020-03): *To: All Fannie Mae Single-Family Sellers Impact of COVID-19 on Originations*, available at <https://singlefamily.fanniemae.com/media/22316/display>; see also Fannie Mae Selling Guide Announcement SEL-2020-06, available at <https://singlefamily.fanniemae.com/media/24066/display>.

⁶³ “Remote Ink-Signed Notarization (“RIN”): Job Aid for COVID-19 Temporary Flexibilities,” Fannie Mae, available at <https://singlefamily.fanniemae.com/media/22666/display>.

⁶⁴ It is also recommended that documents define the term “electronic signature” to ensure that both parties are aligned as to what that term means and what notations are considered by the parties to be an electronic signature. Furthermore, it is recommended that the documents indicate that they are being electronically executed and used in accordance with applicable laws governing electronic signatures, such as UETA or the federal E-SIGN Act.

enforced, recorded, stored, or transmitted as the original, authentic version of the executed loan — i.e. that the documents may be used in the same manner and carry the same validity as if the original documents were executed in hard, paper copy.

If there are multiple electronic copies of an executed document, the documents should indicate which are authentic copies. It would also behoove signers to indicate whether the document may be printed and used for certain purposes (e.g., recording), and if so the expectations for and circumstances under which that hard copy document may be used in place of the original electronic document.

Further, to minimize the risk of confusion, those that store executed “original” copies of documents should — *really must* — store the documents in an “electronic vault.” The term electronic vault is a term used in the mortgage industry to identify a system where electronic documents are stored for safekeeping. The “electronic vault” must be capable of tracking who has “possession” of the electronic note, any changes that are made to the document, and of course must be, like all vaults — secure. Having such a system will help ensure the integrity of the chain of custody in the event of subsequent litigation related to the enforcement of the agreement or documents. Key players in the mortgage lending space have developed these important tools, including Mortgage Electronic Registrations Systems, Inc., Bank of New York Mellon, N.A., DocuSign, Inc. and others.

G. Developing and Implementing Enterprise-Wide RON Policies and Procedures

RON policies and procedures memorialized in writing can ensure consistency across the enterprise. Developing enterprise-wide policies and procedures will also give all stakeholders within the enterprise an opportunity to evaluate any new RON protocols, and identify any areas where the use of RON may not be desired or involve wrinkles to their streamlined use. Finally, such policies and procedures could serve as helpful evidence in the event of any subsequent litigation challenging the enforcement of a note or loan document executed pursuant to these policies and procedures.

V. FACILITATING A NEW TYPE OF LOAN CLOSING: REMOTE ONLINE CLOSINGS

This next section presents a vision for how RON may be used in connection with the mortgage closing process. The majority of loan closings today are generally done in one of three ways: (1) at a bank, lawyers office, or

title agency; (2) by mail; and (3) at a home closing, where the closing agent and notary come to the signer. RON makes possible remote online closings, in which the parties can be located at the place of their choosing and where most convenient.

Using a residential mortgage loan as an example shows how powerful RON can be. A lender based in Florida creates a “remote online closing office.” The closing office is based in Fort Lauderdale. Closing officers are Florida notaries. This centralized, remote online closing office can take the place of a title company, lawyer’s office, at-home, or by mail. The remote online closing office eliminates the borrower or lender’s agent having to travel to the closing office to close the loan. It reduces the time and expense associated with closings by mail and the associated paper that inevitably follows. When the proper policies and procedures are employed, loan closing officers become more efficient and can be more closely supervised when using RONs. Instead of traveling across multiple counties, a remote loan closing officer can be in a single location, increasing his or her efficiency. Using RON can also reduce the need for a power of attorney, giving borrowers additional control and allowing them to stay engaged in the process.

Loans closed using RON through a remote online closing office located in Florida are also not limited to those in Florida. Subject to the important caveats and considerations noted above, a lender, using a Florida remote online closing office, can remotely close a loan for a property located in Texas, while the borrower is in New York and the Florida notary is sitting in Fort Lauderdale. This can be done in this example, because the notary laws of Florida govern how the document can be notarized.

This makes it possible in a remote online closing, for the notary to be in the state where they are licensed (with the exception of Virginia), and the signer and witnesses to be located anywhere in the United States (or in some cases the world), so long as each individual has access to WiFi.⁶⁵ The documents would then be presented on a screen viewable by all parties: the signer/soon-to-be-property-owner and his or her attorney, the closing agent or agents, the notary, and any other representatives of

⁶⁵ Some state laws contain restrictions on where a signer may be located at the time of the RON. Generally speaking, the approach of most states is to allow signers to be located anywhere in the world should the signer be executing loan documents related to purchasing or financing property located within the United States.

the lender. The lender would then distribute to all parties the executed, tamper-proof, electronic version of the executed documents. The lender would then retain the electronic original in its electronic vault for safekeeping.

Importantly, this change enables banks and other lenders to physically locate staff remote notaries and closing agents in one centralized location, without the need to use local notaries or closing agents close to the signer's location. This ensures that those employees facilitating the execution of the loan documents can be the same as those that have been involved in the transaction since its inception, eliminating risk associated with utilizing a closing agent or notary previously unfamiliar with documents.

This section concludes with a case study of a dispute concerning a 2008 mortgage loan that may serve as a test case for potentially the largest issue associated with implementing remote online closings: risks to subsequent enforcement of electronic, remotely notarized loan documents. *Rivera v. Wells Fargo Bank, N.A. et al.*,⁶⁶ stemmed from a foreclosure action brought by Wells Fargo against borrowers that involved enforcement of an electronic note and electronic loan documents. In *Rivera*, the borrowers argued *without success* at both the trial and appellate level that because the note was electronic, and the loan documents were electronically executed, Wells Fargo could not be the holder of the electronic note and could not enforce rights associated with possession, and further that the electronic signatures on the documents lacked both authenticity and validity.⁶⁷

After examining the issues, the appellate court uphold the judgment in favor of the bank. The court noted that the disputed electronic loan documents contained the statutory UETA language regarding how to manage possession and transfer of the electronic note — and that the circumstances reflected the same.⁶⁸ “Applying the Uniform Electronic Transaction Act here, the bank

presented competent, substantial evidence proving that Fannie Mae owned the e-note and authorized the bank to pursue the foreclosure. The e-note, on its face, is a ‘transferable record’ because it is an electronic record that would be a note under [UETA] if it were in writing, and its issuer expressly agreed on its face that it was a transferable record.”(citations omitted). The court also found that Wells Fargo successfully proved the chain of custody associated with the electronic documents, as the bank presented evidence about the system and controls related to transferring electronic loan documents. “The bank's evidence proved that Fannie Mae had control of the e-note by showing that the bank, as Fannie Mae's servicer, employed a system reliably establishing Fannie Mae as the entity to which the e-note was transferred. According to the bank's evidence, the bank's system stored the e-note in such a manner that a single authoritative copy of the e-note exists which is unique, identifiable, and unalterable. (citations omitted).⁶⁹ This holding is especially important because Florida is an original-document state, i.e. a lender is required to present the original note to the court before judgment can be taken.

Rivera serves as a test case of the type of arguments that borrowers could seek to advance against an entity seeking to enforce electronic, remotely notarized loan documents. Given that the bank ultimately prevailed, *Rivera* serves as a blue-print for the circumstances and processes that must exist for entities to be able to enforce such documents.

V. CONCLUSION

RON is governed by state law, and the regulatory landscape for RON is rapidly evolving. To date, 28 states have enacted RON statutes, with three of the 28 enactments coming within the past four months. It is well beyond doubt that RON will play a significant role in the mortgage industry henceforth, and those in the industry would be well-served by learning about and adopting this latest advancement. ■

⁶⁶ 189 So.3d 323 (Fla. 4th DCA 2016).

⁶⁷ *Id.* at 327.

⁶⁸ *Id.* at 328.

⁶⁹ *Id.*