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NATIONAL COMMERCIAL SERVICES

**ESIGNATURE DOCUMENTS & NOTARIZATION:
DRAFTING CONSIDERATIONS FOR ECLOSING REAL ESTATE TRANSACTIONS**

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INTRODUCTION

The COVID 19 pandemic brought with it a rush of change to the world of electronic closing (“eClosing”) for real estate transactions in a very short time. States, like Texas, that passed electronic recording and remote online notarization laws early have fared far better than states that did not have these laws. However, even well-prepared States faced challenges that settlement agents and lenders will need to focus on moving forward. For example, many state Governor’s, including Texas, have issued emergency orders related to COVID-19 where a notary may use Facetime™, Skype™ or Zoom™ to watch the signing of a paper document that is then mailed back to the notary for notarization in wet ink. While these orders appear to be temporary, they demonstrate the uncertainty and challenges of moving toward a fully digital real estate transaction.

This paper will address the statutory and regulatory framework for eClosing in Texas with focus on the key issues and challenges for the real estate Practitioners to ensure a smooth eClosing, eSigning, eNotarization, and eRecording, including Practitioner considerations for:

- (1) drafting consent to demonstrate the parties to the real estate transaction have agreed to conduct the transaction by electronic means within the meaning of the Texas Uniform Electronic Transactions statute. [Texas Bus. Com. Code §322.001](#) (et seq.) (2009);
- (2) drafting electronic and online notarization acknowledgments for real estate documents;
- (3) drafting waivers and releases for online eNotarization; and
- (4) drafting vendor contracts for eClosing transactions considering data protection and privacy issues.

Types Of eClosing

For the purposes of this paper, eClosing is the act of closing a real estate transaction electronically through a secure electronic environment where some of the closing documents are electronically signed and accessed through online platforms. There are now four types of eClosings including: (1) In-person notarization (“IPEN”) where electrotonic documents are eSigned and eNotarized at a table with documents shared by the signer and the notary in person; (2) Remote online notarization (“RON”) where electronic documents are eSigned and eNotarized in a fully digital process once identity is verified with the notary and signer in separate remote locations via an internet portal with webcam; (3) Remote Ink Signed Notarization (“RIN”) where paper documents are ink-signed with the notary witnessing via video conference with documents mailed back to the notary for ink notarization; and (4) Hybrid signing and notarization where any combination of eClosing may occur. An “eClosing” produces an “eMortgage” only if the promissory note is signed electronically. This can still include traditionally wet-signed deeds, notes and deeds of trust or those produced in a RIN or Hybrid eClosing. Finally, the process of electronically recording instrument by the county in the land records, including an eMortgage and/or deed containing an electronic signature, is known as electronic recording (“eRecording”). Texas law provides the statutory structure and Executive Order(s) for all four types of eClosing and eRecording.

LEGAL AUTHORITY FOR ELECTRONIC SIGNATURES

Texas law has long provided for the validity of electronic signatures to conduct voluntary electronic transactions. The Texas Uniform Electronic Transactions Act codified as [TEX. BUS. & COM. CODE §322.001](#) (formerly § 43.001 et seq.) (the “TUETA” or the “Act”), applies to any electronic record or electronic signature created, sent, received or stored on or after January 1,

2002. [TEX. BUS. & COM. CODE §322.004](#). TUETA defines a “transaction” as an “action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs.” [TEX. BUS. & COM. CODE §322.002](#). Under TUETA [Section 322.007\(b\)](#), “a record or signature may not be denied legal effect or enforceability solely because it is in electronic form.” TUETA is designed to meet the statute of frauds requirement by providing that an electronic signature is admissible into evidence and “if a law requires a record to be in writing, an electronic record satisfies the law.” [TEX. BUS. & COM. CODE §322.007\(c\)](#). Therefore, electronic signatures are valid and enforceable in Texas when the requirements of TUETA are satisfied.

Additionally, the Electronic Signatures in Global and National Commerce Act (the “[eSign Act](#)”). [15 U.S. 96 §§7001 et seq](#) provides that contracts and signatures, including electronic signatures to real estate finance documents and disclosures, may not be “denied legal effect, validity, or enforceability” because they are in electronic form for transactions affecting interstate or foreign commerce. [15 U.S.C. Chapter 96 §§7001 et seq](#). The eSign Act, which applies to federal disclosures and promissory notes, is the federal baseline and pre-empts inconsistent state laws. Loan documents that are eligible for electronic signature vary by lender and may include the final loan application, settlement and closing disclosure statement, signer mortgage product disclosures, security instruments, other federal and state signer disclosures, IRS forms, and some closing documents required by law or required by the seller and permitted by law. Loan documents that are typically prohibited for electronic signature include the promissory note and modification agreements. We will touch on the problem with electronic signatures on the promissory notes later in this paper.

Both TUETA and the eSign Act define an electronic signature as “electronic sound, symbol, or process” attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record. The process of affixing an electronic signature to a document is akin to signing a credit receipt on a pad in a store or bank. The signature is then integrated into the document and tamper-sealed so that the signature cannot be changed after signing.

The Consent And Opt-Out Requirements

Under both TUETA and eSign, the parties must give consent to conduct the electronic transaction and intend to sign a document by electronic means. [TEX. BUS. & COM. CODE §322.005\(b\)](#). TUETA grants the parties, who agreed to conduct a specific transaction by electronic means, the right to refuse to conduct other transactions by electronic means. [TEX. BUS. & COM. CODE §322.005\(c\)](#). For example, a signer may use an electronic signature to simply confirm receipt and review of a document, or to bind the signer contractually to a document’s terms. An electronic signature is only valid if it is executed and adopted by a person with the intent to sign the record. [TEX. BUS. & COM. CODE §322.002\(8\)](#). Texas Courts have held that the parties must do more than agree to make a contract. [Hartford Fire Ins Co. v. C Springs 300 Ltd.](#), 287 S.W.3d 771, 778 (Tex. App. Houston, 2009). The language must be sufficient to “clearly and unambiguously express the intent to be bound by the terms of their agreement [Khoury v. Tomlinson](#), 518 S.W.3d 568, 579 (Tex. App. Houston, 2009). For example, an email is enough to establish an agreement to be bound where the essential terms of the deal are described by one party and the other party responds that they agree. *Id.* at 579. However, the language in emails after a bidding process failed was held not conclusive as to whether the parties intended to be bound where essential terms are

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