Expansion of Legal Service MDE Position Paper Version 1.0

Committee Note Draft 01

08 September 2015

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Specification URIs

This version:

http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/cnd01/ecf-esop-v1.0-cnd01.doc(Authoritative)
http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/cnd01/ecf-esop-v1.0-cnd01.html
http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/cnd01/ecf-esop-v1.0-cnd01.pdf

Previous version:

N/A

Latest version:

http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/ecf-esop-v1.0.doc (Authoritative)
http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/ecf-esop-v1.0.html
http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/ecf-esop-v1.0.pdf

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Related work:

This document is related to:

- *OASIS Electronic Court Filing Version 4.0*. 21 September 2008. http://docs.oasis-open.org/legalxml-courtfiling/specs/ecf/v4.0/ecf-v4.0-spec/
- National Information Exchange Model 3.0. http://niem.gov/

Abstract:

This document contains proposed Limited Service of Process approaches for inclusion in the OASIS LegalXML ECF version 5.0 specification.

Status:

This document was last revised or approved by the OASIS LegalXML Electronic Court Filing TC on the above date. The level of approval is also listed above. Check the "Latest version" location noted above for possible later revisions of this document.
Technical Committee (TC) members should send comments on this document to the TC's email list. Others should send comments to the TC's public comment list, after subscribing to it by following the instructions at the "Send A Comment" button on the TC's web page at https://www.oasis-open.org/committees/legalxml-courtfiling/

Citation format:

When referencing this document the following citation format should be used:

[ECF-ESOP-v1.0]

Expansion of Legal Service MDE Position Paper Version 1.0. Edited by Jim Price and George Knecht. 08 September 2015. OASIS Committee Note Draft 01. http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/cnd01/ecf-esop-v1.0-cnd01.html. Latest version: http://docs.oasis-open.org/legalxml-courtfiling/ecf-esop/v1.0/ecf-esop-v1.0.html.

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1 Introduction

Current versions of the OASIS LegalXML Electronic Court Filing (ECF) specification address the concept of "secondary electronic service" whereby parties and/or attorneys may be served documents that do not require "service of process," as defined in state statutes, state court rules, and/or local court rules. Most e-filing implementations, whether they've adopted ECF or not, allow for secondary electronic service, which has proven to be efficient and effective for case litigants.

Building upon the success of secondary electronic service, the ECF Technical Committee (TC) proposes to enhance the Legal Service Major Design Element (MDE) for OASIS LegalXML ECF version 5.0 consideration. The proposed enhancements are herein dubbed Limited Electronic Service of Process or Limited eSOP. The Limited eSOP concept aims to fulfill the following objectives:

1. Enable authorized third-party organizations (e.g., process server, sheriff, constable) to receive service of process documents and document metadata through a Filing Assembly Major Design Element (FAMDE) or Filing Review MDE Electronic Filing Manager (EFM) for the purpose of completing service of process on behalf of a requesting individual or organization.

2. Enable authorized third-party organizations (e.g., process server company, sheriff, or constable) to submit proof-of-service documents and document metadata to a court through a system-to-system interface between the authorized third-party's records management system and an FAMDE or EFM.

3. Enable attorneys, who are either registered agents for an entity or attorneys of record representing parties on existing cases, to opt-in and accept primary service of documents electronically on a case-by-case basis. (Implementation is subject to governing state statutes and applicable court rules).

In fulfilling the objectives outlined above, this document makes the following assumptions:

1. The FAMDE or EFM may initiate Limited eSOP via electronic messages to a third-party entity's system that is used in the preparation and service of case documents.

2. ECF support will be extended to entities whose primary purpose is to complete service of process per the rules of the local jurisdiction(s) they serve.

3. ECF will address a Limited eSOP message within the XML schema for the ServeFiling operation. This may entail modifying the existing ServeFilingMessage or creating a new message specifically designed to address this need (e.g., ServeProcessMessage). New

ServeFilingMessage XML elements may include those that carry instructions to the third-party entity responsible for fulfilling service of process.

4. The LegalXML ECF sequence diagram and associated supporting specification language will be added to the specification documentation that addresses the concept of Limited eSOP and accompanying messages.

When reviewing this document, please reference the Appendix B. Terms section.

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2 Major Facts

The following observations/experiences are associated with service of process. These facts aid in stating the problem(s) to be solved and identifying possible solutions that address the problem(s).

1. Electronic primary service is not typically allowed in e-filing implementations across the country.
2. Secondary electronic service is typically allowed in jurisdictions where electronic filing is or is not available.
3. The rules governing both primary and secondary service are generally defined by court rules, administrative orders, and/or state statutes.
4. Courts have generally not wanted the responsibility of facilitating:
    a. Primary service between parties in a case
    b. The exchange of discovery materials between parties in a case
5. Some courts that directly support secondary service require:
    a. All parties and/or party representatives, once identified in a case, to accept secondary service electronically
    b. Parties served via secondary service or the parties' representatives to log into a system or application to retrieve documents
        i. A link to the documents to be served are contained in an electronic mail sent to served parties and/or party representatives
        ii. Once parties and/or party representatives successfully log into the electronic filing portal, service is confirmed
        iii. Once parties and/or party representatives successfully log into the court's electronic filing portal or portal provider, they agree to receive ALL secondary service electronically
        iv. ***Note****: Once successfully registered, case participants may accept secondary service electronically*
6. Some courts that directly support primary service charge service fees (fees vary)
7. Electronic secondary service has been recognized as being a convenience in terms of time and cost for parties and/or party representatives
    a. Document assembly is done once and distributed electronically to wherever needed
    b. No runners are required
    c. Secondary service can occur 24x7x365
8. Process servers may submit proofs-of-service to courts
9. Process servers could submit proofs-of-service via court electronic filing, but should not be given access to case records by virtue of the fact that they use court electronic filing to submit proofs-of-service
10. Discovery, while out-of-scope for the purposes of this position paper, may require similar functional support as Electronic Service of Process

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3 Problem Statement

Which mode(s) of electronic court filing is best for facilitating Limited eSOP and by which Legal Service MDE operation name, ServeFiling or ServeProcess?

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4 Existing Electronic Service Methods

To assist in formulating additional Legal Service MDE support approaches, it is useful to understand the methods by which secondary electronic service is supported today.

Electronic Mail

Many jurisdictions have adopted court rules whereby the use of electronic mail (email) to affect secondary service is a valid means of service so long as the recipient party has agreed to be served electronically. In the absence of electronic filing, agreement between parties / attorneys might occur in a variety of ways depending on the local court rules, including but not limited to verbal agreement, written agreement via email, fax, or letter, or a signed and filed stipulation with the court. Once agreement has occurred, secondary service to may occur by simply attaching a document to an email and sending it to the party to be served.

Where e-filing is present, service by email may also occur but some differences may exist in how parties agree to service, and how the generation and delivery of service emails occurs. Some e-filing systems and the jurisdictions they've been implemented in require the user to agree to e-service by creating an e-filing account and participating in e-filing. Others allow the user to register, and agree to e-service by other means, such as adding themselves as a service recipient to specific cases, or system wide.

Where e-filing is present, it is often the e-filing system that generates secondary service emails to the service recipient, not the filing attorney themselves. These systems may attach the documents to be served to the email, or simply provide a link within the body of the email for the recipient to click and view the document.

In-App Notifications

Other jurisdictions have adopted court rules that allow for electronic service, but do not define electronic mail as a valid means of service. Such jurisdictions have stricter requirements about how electronic service may occur, often due to the acknowledgment that the delivery of email to a recipient cannot be guaranteed for a variety of reasons (e.g., spam filters, IP or domain blacklisting, etc…). One method that guarantees the electronic delivery of service documents to a specified recipient is by the use of "in app" or "system notifications" within an application by which the service recipient has created an account on. Such systems require the service recipient to login to the system to view any new notifications that may have been sent to them. The notification will include detail about the documents being delivered upon them, as well as access to the documents themselves.

In the absence of electronic filing, such a system may come in many forms. It may be a feature of an existing court application, or stand alone. Where e-filing is present, the system where these in app notifications occur is often the e-filing system itself.

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It should be noted; that where valid service occurs by the system notifications such as those described here, this is often supplemented by the use of email to alert the service recipient that a new notification has occurred. The email itself, however, is not considered valid service, but simply a courtesy alert.

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5 Proposed Legal Service MDE Enhancements for Limited eSOP

The following approaches are proposed as Legal Service MDE enhancements in support of Limited eSOP. Each of the proposed approaches satisfies one or more of the objectives outlined in the Introduction section. Additionally, any approved approach(es) will require the definition of request/response message pairs and error handling methods.

Common Registration System & Service

This approach exposes a service that front-ends a common registration system. The common registration system/service could be implemented as part of the EFM, an FAMDE, or third-party Legal Service MDE.

A common registration system/service introduces several benefits. For instance, in a multi-vendor FAMDE supported environment, subscribers can direct service to opposing parties registered in the system without having to know to which FAMDE to direct service (the portal will take care of the distribution). Additionally, portal registrants (e.g., free-lance attorneys, process servers) could include free-lance service providers that could be called upon on-demand by anyone in need of Limited eSOP services. Ideally, only one registration profile would be required for each registrant regardless of the type of role s/he performs during their lifetime (e.g., independent attorney, law firm attorney, judge, court clerk, process server, self-represented litigant, etc.). Due to file size limitations associated with electronic mail, the portal could include support for served parties to retrieve their documents (non-registrants could be required to establish an account before they are permitted to retrieve their information).

The portal's registration system could be based on an open standard such as the Lightweight Directory Access Protocol or LDAP. Adopting vendor-neutral, industry standard application protocols that support Internet-based communications is a plus. The portal's registration system could be made to scale to support other public-facing services in addition to electronic filing, making it a good long-term investment strategy.

Specific error handling methods are needed, particularly when an opposing party is not known to the portal's registration system. If an error occurs, the sender could opt to affect service through another approach (e.g., e-mail, personal service).

Challenges with a common registration system may include the fear some courts may have of being perceived as service of process intermediaries. Like e-filing, though, terms and conditions governing the use of the service can limit the court's exposure, particularly due to technical issues that may arise.

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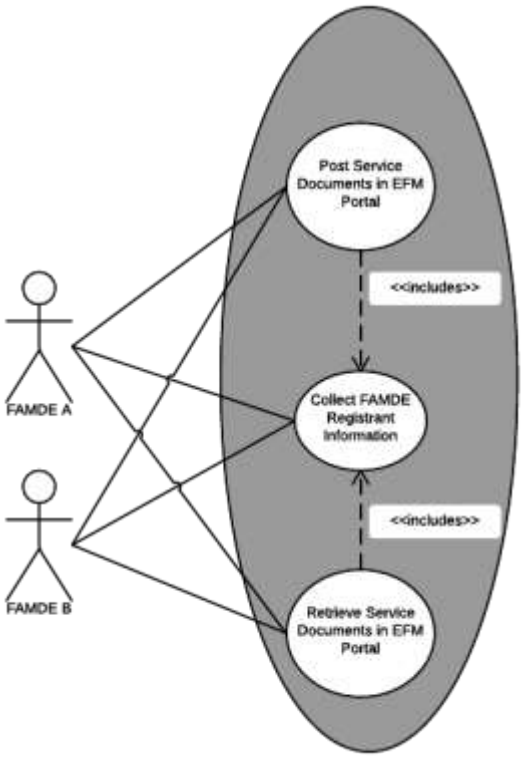

Figure 1: Central registration service facilitates Limited eSOP message exchanges on behalf of FAMDE subscribers. The EFM portal could optionally host service documents to guard against errors that can occur when document(s) exchanged exceed email gateway file size limitations.

GetFilingAssemblyProviders Operation

This approach calls for a new operation that enables FAMDEs to query other court-supported FAMDEs for information about their respective registrants.

The benefits of the proposed operation are similar to those identified in the Common Registration System & Service approach (above), i.e., the operation facilitates the exchange of opposing party FAMDE registrant information, which enables litigants to affect Limited eSOP in a multi-FAMDE court-supported environment.

The proposed operation differs from the Common Registration System & Service approach in that it enables direct communication between FAMDEs. There is no Common Registration System & Service that responds to FAMDE registrant information requests and the court would not serve as the message exchange intermediary.

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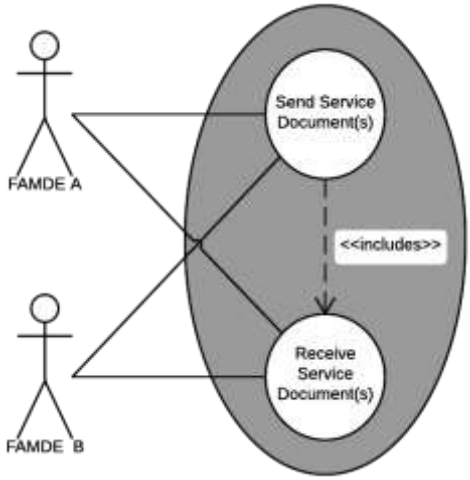

Figure 2: FAMDE subscribers serve opposing parties directly via a FAMDE-to-FAMDE message exchanges.

Post Service Documents to a Secure/Trusted Third-Party File Hosting Service

This approach enables the posting of service documents to a third-party hosting service (e.g., Dropbox, Microsoft OneDrive, Apple iCloud) by parties and/or party representatives. Opposing parties and/or party representatives, based on a formally defined notification process, would retrieve the served documents from the third-party hosting service.

The relatively light-weight approach leverages existing facilities through which service of process may take place. Notification to the opposing case participants can occur via email messages containing hypertext links to service documents posted to the third-party hosting service. This approach is also similar to leveraging the EFM as a place to post service of process documents, which mitigates the risks associated with e-mail and the transfer of large documents. Audit logs of email notifications and document access attempts could be collected for confirmation of service delivery.

The challenge with this approach is that the litigants must know the electronic mail addresses of the opposing party(s) and/or party representative(s) to be served.

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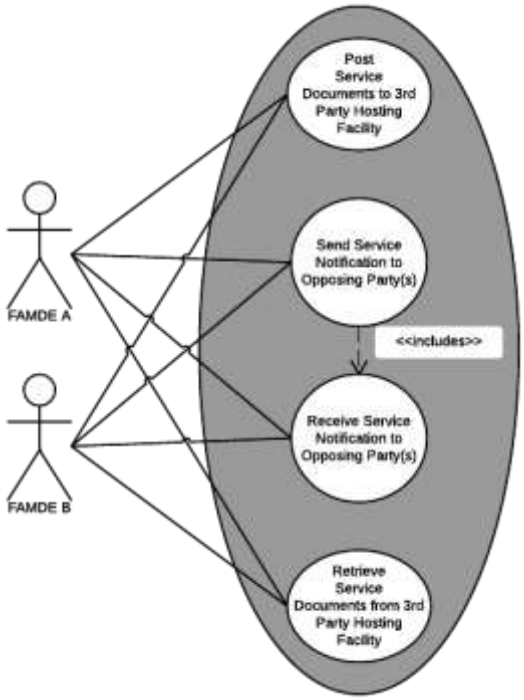

Figure 3: FAMDE subscribers exchange service documents via an external 3rd party service document portal. This approach guards against errors occurring when document(s) exchanged exceed email gateway file size limitations.

Change Legal Service MDE operation name from 'ServeFiling' to 'ServeProcess'

An operation name change is proposed for a couple of reasons. First, a case submission is not considered 'filed' until a reviewing clerk accepts the submission. Second, 'ServeProcess' appears consistent with the Limited Electronic Service of Process (Limited eSOP) concept.

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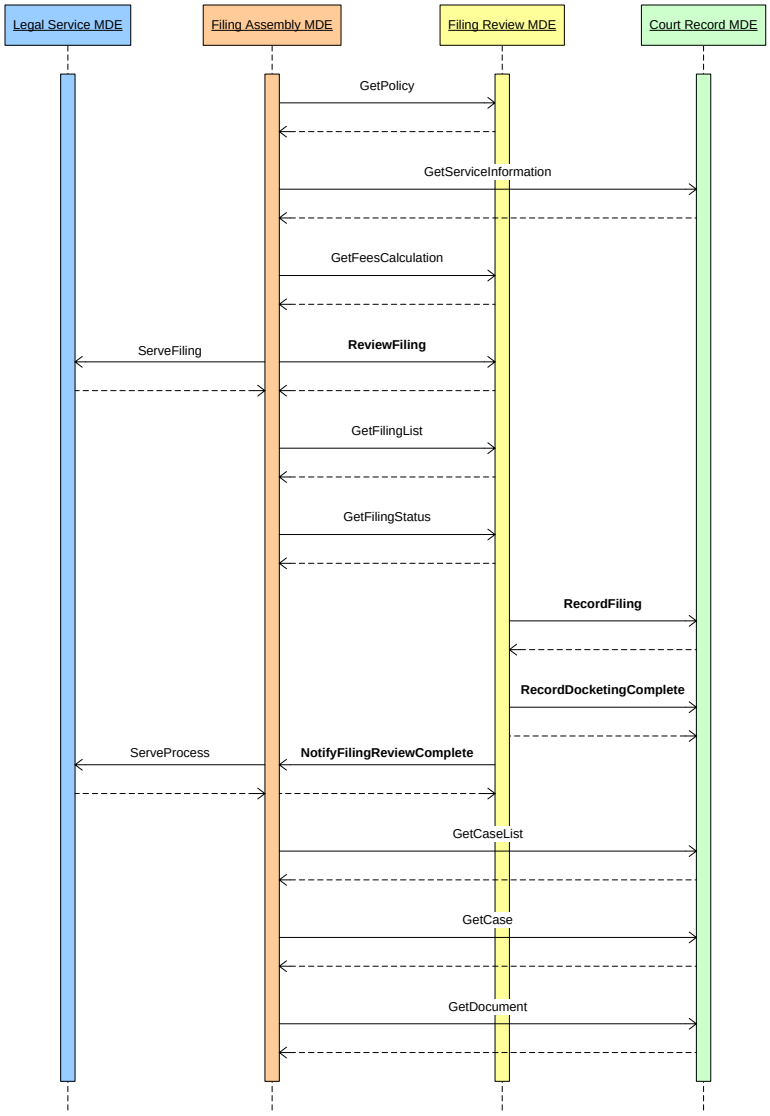

Figure 4: ServeFiling and ServeProcess operations.

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6 Next Steps

This position paper is published for public review and approval of one or more of the proposed approaches. The TC must develop the ECF XML schema and technical specifications for each of the approved Legal Service MDE enhancement(s) proposed. The specifications will likely require conversations about modifying the Filing Assembly and Filing Review MDEs. The final product may include process diagrams, test scripts that validate business requirements, Use Case and Activity diagrams, and other artifacts that provide clear traceability to the business requirements associated with this effort.

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Appendix A. Acknowledgments

The following individuals have participated in the creation of this specification and are gratefully acknowledged:

- Jim Cabral, MTG (TC Chair)
- Robert DeFilippis, OneLegal, President & COO (TC Member)
- Gary Graham, Arizona Supreme Court (TC Member)
- Jeff Karotkin, OneLegal, Vice President of Strategic Development
- George Knecht, Green Filing, LLC (TC Member)
- Jim Price, Arizona Supreme Court (TC Member)

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Appendix B. Terms

In consideration of the concept of Limited eSOP it is important to understand some key e-filing terms, with respect to the ECF specification, and general court terms. These terms are used throughout this document.

- ECF – Electronic Court Filing
- EFSP – Electronic Filing Service Provider
- EFM – Electronic Filing Manger
- eSOP – Electronic Service of Process
- FAMDE – Filing Assembly Major Design Element
- FRMDE – Filing Review Major Design Element
- Limited eSOP – Limited Electronic Service of Process
- LSMDE – Legal Service Major Design Element

In addition to the terms outlined above, it is important that the reader have a clear understanding of the differences between service of process and regular service. The following information differentiates these types of service as primary and secondary, respectively. Where applicable, the phrase "***e-filing opportunity***" is included to highlight under which conditions primary and secondary service may be applied via electronic filing.

1. Service of Process (aka Primary Service)
    a. General Description
        i. A type of service whereby a document is required to be physically delivered to opposing counsel, registered agent, party, or 3rd party (e.g., witness, victim, entity possessing evidence)
        ii. A person who is served is also known as a "servee"
        iii. The physical delivery of documents (typically defined in state statutes, state court rules, and/or local court rules) often occurs through the use of Process Servers, Sheriff Deputies, Constables, or by Certified Mail
        iv. Most commonly, Primary Service is REQUIRED when initiating a case.
        v. Primary Service may also occur throughout the life of a case when documents (e.g., court-issued summonses and subpoenas)
    b. Service Methods
        i. Proof-of-Service
            1. Generally accomplished by filing a "Return of Service" or "Summons/Subpoena on Return" in the court responsible for hearing the case
            2. May include a signed copy of the served documents
            3. May be filed in the court by the process server or the party/attorney who performed the act of service (***e-filing opportunity***)
        ii. Affidavit of Service

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1. Rather than file a signed copy of the documents served, the Process Server prepares an Affidavit of Service attesting to the delivery of the documents on to the servee.
2. The Process Server files the Affidavit of Service in the court responsible for hearing the case (***e-filing opportunity***)

iii. Option(s)

1. Electronic Primary Service (***e-filing opportunity***)
    a. Attorneys who serve as "Registered Agents" may elect (opt-in) to a system by which "Service of Process" may occur electronically
    b. Attorneys participating in an ongoing case may elect to receive service electronically for the service of documents, e.g., Subpoenas, Judgments, or Orders
    c. Lead counsel
2. Other – TBD

2. Regular Service (aka Secondary Service)
    a. A type of service whereby the filing party is required to provide copies of the pleading they are filing to all other parties and / or attorneys on the case. The serving counsel or party MUST attest that case documents were sent to the opposing counsel or party
    b. The serving counsel or party MUST file a "Certificate of Service," which is the court document that attests that case documents were sent to the opposing counsel (***e-filing opportunity***)
    c. Proof-of-Service is NOT required; however, identifying the method of delivery is required as part of the "Certificate of Service"
    d. Several states
        i. Permit the electronic transmission of case documents to opposing counsel or parties (***e-filing opportunity***) if the opposing counsel has agreed to receipt of documents electronically.
        ii. Require counsel or parties to accept Secondary Service electronically if they filed their case documents electronically into the court (***e-filing opportunity***)

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Appendix C. Revision History

Revision	Date	Editor	Changes Made
0.01	04/01/2015	Jim Price	Document creation.
0.02	07/01/2015	George Knecht	Revisions.
0.03	07/06/2015	Jim Price	Accepted previous revisions. Added edits for review.
0.04	07/07/2015	George Knecht	Accepted previous revisions.
0.05	07/07/2015	Jim Price	Placed Terms section in Appendix B and removed the same information from the Introduction section. Modified Recommendation section.
0.6	07/09/2015	George Knecht, Jim Price	Finalized draft for TC review.
0.7	07/10/2015	Robert DeFilippis	Provided feedback to the initial draft.
0.8	07/10/2015	Jim Price	Responded to Robert DeFilippis and Jim Cabral's feedback and made edits as necessary.
0.9	08/19/2015	Jim Price	Modified objectives in Introduction section and document title based on a consensus reached between Robert DeFilippis, George Knecht, Jim Cabral, Gary Graham, and Jim Price.
0.10	08/28/2015	Jim Price	Incorporated suggested edit to Introduction section made by Jim Cabral. Prepared document for public review.
0.11	08/31/2015	Jim Price	Incorporated edits provided by Jim Cabral, George Knecht, and Gary Graham. Introduced Use Case diagrams for the different proposed approaches.
0.12	09/02/2015	Jim Price	Modified Use Case diagrams.

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