

COMPONENTS OF A DIGITAL CLOSING:

# eSIGN



*Part 1 of 5*

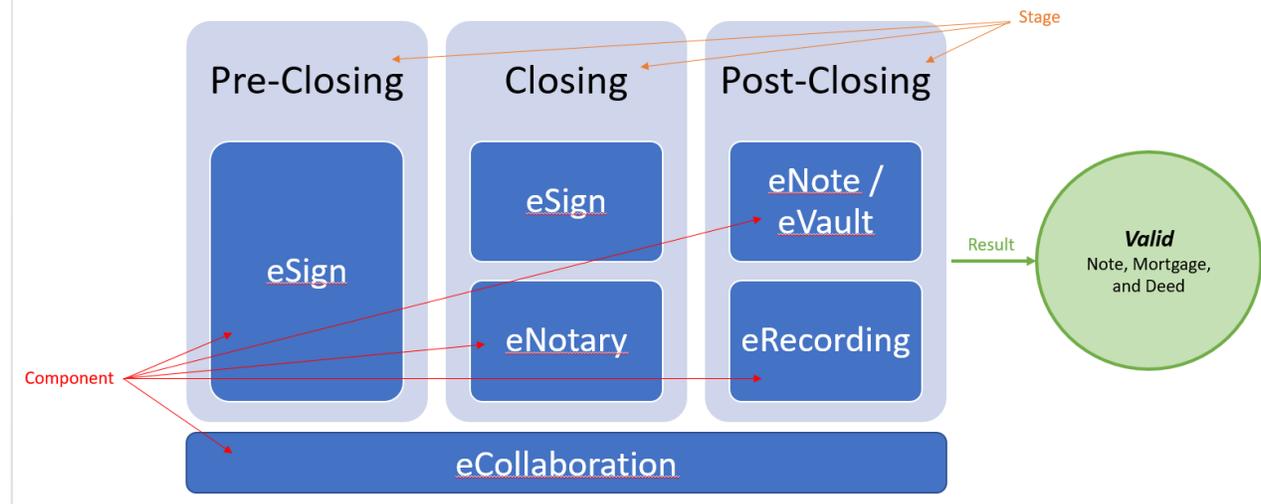


**ALLIANT  
NATIONAL**  
TITLE INSURANCE COMPANY



## COMPONENTS OF A DIGITAL CLOSING

### What does a Digital Closing actually involve?



This paper is one in a series of handbooks intended to familiarize Alliant National agents with the Digital Closing Process and its five major components: eSign, eNotary, eNote/eVault, eRecording and eCollaboration. Each handbook in this series explores one component. The purpose of the component is briefly described and placed within the context of the stages of the transaction (*i.e.* pre-closing, closing and post-closing) and within the context of the broader Digital Closing Process. Laws, regulations, technological requirements and specific technologies are discussed where appropriate.

It is our hope that you will find this collection of handbooks to be a comprehensive, ready reference as the industry transitions toward the digital closing environment.

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**The information contained herein is not intended to serve as legal or financial advice and should not be relied upon for legal or financial decisions; consultation with a qualified professional for specific advice tailored to the user's situation is recommended.**

## Component: eSign

### Description: The Purpose of eSign

eSign (or eSignature) is short for “electronic signature.” It refers to the execution of an electronic document (also referred to as an eDocument, eDoc, eRecord, or “digital document”) in a manner that provides the same legal affect as if it had been a paper document signed with wet ink. The ultimate goal of applying the eSignature in a digital closing is to electronically create valid loan documentation, deed, mortgage or deed of trust, and note.

The federal Electronic Signatures in Global and National Commerce Act (ESIGN) defines “electronic signature”:

The term “electronic signature” means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record. (ESIGN, 15 USC 7006).

As it was originally conceived under federal law, eSign can be manifested as a signature image created by a human hand on an electronic medium; a typed name; a click agreement; a typed PIN number or unique credential; a biometric measurement; or a digitized picture of a handwritten signature. However, the interplay between federal and state law, as well as consumer preference and the influence of stakeholders in the real estate market, will ultimately determine what eSign will look like in the Digital Closing Process.

### eSign as a Component of the Digital Closing Process

eSigning documents actually begins in the Pre-Closing stage of the Digital Closing Process. In the Pre-Closing stage, notarization is unnecessary and is therefore not an obstacle to (potential) borrowers who have the required hardware and software and can eSign documents from wherever they are located (e.g. sitting at home, filling out a loan application on a computer). eSigning at the Pre-Closing stage has become prevalent; in a survey conducted by the American Bankers Association, 82 percent of bankers said they currently use an online or digital mortgage loan origination channel.<sup>1</sup>

At the Closing stage, there are certain eDocuments that are both eSigned by the consumer and electronically notarized (eNotarized) by an electronic notary (eNotary). This adds a layer of complexity: the consumer(s) must either be physically present before the eNotary, or may have the option to eSign outside of the eNotary’s physical presence if Remote Online Notarization (RON) is permitted under the law of the state where the real property is located. See **Component: eNotary**, and Alliant National’s Underwriting Guidelines.

A *fully* Digital Closing occurs when *all documents* – including the deed, mortgage or deed of trust, and note – are in electronic form and are executed with eSignatures (and eNotarized, for those documents

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<sup>1</sup> American Bankers Association (2018). The State of Digital Lending (Results of an American Bankers Association research study). Retrieved September 12, 2018 from <https://www.aba.com/Products/Endorsed/Documents/ABADigitalLending-Report.pdf>.

requiring notarization). A *hybrid* Digital Closing occurs when *some of the documents* must necessarily be executed in paper form with pen and ink.

To learn more about the eNotary's role in the Digital Closing Process, see **Component: eNotary**.

## Rules: Federal and State Statutes and Regulations

### **Federal Law**

The federal [Electronic Signatures in Global and National Commerce Act](#) (ESIGN, Pub.L. 106–229, 114 Stat. 464, 15 U.S.C. ch. 96), was enacted June 30, 2000, to ensure the legality, validity and enforceability of electronic signatures, contracts, and other records related to any transaction regarding interstate or foreign commerce. While it continues to have dominion over interstate and foreign commerce, by its own terms ESIGN allows the states to create their own laws so long as they either adopt the model [Uniform Electronic Transactions Act \(UETA\)](#) (as drafted by the National Conference of Commissioners on Uniform State Laws), or they enact laws that are consistent with ESIGN and are technology-neutral (*i.e.*, without preference for any particular technology or technical specification). Any variance by a state is preempted to the extent that it is inconsistent with ESIGN's provisions.

### **State Law**

As ESIGN allows, the states have exercised the opportunity to enact their own laws. Forty-nine jurisdictions enacted versions of UETA and three other states – Illinois, New York, and Washington – drafted their own laws regarding electronic signatures and records. Most state versions of UETA are very similar to one another.

UETA serves the same purpose as ESIGN: it gives legal effect to electronic signatures, contracts, records, and transactions (between two or more persons) on a state-wide basis, providing uniformity among states. There are typically a few specific exclusions from the legal validity afforded electronic transactions, such as for the execution of wills, codicils, or testamentary trusts, and certain Uniform Commercial Code (UCC) sections, and any other state law that is identified as an exclusion to the state's UETA. That said, there are some states that do allow electronic wills – a careful review of each state's unique requirements is critical.

According to the model [state] UETA, section 11, “[i]f a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.” Thus, the legality UETA bestows upon eSignatures is extended to the eSignature of an authorized notary, thereby laying the foundation for eNotarization (see **Component: eNotary**).

Lastly, the model [state] UETA, section 12, authorizes electronic records to satisfy record-retention laws, and states that “[i]f a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record ... ” Thus, UETA also lays the foundation enabling eRecording (see **Component: eRecording**).

### **Common State UETA Requirements**

Under the state UETAs, the common eSignature requirements are:

1. Parties must consent to conduct the transaction electronically.

- Consumers’ affirmative consent must be obtained to use electronic signatures or records.
  - Note: some states have specific additional delivery requirements where the method of presentation, access and consent vary. These states opt to follow the provisions of ESIGN and require that consumers be provided with information regarding the hardware and software used. They also require that consumer consent be obtained in a manner that demonstrates access to the information in the same electronic format used. [Guidelines for e-Signature and e-Delivery in the Insurance Business<sup>2</sup>](#), identifies the pertinent statutory citations of states (referencing AK, AL, CO, CT, GA, MD, MA, NH, NV, NC, NJ, OR, SC, TN, VT, WV and WI) opting to follow these ESIGN requirements.
2. Consumer disclosures must be delivered.
    - Provide consumers with “clear and conspicuous” statements regarding procedures using electronic data.
  3. When the eDocument is transmitted, the recipient should be able to print and store it.
    - Note, any technology platform that inhibits the ability to print or store the electronic record is not an acceptable technology platform.
  4. The eSignature and eRecord must be attributable to the person, and there must be a way (*i.e.* a security procedure) to demonstrate this attribution. Typically, the evidence would be able to demonstrate the following characteristics:
    - The eSignature is capable of being authenticated;
    - The eSignature is unique;
    - The eSignature is under the sole control of the user; and
    - The eSignature is linked to the data in such a way that if the data changes, then the eSignature is invalidated.
  5. If a law requires a notarization, then it is satisfied with the eSignature of the eNotary (along with all of the other required eNotarization formalities), which is attached to or logically associated with the eRecord (See **Component: eNotary**).
  6. If there is a record retention requirement, then that record must accurately be reflected as first generated in its final form, and it must remain accessible for the period of time prescribed by state statute (See **Component: eNotary**).

#### Links: Relevant Sources and Articles

- [Agents Council for Technology \(ACT\) – Procedure for Electronic Delivery of Insurance Documents Pursuant to the Federal eSIGN Act](#) (*Sample ESIGN Consent Form is attached as Exhibit A, but read Disclaimer before using*)
- [FDIC Compliance Examination Manual – January 2014, Chapter X. Other – Electronic Signatures in Global and National Commerce Act](#) (*providing a summary of the major provisions of ESIGN*)
- Hatfield, P. J., & Casamento, G. T. (n.d.). [Guidelines for e-Signature and e-Delivery in the Insurance Business](#). Retrieved June 15, 2018, from <http://gregmaciag.typepad.com/Documents/eSignature and eDelivery.pdf>.

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<sup>2</sup> A complete reference to the source article is provided within the “Links: Relevant Sources and Articles” section.

- Rhine, Tison H. [So, You Want To . . . Know How to Sign Documents Electronically](#). Retrieved July 30, 2018, from Wisconsin Lawyer (Technology section, published April 2017, Volume 90, Issue 4).
- Serum, Jeffrey J. [Legal Effect of Electronic Transactions](#). Retrieved July 30, 2018, from Wisconsin Lawyer (Published February 2005, Volume 78, Issue 2).

## Technology

### ***Examining the Legal Demands Upon Technology***

While ESIGN and UETA are technology neutral and don't provide guidance for technical implementation, they do require:

- **Compliance with all laws concerning consent, signature, presentation, delivery, and retention.**
- **The eSignature to be effectively attributed to the declared signer** — which would require an effective method to confirm the signer's identity – to authenticate it; and to link to the data in such a way that if the data changes, then the eSignature is invalidated – to make the document tamper evident. (See **Component: eNotary** section on **Technology**.)
- **Evidence of the signer's intent to sign** – which would require an action by the signer to reflect his intent.
- **A manifestation of the signer's eSignature on the eDocument** – which, in the context of the real estate transaction, would be a visual display or image of the signer's signature.
- **A copy of the eDocument, as eSigned, be made available for the signer to retain.**

### ***Technical Implementation: Features that Can or Should be Used***

#### ***Software***

To eSign a document, the document must be in electronic format and provide fields that permit the placement of the electronic signature. Special software is required to create or convert an already existing electronic document into one with the capability of inserting an electronic signature, encrypting it and making the electronic signature and the electronic document tamper evident. Some of the vendors who provide this software or perform this service are identified below.

#### ***Hardware***

- computer – desktop, laptop or tablet
- signing pad, and stylus or electronic pen (optionally)
- printer (if needed)
- electronic storage device (if needed)

#### ***Other Technical Features***

- a current version of the internet browser supported by the technology vendor
- a secure and reliable connection to the internet
- the proper software to read and display the eDocument

***Vendors: Service Providers***

The following are examples of companies that provide electronic signature services. They have not been vetted by Alliant National Title Insurance Company, Inc., and their identification below should not be considered an endorsement.

- [DocuSign](#)
- [Adobe Sign](#)
- [DocVerify](#)