

BURR ALERT

Remote Electronic Commercial Loan Closings and Workouts: A Summary Guide During COVID-19 Interruptions

By Ed Snow

March 2020

This is a summary of issues to be considered for commercial loan closings and workouts conducted by lenders'/borrowers' remote offices using documents signed and delivered via electronic means during COVID-19 business interruptions.¹

For 20 years electronic signatures have been a legal method of conducting business in the United States so long as the parties to a particular transaction have agreed to conduct it by electronic means.² In spite of this enhancement to contract law, commercial lenders have continued to generally conduct dual-track closings, with signature pages signed in ink being scanned and circulated via email, to be followed by delivery of the inked versions for the lenders' files and recordation in public records. There are several reasons for such dual-track closings, including some lenders' pledging signed-in-ink promissory notes to such lenders' funding sources. COVID-19 interruptions and resultant remote operations present a pressing current need for lenders to reconsider dual-track closing policies and to consider relying on e-signature closings. **Before relying solely on electronically signed documents (or scanned copies of documents signed in ink) to close a commercial loan transaction, each lender will need to ensure that such a process complies with that lender's internal policies and practices and that the following items are also considered.**

Below is a chart listing typical commercial loan documents and items to consider, in addition to the "E-signature Provision" noted below to be included in commercial loan documents:

Type of Commercial Loan Document	E-Closing Considerations
LOAN AGREEMENTS, SECURITY AGREEMENTS, GUARANTIES, AND MOST OTHER COMMERCIAL LOAN DOCUMENTS (OTHER THAN PROMISSORY NOTES AND MORTGAGES).	<p>Each of these forms of commercial loan documentation may be signed in ink, scanned and emailed and retained as enforceable agreements, as well as signed via electronic signature software (such as DocuSign) and emailed and retained as enforceable agreements.</p> <p>Due care should be taken in saving all such documents in secure folders or e-vaults, in unalterable form, with copies given to the opposing parties. In obtaining signatures, lenders must implement security procedures</p>

¹ This commercial loan documentation guide is a summary only for states that have adopted the Uniform Electronic Transactions Act (all but NY, IL, and WA) and is not a substitute for legal advice from an attorney experienced in this area. Burr & Forman lawyers also have experience with other forms of electronically signed legal documentation and are available to assist for non-lending transactions.

² The Uniform Electronic Transactions Act does not apply to non-transactions, such as court pleadings or wills and estate documentation, among other exceptions.

	<p>to ensure proper authentication of e-signatures, including: lenders initiating the e-signature process via DocuSign or other provider to insure lender access to an audit trail, as well as requiring dual-factor authentication for such signatures, rather than relying on a borrower's own initiated form of e-signature; a pre-closing conference call in which signatories are confirmed present and ready, willing and able to sign; and saving emails to and from borrowers and guarantors evidencing their willingness to sign and close the documents they are transmitting.</p>
<p>PROMISSORY NOTES.</p>	<p>The considerations to loan agreements and other loan documents listed above also apply to promissory notes, with the following additional considerations.</p> <p>If the lender needs its promissory note to constitute a "negotiable instrument" (i.e., a note that is transferred in the ordinary course of business, such as in a mortgage-backed securitization), an inked original of the note may still be required, unless the transferee is able to accept "quasi-negotiable electronic notes" (technically known as "transferrable records" and required to be stated as such in the note itself). Otherwise, an electronic note (ink-scanned or issued and delivered in electronic format) will still be enforceable (with a special emphasis on the inclusion of the "E-signature Provision" below).</p>
<p>MORTGAGES/DEEDS OF TRUST.</p>	<p>The considerations to loan agreements and other loan documents listed above also apply to mortgages/deeds of trust, with the following additional considerations.</p> <p>An electronic mortgage/deed of trust (ink-scanned or issued and delivered in electronic format) is NOT excluded under the Uniform Electronic Transactions Act and is enforceable between the mortgagor and the mortgagee. The issue is, however, whether such an electronic mortgage can be recorded in the land records and thereby perfect a lender's lien against the real property. This is a more complicated and not-quite-settled issue that depends on local county recordation office practices and the kind of e-notarization that will be accepted in that jurisdiction (which may or may not permit "remote" e-notarization, and which will be governed by other applicable requirements of a particular state's notary laws and regulations).</p>

UCC FINANCING STATEMENTS	UCC financing statements are not signed and therefore can be produced by lender’s counsel electronically and filed, either via a paper filing or electronic filing, again, depending on the secretary of state (or other recordation office) practices.
COVID-19 INTERRUPTION IN FILING OFFICE OPERATIONS	Perhaps the most important challenge during the COVID-19 interruption is the potential closure of recordation offices for mortgages/deeds of trust and/or UCC financing statements. This issue requires a case-by-case analysis. Burr & Forman may circulate or post additional memos from time to time to reflect the quickly evolving responses of recordation offices to the COVID-19 interruption.
COVID-19 INTERRUPTION AND TITLE INSURANCE	Obtaining title insurance at a closing or workout during the COVID-19 interruption must also be analyzed on a case-by-case basis since some title insurance companies may or may not cover the gap between closing and recordation of a mortgage/deed of trust.

Finally, commercial loan documents obtained via electronic closings (whether consisting of scanned written documents or documents issued and signed in purely electronic format) should include language similar to the following (the “E-signature Provision”):

This agreement, promissory note or other instrument may be issued, executed and then delivered via facsimile transmission, by sending PDF or other copies hereof via email or other electronic means and in one or more counterparts, each of which shall be (i) an original, and all of the counterparts of which taken together shall constitute one and the same agreement, (ii) a valid and binding agreement and fully admissible under state and federal rules of evidence and (iii) enforceable under UCC Section 3-309, UCC Section 3-604, or any other similar statute (with any provision thereunder to the contrary being waived hereby), without regard to any loss or destruction of any written counterpart hereof, the parties hereto agreeing that the possession or maintenance of an executed and delivered, scanned, electronic or digital version hereof shall constitute possession hereof, and shall not constitute the destruction hereof and shall not result in the discharge of any obligation evidenced hereby, notwithstanding UCC Section 3-604 or any other similar statute. If this is a promissory note and issued via electronic signature in electronic format it shall also constitute a “transferable record” under UETA and/or E-SIGN or other equivalent, applicable law.

Questions? Please contact [Ed Snow](mailto:Ed.Snow@burr.com) at esnow@burr.com or another member of Burr & Forman’s commercial lending team or creditors’ rights and bankruptcy team for more information. Burr & Forman has a COVID-19 Continuity Plan in place and will be available to assist you as needed.

No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.