
eMortgage Foreclosure Educational Aid

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I. Introduction

This educational aid resource, created by Fannie Mae and Freddie Mac (the “GSEs”), is intended to address a barrier to eMortgage adoption identified in the 2016 joint GSE eMortgage outreach survey. From the survey we learned that Servicers (and some of their local foreclosure law firms) wanted to better understand eMortgages, specifically, how eMortgages are foreclosed. While this document does discuss the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001, et seq. (“ESIGN”) and its interaction with the model Uniform Electronic Transactions Act (“UETA”), ***the GSEs do not intend nor should anyone construe, the information herein to be legal advice upon or an interpretation of any state’s adopted version of the UETA.***

This document provides a high level summary of the federal law, ESIGN, and how it governs eNotes and eMortgages and a basic overview on foreclosure of eMortgages.

- An overview of transferable records (eNotes).
- Definitions for key terms related to eMortgages.
- Important eMortgage foreclosure court decisions.
- Other important information on the eMortgage foreclosure process.

II. Applicable Laws

The essential difference between a transferable record (eNote) and a traditional paper Note is that an eNote does not exist in physical form. Therefore, the common test for standing in foreclosure cases (the foreclosing party should (or must) be the “holder” of the Note by possessing a paper Note indorsed in blank or indorsed to the foreclosing party) doesn’t work with eNotes since there is no instrument to possess. The applicable laws that govern electronic transactions are:

- In 2000, Congress passed ESIGN. The ESIGN states that contracts and signatures may not be deemed invalid simply because they are in electronic form. ESIGN further provides that electronic contracts and other records can be retained in electronic form as long as 1) they accurately reflect the information set forth in the contract or record, 2) are accessible to the parties and 3) can be accurately reproduced by electronic transmission or printing on paper.
- In 1999, the UETA was drafted by the Uniform Law Commission. It has been adopted in 47 States and the District of Columbia (but not Illinois, New York or Washington at this time). ESIGN and the UETA essentially parallel each other, legitimizing electronic records throughout the country. The text is available at:
http://www.uniformlaws.org/shared/docs/electronic%20transactions/ueta_final_99.pdf.¹

¹ Despite its name, UETA has not been adopted uniformly across the U.S. - California, for instance, omits sections 16-20 of UETA (Cal. Civ. Code §§ 1633.1 – 1633.17). Accordingly, it is the GSEs’ view that ESIGN supersedes the California UETA, at least for transferable records (eNotes).

III. Key Terms

It's important to understand some of the key terms used in connection with eMortgages, which are defined below:

- **Transferable Record:** Both ESIGN and UETA contain special sections for “transferable records” (ESIGN 15 U.S.C. §7021; UETA §16). A “transferable record” is an electronic record that would be a Note under Article 3 of the Uniform Commercial Code (UCC) if it were in writing. To be a transferable record, the issuer (borrower) must have agreed the document is a transferable record and the document must relate to a loan secured by real property. (**GSEs often refer to transferable records as “eNotes”**).
- **Control:** ESIGN and UETA then provide that a “person having control” (in the MERS® eRegistry, this person is referred to as the “Controller”) of a transferable record is the equivalent of a “holder”, as that term is used in the State’s version of the UCC, and has the same rights and defenses as a “holder”. A “person has control” of a transferable record if the system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred. (ESIGN 15 U.S.C. §7021 (b); UETA §16b). The most common system for evidencing the transfer of interests in eNotes is the eRegistry operated by MERS®. (**The MERS® eRegistry tracks the identity of the person that has Control and refers to that person as the “Controller” of the eNote**).
- **Authoritative Copy:** A system satisfies the conditions of ESIGN and UETA if it maintains records in a manner such that an “Authoritative Copy” of the transferable record exists. An authoritative copy must be a single, unique, identifiable, and generally unalterable copy. (**This means that while there can be many copies of each eNote, there can be only one authoritative copy of the eNote, and only the Controller of the authoritative copy can enforce it.**)
- **Location:** The MERS® eRegistry tracks the “Location” of every eNote. In the MERS® eRegistry, the location is a named party (usually the Controller or its designee) that stores the eNote in an eNote Vault, similar to a document custodian storing an original paper Note.

The interplay of Controller, Location, and Authoritative Copy is discussed in the GSE context, below.

IV. eNotes in the GSE Environment

The information below provides an overview of the delivery of eNotes to the GSEs. This information is particularly relevant for understanding the requirement for a transfer of control in order to enforce an eNote.

There are two components of the process that warrant explanation.

- **The MERS® eRegistry** – the system of record identifying the Controller and the location of the eNote. The MERS® eRegistry allows eNotes to be registered and tracked to the single, unique authoritative copy of the transferable record (eNote).

- **GSE eNote Vault** – refers to the GSEs’ respective electronic storage systems that eNotes are delivered to and stored in.

An overview of the eNote delivery process is as follows:

- The eNote is electronically signed by the borrower through use of an electronic closing system (“eClosing System”).
- The eClosing System secures the electronically signed documents by applying a tamper-evident seal to the entire transferable record (eNote).
- The eNote must be registered on the MERS® eRegistry within one business day.
- The lender transmits the eNote to the applicable GSE eNote Vault using the MERS® eDelivery software application.
- The lender submits a request to the MERS® eRegistry to transfer control of the eNote from the lender to the applicable GSE.
- The GSE eNote Vault validates that the tamper-evident seal value on each eNote delivered by lender and matches the tamper-evident seal value stored in the MERS® eRegistry and, if the values match, accepts the eNote delivery.

So, for all eNotes purchased by the GSEs, the applicable GSE becomes the Controller and the Authoritative Copy of the transferable record (eNote) is stored in the applicable GSE’s eNote Vault.

V. Enforcement of eNote

The requirements for paper Notes and eNotes are the same as it relates to the following:

- Pre-enforcement workout solicitation requirements.
- Notices and GSE workout requirements.
- GSE requirements for the selection of foreclosure counsel.

However, some aspects of the enforcement process are quite different for eNotes. The party seeking to enforce a transferable record (eNote) must have *Control* of the *transferable record* (eNote). The Controller of a transferable record (eNote) has the same rights as the *Holder* of a paper note under the UCC. Since the GSEs are identified as the *Controller* of the transferable record (eNote) in the MERS® eRegistry, when foreclosure is the action that must be taken, in many jurisdictions control of the *authoritative copy* of the transferable record (eNote) will need to be transferred from the applicable GSE to the Servicer for the Servicer to enforce the Note in its name.² The process for requesting transfer of control from the GSEs are provided below:

- **For Fannie Mae loans:** A transfer of control can be initiated by contacting Fannie Mae’s Custodian Oversight Department at eMortgage_Custody@FannieMae.com and

² The discussion in the main text concerns handling of the eNote. Don’t forget that for loans registered in the MERS® System, the security instrument must also be assigned from MERS® to the foreclosing party (usually the servicer) before starting the foreclosure.



submitting Form 2009, *Request for Release/Return of Documents*. Note that at present, when *Control* is transferred on a Fannie Mae eNote, the *location* of the eNote in the MERS® eRegistry is simultaneously transferred as well from the Fannie Mae eNote Vault to the servicer's eNote Vault. Although transfer of the eNote's location is not legally required in order to enforce the eNote, at present Fannie Mae requires that both control and location transfer to the Servicer at time of enforcement. When Fannie Mae system upgrades are completed in late 2017, Servicers will be able to transfer control of the eNote without changing the location of the eNote.

- **For Freddie Mac loans:** The Servicer desiring the transfer of control and/or location should submit the request to Loan_Delivery_Funding_Ops@FreddieMac.com, three business days before the change is desired. Freddie Mac will transfer control of the eNote without changing the location of the eNote, the Freddie Mac's eNote Vault. Freddie Mac will transfer location if Servicer's counsel determines it is necessary under applicable state law.

Regardless of the GSE, in states which require the foreclosing party to present a physical Note, the Servicer may (depending on State law requirements) print out a Servicer certified copy of the transferable record (eNote) and complete and execute an affidavit comparable to the GSE uniform sample Electronic Note Affidavit attached hereto as Exhibit A.

In the event the transferable record (eNote) is removed from the foreclosure process because of reinstatement or loan modification, the Servicer must initiate a timely transfer of control (and location, as applicable) of the transferable record (eNote) back to the applicable GSE.

The standard affidavit used today to prove up the amount of the default, could be used in tandem with the Electronic Note Affidavit.

Note: Be sure to use the correct ESIGN and UETA terminology in pleadings, etc. and, subject to state law, remove references to "holder" of the Note or "possession" of the Note.

VI. Court Decisions

Here are some court decisions addressing eNote foreclosures:

- *Good v. Wells Fargo*, 18 N.E.3d 618 (Ind. App. 2014): The Indiana Appellate Court reversed an entry of summary judgment in favor of the lender, holding that the lender failed to adequately establish standing to foreclose.
- *New York Community Bank v. McClendon*, 29 N.Y.S.3d 507 (NY App. Div. 4/13/16): The New York Appellate Division reversed a decision dismissing a foreclosure complaint for lack of standing, finding that the lender adequately established standing.
- *Rivera v. Wells Fargo*, 189 So.3d 323 (Florida 4th DCA 4/20/16): The Florida Appellate Court upheld a decision of the trial court in favor of the lender, finding the affidavits submitted by the lender sufficient to establish the lender's standing and right to foreclose.

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- Wells Fargo v. Benitez, 2016 N.Y. Misc. LEXIS 4823 (N.Y. Supreme Court, Suffolk County, 12/14/2016): The New York Supreme Court (trial level) found that the lender failed to establish its standing as the controller or holder of the eNote .

VII. GSE Resources

- **Fannie Mae's Guide to Delivering eNotes:**

https://www.fanniemae.com/content/technology_requirements/emortgage-delivery-guide.pdf

Complete requirements for servicing eMortgage are available in Fannie Mae's master Servicing Guide:

<https://www.fanniemae.com/content/guide/servicing/index.html>

- **Freddie Mac eMortgage Guide** (*Chapter 3 addresses servicing, and the sub-chapter 3.5 addresses servicing of non-performing loans*)

http://www.freddie.mac.com/singlefamily/pdf/eMortgage_Guide.pdf

For additional assistance and other resources, contact the Fannie Mae legal team at default_attorney@FannieMae.com or the Freddie Mac legal team at Legal_eMortgage@FreddieMac.com.

EXHIBIT A

File No. / **BORROWER NAME**

ELECTRONIC NOTE AFFIDAVIT

The undersigned being first duly sworn, and under penalty of perjury, states as follows:

1. My name is [duly authorized employee of Controller name] and I am a [title] of [legal name of Controller];
2. Capitalized words used herein that are not defined, proper names, commonly capitalized or statutory citations herein, shall have the meanings ascribed to such words in 15 U.S.C. § 7021 and [Insert applicable State UETA statutory citation];
3. The borrower(s), using an Electronic Signature, executed an electronically created promissory note (the "Note") dated [date of Note], to [Enter original lender legal name]. The Note represents a promise from the borrower(s) to pay \$ [amount]. A copy of the Note is attached hereto as Exhibit A and is incorporated herein by reference;
4. As part of the terms of the Note, the borrower(s) expressly agreed that the Note would be:
 - a. authenticated (signed), stored and transmitted by electronic means and that the MERS[®] eRegistry would identify the Person in control of the Note (the "Controller"); and
 - b. a Transferable Record pursuant to 15 U.S.C. § 7021 and [Insert applicable State UETA statutory citation];
5. On [date registered with MERS[®] eRegistry], the Note (Transferable Record) was registered with the MERS[®] eRegistry by [registering lender legal name] under MERS[®] Organizational Identification Number [number]. The copy of the MERS[®] eRegistry Transaction History, attached hereto as Exhibit B and incorporated herein by this reference, identifies [legal name of controller] as the Controller of the Note (Transferable Record);
6. The Controller of the Note (Transferable Record), pursuant to 15 U.S.C. § 7021 and [Insert applicable State UETA statutory citation]:
 - a. has the same rights as a "holder" defined in [Insert applicable State UETA statutory citation]; and
 - b. is the only Person who can transfer control of the Note (Transferable Record);

