

eSign[®]

Electronic Mortgage Closings

Legal Framework for Electronic Mortgage Closings

Fannie Mae and NYCB Mortgage Company, LLC have invested significant resources towards the development of a viable and enforceable electronic mortgage closing process. The legal framework for electronic mortgage closings is now well-established and is used routinely to support the origination and sale of mortgages in the secondary market. A series of eSignature laws enacted by Congress and states in recent years to spur the growth of electronic commerce – and specifically electronic closings – means that electronic mortgage documents are fully enforceable in every jurisdiction. These standards provide a solid legal framework for the electronic signing of mortgage documents.

Statutory Basis for Electronic Mortgage Closings

The Electronic Signatures in Global and National Commerce Act (e-Sign) and the Uniform Electronic Transaction Act (UETA)

- Federal e-Sign and the state UETAs provide the legal basis for the use of electronic documents in contracts, lending and consumer disclosures.
- Because paper promissory notes have very specific legal benefits under the Uniform Commercial Code (UCC), the drafters of both e-Sign and UETA sought to recreate these benefits with respect to electronic promissory notes (eNotes). Known as the “transferable records” provisions of e-Sign and UETA, they allow lenders to create the electronic equivalent of negotiable instruments that will have the same benefits under the UCC as would a paper note.

Electronic Signatures

- Neither e-Sign nor UETA dictate what type of electronic signature technology that a lender must use to create enforceable electronic mortgage documents. (Even voice signatures are permissible under law, although practical considerations have thus far prevented their use for electronic mortgage documents.) Rather, e-Sign and UETA require that the signature be attributable to the signor.

The Role of the Mortgage Electronic Registration System (MERS[®]) eRegistry

- While ownership and other rights to a paper note are largely determined by endorsements and possession, the eNote by virtue of its electronic status requires a different structure.
- At a high level, in order to qualify for “transferable record” status, (i) the eNote must qualify as a promissory note but for its electronic nature; (ii) the borrower must agree to the creation of the eNote, and (iii) there must be a reliable system to establish who is in control (i.e., who holds) the eNote.
- The MERS eRegistry satisfies the requirement for a reliable system to establish who is in control of the eNote. Additionally, the MERS eRegistry allows interested parties to validate that a particular copy of the eNote is the same as what was originally registered. Most closing systems register the eNote with MERS immediately after signing by the borrower.
- More information on the MERS eRegistry is available at www.mersinc.com.

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What about title insurance?

- In July 2006, the American Land Title Insurance Association (ALTA) adopted a new title policy, that among other things, makes specific mention of electronically signed mortgage documents. Although previous versions of these policies do not specifically mention eMortgages, it is believed that these policies do cover electronically signed closing documents.
- The new ALTA title policies are available at www.alta.org.

Are Fannie Mae and Freddie Mac buying eMortgages?

- Yes. Fannie Mae has been purchasing eMortgages since 2000, and has published guidelines which are available on eFanniemae.com. Freddie Mac has recently published its eMortgage Handbook, which is available on Freddiemac.com.

What about other participants in the process?

- For years, warehouse lenders, document custodians, lenders, servicers and others have been participating in a variety of forums to help set industry standards for electronic mortgage transactions. For example, the MERS eRegistry was created after detailed business requirements were developed by an industry body coordinated by the Mortgage Bankers Association (MBA). The MBA's Mortgage Industry Standards Maintenance Organization (MISMO) is an excellent source of information for the standards that have been developed: visit <http://www.mismo.org>



For information and use by Wholesale Loan Originators and Closing Agents.
WSI: 423 (Revised: 01/11 7994)

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