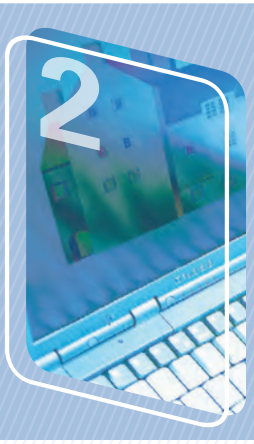
MERS® eRegistry

Speed. Liquidity. Security.

MERS® eRegistry

HERE'S HOW THE MERS® eREGISTRY WORKS…

Lender has borrower eSign an eNote at closing (using eClosing platform). eNote contains MIN and MERS® eRegistry clause.



Immediately after closing, Lender registers the eNote on the MERS® eRegistry. The registration record shows the Lender as the Controller and the Location of the eNote.

WHAT DOES THE MERS® eREGISTRY DO FOR YOU?

Lenders: Provides eNote liquidity and best execution
Improves pipeline management

Settlement Agents: Improves quality control and productivity
Mitigates document fraud

Warehouse Lenders: Improves control of collateral
Reduces exposure to borrower or lender default

Document Custodians: Gives first-to-market competitive advantage
Creates more efficient and more accurate automated note certification

Servicers: Assists in automating post-closing audit of eNote servicing data

Investors: Creates best execution advantage
Faster and more efficient delivery to the secondary market
Improves quality control and assists in fraud detection

WHAT IS THE MERS® eREGISTRY?

The MERS® eRegistry is the system of record that identifies who is in control of the electronic note. It points to the location of the authoritative copy of the eNote, stored by a custodian in a secure electronic vault.

The MERS® eRegistry is essential in the eMortgage world. It saves money and prevents confusion on who owns the eNote.

Today, lenders are closing eNotes and selling them into the secondary market through the MERS® eRegistry. Fannie Mae and Freddie Mac both require the use of the MERS® eRegistry when selling eNotes to them.

The MERS® eRegistry fulfills the "Safe Harbor" requirements in the state-led Uniform Electronic Transactions Act (UETA) and E-SIGN (Electronic Signatures in Global and National Commerce Act of 2000) adopted by Congress.

WHAT DOES THE MERS® eREGISTRY DO?

When a lender registers an eNote on the MERS® eRegistry, the registration process:

- Uniquely identifies the eNote's current Controller and Location of the Authoritative Copy
- Validates the MIN – Mortgage Identification Number (the unique identification number for a registered eNote)
- Stores the unique digital signature (hash value) of the eNote
- Confirms the registration is complete
- Prevents duplicate registrations
- Stores key information to readily identify the loan

WHAT IS MERS® eDELIVERY?

MERS® eDelivery provides a secure method for distributing eMortgage packages from one MERS® eRegistry Member to another, using the existing MERS® eRegistry infrastructure and transaction security requirements.

All eMortgage trading partners can adopt MERS® eDelivery with confidence knowing that it leverages the backbone of the MERS® eRegistry and is powered by MERS.

WHAT DOES MERS® eDELIVERY DO?

When a member transfers electronic documents using MERS® eDelivery, the process:

- Validates the MIN (Mortgage Identification Number) associated with the electronic document
- Validates the identity of the transferor and the transferee
- Requires confirmation of receipt by the transferee, and
- Maintains an audit trail of all deliveries

The Mortgage Bankers Association endorsed the creation of a single, national eNote registry and endorsed MERSCORP Holdings, Inc. as its builder and provider.

Both Fannie Mae and Freddie Mac require MERS® eRegistry registration of eNotes as a condition for purchase.

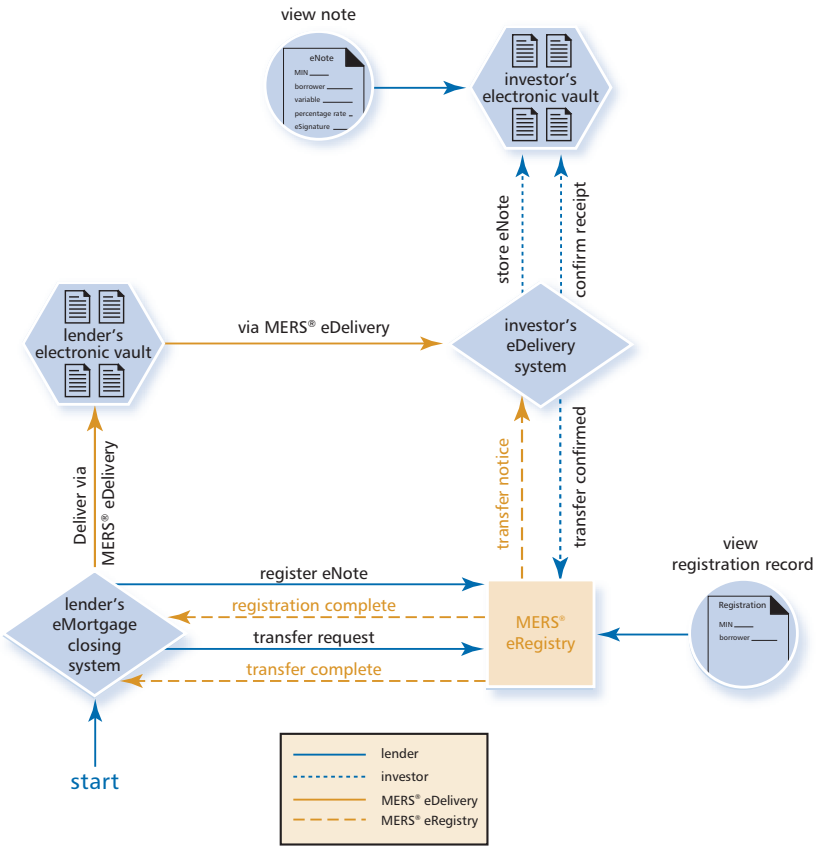
When the eNote is sold, the Lender initiates a transfer of control transaction to the new Investor.

If the eNote is to be delivered to the Investor, the Lender will also include a transfer of Location to the Investor. The Lender delivers the eNote at the Investor's instructions. NOTE: Fannie Mae requires the use of MERS® eDelivery in this process.

The new Investor confirms the transfer request(s). The MERS® eRegistry record is automatically updated to show the Investor as the Controller (and Location, if applicable).

The current Controller or servicer is responsible for reporting servicing events to the MERS® eRegistry. All messages to and from the MERS® eRegistry are XML transactions sent across a secure connection.

REGISTRATION AND SALE PROCESS



NEW WORLD / NEW LANGUAGE

Paper World	Electronic World
Negotiable Instrument	Transferable Record ("eNote")
Original Note	Authoritative Copy of eNote
Possession	Control
Investor/Holder	Controller
Custodian	Location (electronic vault)
Endorsement	Transfer of Control
Chain of Endorsements and Delivery	Transferable Record Audit Trail
Wet Signature	Electronic Signature

WHY eNOTES?

Making eNotes part of the mortgage lending process provides the following benefits:

- Improves the borrowers' experience by shortening the closing time, ensuring quality control.
- Saves money by eliminating the cost of replacing lost or missing notes, and the cost of shipping notes
- Saves time by ensuring accuracy of note data and eliminating re-keying time and errors.
- Delivers operating efficiencies by improving pipeline management, use of capital, and best execution timing.
- Makes the promise of eMortgages possible by fulfilling regulatory requirements outlined in the UETA and E-SIGN legislation.
- Supports correspondent and wholesale lending models
- Supports warehouse lending

MERSCORP HOLDINGS, INC. SUPPORT

- **Regional Sales Directors**
  Available nationwide for on-site sales and visits for members and their clients. Call **800-646-MERS (6377)** for more information.
- **Business Integration Staff**
  Assist members in integrating MERS in their business and technical environment.
- **Website (members.mersinc.org)**
  Convenient online source for everything MERS.
- **User Conference**
  Annual conference for new and experienced MERS members that provides educational information on legal, regulatory and system enhancement topics.
- **Help Desk**
  Answers systems, procedural and technical questions for active members.

MERS® eREGISTRY FAQS

Q. What is the MERS® eRegistry?

A. It is an industry utility that serves as the central location to identify the current Controller (holder) and Location (custodian) of the Authoritative Copy of an eNote. The Controller of an eNote has the equivalent rights as that of a "Holder in Due Course" with a paper negotiable promissory note. The MERS® eRegistry is the mortgage industry's "system of record" of ownership for eNotes.

The concept of a national eNote registry was the industry's response to the requirements imposed by the Uniform Electronic Transactions Act (UETA) and the federal Electronic Signatures in Global and National Commerce Act (E-SIGN). It evolved out of the need to track and identify electronic promissory notes or eNotes for electronic mortgages.

Q. Do investors require the use of the MERS® eRegistry?

A. Fannie Mae and Freddie Mac require use of the MERS® eRegistry for eNotes that they purchase. Furthermore, Fannie Mae also requires the use of MERS® eDelivery.

Q. Does the MERS® eRegistry store eNotes?

A. No. Organizations that are in the business of providing eVaulting services store eNotes on behalf of the investor.

Q. Since the MERS® eRegistry is the "system of record" of ownership for eNotes, does MERS control the disbursement of closing funds?

A. No. Closing funds are disbursed as they would be with the closing of a paper note.

Q. Why eNotes? What is the benefit?

A. A Promissory Note in electronic form and registered with the MERS® eRegistry is eligible for sale to all investors with membership in the MERS® eRegistry. Due to the lower costs of handling and greater access to information, loans backed by eNotes can be more valuable to investors than the equivalent loans backed by paper notes. The MERS® eRegistry enables lenders to sell these higher value eNotes on a best execution basis.

Lenders also reduce costs with eNotes by streamlining the post closing and certification process, eliminating transportation costs and reducing costs associated with lost, destroyed and missing paper notes.

Q. If I want to originate eNotes, what do I need to do?

A. There are two scenarios for originators of eNotes to interact with the MERS® eRegistry, one is direct, and the other is through a trading partner.

In the first scenario, you close loans on eNotes that contain the MERS® eRegistry language and a Mortgage Identification Number (MIN), and register them on the MERS® eRegistry. This requires you to have

- connectivity with us (a VPN or Frame Relay connection)
- the ability to create the XML transactions required by the MERS® eRegistry
- the ability to sign those transactions with a digital certificate provided to you from a MERS® eRegistry-approved issuer

In the second scenario, you close loans on eNotes that contain the MERS® eRegistry language and a MIN, and immediately sell them to an investor who will do the registrations for you. This is called a Broker/Delegatee relationship. MERS will set up your profile (as the Broker) on the MERS® eRegistry so that it allows another party (your Delegatee) to name you as the initial Controller (holder) and then do a transfer of control to itself.

Whichever scenario you choose, or role you play (lender, broker, investor) we will help you integrate your process with MERS to set up procedures and do any necessary transaction testing.

NOTE: the current Controller (or its servicer) listed on the loan also reports servicing events to the MERS® eRegistry.

Q. Does my current MERS Membership allow me to start this process?

A. Yes, but you must also sign the MERS® eRegistry Addendum. If you are not currently a MERS® System member, you must sign the Membership agreement and the Addendum.

Q. What do you charge for using the MERS® eRegistry?

A. There is no additional membership fee for signing the Addendum if you are already a MERS® System member. There is a one-time Registration Fee. Please reference our Fee Schedule for current pricing.

Q: Does MERS® eDelivery replace the need for an electronic document management system and an eVault?

A. No. MERS® eDelivery securely delivers documents in any electronic format (SmartDoc, PDF, TIFF, etc.). It does not validate or store electronic documents.

Q. Where do I get more information?

A. **Call the Customer Division at 800-646-6377 or visit the web site at www.mersinc.org.**

Getting Started with the MERS® eRegistry

Congratulations! Your company has decided to take the next step towards a true eMortgage by becoming MERS® eRegistry READY. Here is what's ahead for your company:

Phase I:

1. Sign the MERS® System Membership Addendum
2. Obtain the ability to originate and close electronic notes (MISMO SMARTDOC format)
3. Establish an investor compliant eVault to hold electronic notes prior to sale
4. Notify trading partners (investors/warehouse lenders) of your intention to use eNotes and obtain their requirements for eNote delivery

Phase II:

Phase II only applies to companies who plan to interact directly with the MERS® eRegistry.

1. Obtain connectivity to the MERS® eRegistry through a VPN (virtual private network)
2. Get digital certificates from a MERS-approved issuing authority
3. Begin programming and testing all appropriate transactions: registrations, transfers, confirmations, updates and status changes (e.g., deactivations). NOTE: All transactions are performed through system-to-system XML messages
4. Establish connectivity with trading partners to move the eNote from your eVault to theirs
5. Provide us with procedures documents
6. ACTIVATION. Begin using the MERS® eRegistry

Questions?

Contact us today (800-646-6377) and ask to speak with you regional director!

Glossary of Terms

Certificate Authority. A trusted third-party company approved by the investor that issues digital certificates used to create digital signatures and public-private key pairs.The role of the CA in this process is to guarantee that the individual granted the unique certificate is, in fact, who he or she claims to be.

Digital Certificates. Electronic files that act like a kind of online passport. Certificates are issue by a trusted third-party (Certificate Authority) that verifies the identity of the certificate's holder.They are tamper-proof and cannot be forged. Digital certificates do two things: 1) They authenticate that their holders (people, websites, etc.) are truly who or what they claim to be, and 2) They protect data exchanged online from theft or tampering.

eVaults. A secure, electronic repository for eNotes. May be operated by an eCustodian or by a lender or investor to store their own eNotes. Similar to a paper vault run by the document custodian industry today.

MERS® eRegistry Addendum. New supplemental document to the MERS Membership Application specifically for the MERS® eRegistry. Both current members and applicants must sign the addendum to complete the application process.

MISMO. Mortgage Industry Standards Maintenance Organization. Develops, promotes, and maintains voluntary electronic commerce standards for the mortgage industry. Established in 1999 by the Mortgage Bankers Association.

SMARTDOCS. An electronic document created to conform to a specification standardized by MISMO. A SMARTDOC locks together data and presentation in such a way that it can be system-validated to guarantee the integrity of the document. SMARTDOCs will enable lights-out, downstream processing by all parties and are the key to unlocking the savings in eMortgages.

VPN. Virtual Private Network. A way to communicate through a dedicated server securely to a corporate network over the Internet.

Addendum to MERS® System Membership Agreement

ORG ID#: | 1 | 0 | | | | | |

1. The MERS® eRegistry is a registry system evidencing the transfer of interests in eNotes (transferable records) that are intended to satisfy the safe harbor provisions of Section 16 (c) of the Uniform Electronic Transaction Act ("UETA") and Section 201 (c) of the Electronic Signatures in Global and National Commerce Act ("ESIGN"). The MERS® eRegistry is owned and operated by MERSCORP Holdings, Inc. (the "Company").
2. Each Member that accesses, uses, and/or integrates with the MERS® eRegistry shall execute this Addendum by an authorized officer of the Member, and in doing so, agrees to be bound by the terms and conditions set forth in this Addendum, and such other MERS® System Rules of Membership (the "Rules") and applicable MERS® eRegistry Procedures that govern the access and use of, or the integration with, the MERS® eRegistry.
3. Upon execution, this Addendum shall be incorporated into the Rules to which each Member agrees to comply with upon executing a MERS® Membership Application or Agreement. References to the "MERS® System" in Rules 5, 6, 7, 9, 10, 11, 12, and 13 shall be deemed to incorporate the "MERS® eRegistry." Terms not otherwise defined herein shall be as defined in the Rules. References to "transfer of servicing" or "servicing" in Rule 5, Section 1 shall be deemed to incorporate "Transfer of Control" or "Control" as defined in the MERS® eRegistry Procedures.
4. The only instruments that can be registered on the MERS® eRegistry are eNotes (transferable records) as defined in UETA and ESIGN. Member Investors (i.e., persons to which transferable records are issued or transferred) will determine the acceptable conditions of sale and the form and format of transferable records; provided, however, that each transferable record registered on the MERS® eRegistry must include a valid mortgage identification number ("MIN") and a reference that the MERS® eRegistry is the definitive source for information as to the current Member Investor. The Company should not be deemed to have a beneficial interest in any transferable record registered on the MERS® eRegistry, and the Company expressly disclaims any such interest.
5. The MERS® eRegistry Procedures define: (a) the format and rules under which MINs are generated to ensure non-duplication and consistency, and (b) the requirements for registration and transfers of electronic records, electronic messages and interfaces between Members, system security, record retention, and audit logs.
6. Upon written request to the Company, a Member who is the current Member Investor for an electronic record will be provided with a certificate of that status that the Member can provide to third parties as proof of their ownership of the electronic record.
7. Members will have access to the software code used to operate the MERS® eRegistry if, and only if, a court of competent jurisdiction makes a final determination that the Company has materially breached its obligations to operate the MERS® eRegistry.
8. Payment of funds in conjunction with the transfer of an electronic record registered on the MERS® eRegistry is subject to the arrangements and agreements of the Member Investors, and is not part of the operations of the MERS® eRegistry.
9. By submitting a loan registration or a transaction to the MERS® eRegistry, the Member represents and warrants to the Company that, at the time of the submission:
    a. The Member has all requisite corporate power and authority, with all necessary consents, approvals, authorizations, orders, registrations, qualifications, licenses, and permits of and from all public, regulatory or governmental agencies and bodies, to register loans and execute transactions on the MERS® eRegistry.

b. The registration of loans and execution of transactions on the MERS® eRegistry are legal, valid, and binding on and enforceable against the Member.
c. The officers, employees, and agents of the Member registering loans and executing transactions on the MERS® eRegistry were duly authorized and acting within the scope of their authority.
d. The information and data submitted by the Member to the MERS® eRegistry in conjunction with the registration of loans and execution of transactions is true and correct.
e. The Company and any other user of the MERS® eRegistry are entitled to rely on the information and data (including any digital certificates or other authentication procedures) submitted to the MERS® eRegistry by the Member.
f. There are no legal or governmental proceedings pending or threatened to which the Member is a party that would affect the ability or power of the Member to register loans and execute transactions on the MERS® eRegistry.

10. The Company shall notify in writing all Members of any proposed changes to this Addendum, and shall provide a copy of such proposed changes to all Members no fewer than ninety (90) days prior to the proposed implementation date of such changes. Members may submit comments to the Company for its consideration with respect to any such proposal, and such comments shall be reviewed by the Company, and filed with the records kept by the Company. Notwithstanding the receipt of any such comments, the Board of Directors of the Company, in its sole discretion, shall have the right to amend or add to this Addendum, or repeal any part thereof, after the expiration of such 90-day comment period, so long as such amendment is not contrary to the Company's Certificate of Incorporation. Each Member shall be bound by any amendment to the Addendum with respect to any transaction occurring subsequent to the time such amendment takes effect as fully as though such amendment were now a part of the Addendum; provided, however, that no such amendment shall affect the Member's right to withdraw its membership from the MERS® eRegistry in accordance with the procedures set forth in the Rules before such amendment or change becomes effective.

_____
Member Name

By: _____
Authorized Officer

OrgID # _____

MERS® eRegistry Fee Schedule

Use of the MERS® eRegistry is not subject to an additional membership fee. Usage is covered under the scheduled membership fee for the MERS® System.

TRANSACTIONS (See Notes below)	PRICE PER LOAN
eNote Registration	$ 4.95
Security instrument registration on the MERS® System	$ 11.95
Combined eNote registration on the MERS® eRegistry and security instrument registration on the MERS System[1]	$ 15.90
Transfer of Control – seasoned loan[2]	$ 2.00
Transfer of Control – flow loan[2]	-
Transfer of Location	-
Transfer of Delegatee	-
Transfer to Proprietary Registry	$ 2.00
eNote Converted to Paper	$10.00
eNote Deactivation	-
Assumption or Modification	-
Transaction performed on behalf of member	$100.00

NOTES:

1. A discount of $1.00 is granted when a loan's security instrument with MERS as mortgagee is registered on the MERS® System following the eNote being registered on the MERS® eRegistry.
2. A Transfer of Control-seasoned loan fee will be charged when the transfer date is greater than 270 days from the note date. When the transfer date is 270 days or less from the note date, then the transaction is a Transfer of Control-flow loan. Intra-company Transfers of Control are included in this category.
3. Other charges:
   - Broker membership fee (paid by delegatee): $50.00
   - Broker membership annual renewal fee (paid by delegatee): $10.00

COVINGTON & BURLING

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October 21, 2004

VIA HAND DELIVERY

Sharon McGann Horstkamp, Esq.
Vice President and Corporate Counsel
MERSCORP, Inc.
1595 Spring Hill Road
Suite 310
Vienna, VA 22182

Re: Validity of MERSCORP, Inc.'s eRegistry System

Dear Ms. Horstkamp:

You have asked us to evaluate MERSCORP, Inc.'s ("MERS") system of registering certain transferable records – namely, electronic mortgage notes ("eNotes") – with respect to the federal Electronic Signatures in Global and National Commerce ("E-SIGN") Act and the model Uniform Electronic Transactions Act ("UETA"). Specifically, you asked us to consider whether either E-SIGN or UETA restricts the types of entities that may operate an eNote registry ("eRegistry")[1], as well as whether the eRegistry as designed by MERS is consistent with the requirements of E-SIGN and UETA for the establishment of a system reliably evidencing the transfer of interests in a transferable record.

Based on our review of E-SIGN and UETA, and our understanding of the design of the MERS® eRegistry, it is our view that the MERS® eRegistry as designed satisfies the requirements of both E-SIGN and UETA for the establishment of a system reliably evidencing the transfer of interests in transferable records. Moreover, neither statute restricts the types of entities that may operate a system for transferable records; in particular, absent state law to the contrary, neither statute limits operation of such a system to a trust company or similar institution.

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[1] The MERS® eRegistry is a system of record that identifies the owner and custodian of registered eNotes.

In these circumstances, we conclude that MERS may permissibly operate the eRegistry as designed. Our detailed analysis is set forth below.

I. Background

A. E-SIGN and UETA

UETA represents the product of an effort by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in the late 1990s to rationalize widely-disparate state laws affording legal status to electronic records and signatures. Although a number of states adopted the UETA template for recognizing these records, the states often made significant changes to the model statute, thereby undermining NCCUSL's goal of uniformity in interstate commerce.

Congress intervened in 2000 by adopting E-SIGN[2] to overlay the inconsistent patchwork of state laws governing electronic records and signatures. Notably, Congress did not seek to preempt UETA.[3] Rather, it provided that any state law adopting UETA, in the form approved by NCCUSL, may "modify, limit, or supersede" E-SIGN.[4]

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[2] *See* Electronic Signatures in Global and National Commerce Act of 2000, Pub. L. No. 106-229, 114 Stat. 464 (codified at 15 U.S.C. §§ 7001 et seq.).

[3] "[S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within the field is preempted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law . . . ." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 621 (1984) (internal citations omitted). Congress may express its intent to preempt state law explicitly (*i.e.*, in the language of the statute) or implicitly (*e.g.*, where compliance with federal and state law is impossible, where Congress has legislated comprehensively, or where there is implicit in federal law a barrier to state regulation). *See La. Pub. Serv. Comm'n*, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898 (1986).

[4] 15 U.S.C. § 7002(a)(1).

In short, in adopting E-SIGN, Congress expressed no intent to "occupy the field" of regulation of electronic records. However, it nevertheless preempted state law to the extent such law either modifies UETA from the form in which UETA was adopted by NCCUSL in 1999, if such modification conflicts with E-SIGN, or otherwise is inconsistent with E-SIGN. *See id.*; *see also* 15 U.S.C. § 7001(a)(1) (providing that an electronic record or signature relating to virtually any transaction "may not be denied legal effect, validity, or enforceability solely because it is in electronic form," notwithstanding any other law or regulation). Although at least one court has, in *dicta*, questioned the authority of Congress to preempt state law "in respect to transactions not in interstate commerce," *People v. McFarlan*, 744 N.Y.S.2d 287, 293-94 (Sup. Ct. N.Y. Cty.
(continued…)

Both E-SIGN and UETA contain rules regarding so-called "transferable records." UETA defines a "transferable record" as an electronic record that would be deemed to be a note or document for purposes of the Uniform Commercial Code ("U.C.C.") if it were a physical "writing," provided that the issuer of the note or document has expressly agreed that it is a transferable record.[5] E-SIGN defines "transferable record" similarly, although it limits its application to loans secured by real property.[6] In light of these definitions, an electronic mortgage note may qualify as a "transferable record" under either statute and therefore is valid consistently nationwide.

While both E-SIGN and UETA pertain to records that would be governed by the U.C.C. if they were paper instruments, the statutes also expressly state that they do not apply to records that are, in fact, governed by the U.C.C.[7] In addition, the requirement that the issuer of the electronic record expressly agree that the record is a "transferable record" operates "to assure that transferable records can only be created at the time of issuance by the obligor."[8] Thus, a paper note cannot later be converted to a "transferable record" for purposes of the statutes.[9] For

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2002), no court in the four years since E-SIGN's enactment has upheld a constitutional challenge to E-SIGN. It is our sense that a constitutional challenge to E-SIGN's preemptive authority would face an uphill challenge; E-SIGN's design indicates that Congress carefully balanced state and federal authority in devising the legislation, and struck a compromise that, we believe, is likely to seem to most courts to be within Congress' Constitutional authority.

[5] Uniform Electronic Transactions Act (UETA) § 16(a).

[6] 15 U.S.C. § 7021(a)(1).

[7] Specifically, the statutes state that they do not apply to a transaction or record to the extent it is governed by "The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A." UETA § 3(b)(2); *accord* 15 U.S.C. § 7003(a)(3).

Notably, the statutes exclude negotiable instruments, which are governed by Article 3 of the U.C.C. Under the U.C.C., a "negotiable instrument" is a "written" instruction or undertaking to pay money to another under certain conditions. *See* U.C.C. §§ 3-102(a), 3-103(a)(6), 3-103(a)(9), 3-104(a). Concerned about impacting the broad systems relating to payment mechanisms for such instruments (specifically, checks), the drafters of UETA limited the statute to apply only to *electronic equivalents* of paper notes and documents. *See* UETA § 16 cmt. 2 (emphasis added).

[8] UETA § 16 cmt. 2.

[9] *Id.* (stating that "the issuer would not be the issuer, in such a case, of an electronic record"). Rather, the issuer must set forth its agreement to designate the electronic record as a "transferable record" in the electronic record itself or, arguably, in a contemporaneously issued record. *Id.*

the most part, however, the substantive provisions of E-SIGN and UETA incorporate the U.C.C. provisions that would apply if the transferable record were a paper instrument.[10]

B. MERS® eRegistry

MERS has created and operates a national eRegistry that establishes the functional equivalent of an official promissory note holder for the real estate finance industry.

Specifically, as we understand it, eNotes are registered with MERS and uniquely identified in the eRegistry for tracking and verification. The eRegistry does not store the actual eNote. Rather, the eNote is stored by a legal fiduciary ("eCustodian") in a secure electronic repository ("eVault"). However, the eRegistry stores information regarding the owner (or "controller") and the location (or "custodian") of the eNote. In turn, the eNote contains specific language referring to the eRegistry to identify its controller. In this manner, the eRegistry enables the rightful eNote owner to demonstrate conclusive legal control of the transferable record.

Further, it is our understanding that, in performing initial registration of eNotes, the eRegistry:

- confirms the validity of the issuer;
- confirms that the registration dataset is complete;
- confirms that the eNote is not already registered by assigning a unique Mortgage Identification Number (MIN) and hash value to each eNote;
- creates a unique registration record; and
- sends a confirmation to the issuer.

Likewise, in recording a transfer of eNotes, the eRegistry:

- validates both the transferor and transferee;
- compares the hash value stored in the eRegistry with the value submitted by the transferor; and

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[10] In brief, the person who controls a transferable record has the same rights as a holder of an equivalent paper instrument under the U.C.C., including, where applicable, rights as a holder in due course. *See* UETA § 16(d); 15 U.S.C. § 7021(d). Likewise, the obligor is entitled to the defenses that it would have under the U.C.C. *See* UETA § 16(e); 15 U.S.C. § 7021(e).

- requires confirmation by the transferee within a specified time period after the transfer request.

Finally, we understand that the eRegistry performs additional functions, including (i) storing information about the location of an eNote; (ii) regulating access to the eRegistry by a controller or its delegatee; and (iii) providing functionality for handling the modification or liquidation of an eNote.

As discussed below, the foregoing elements of the MERS® eRegistry are consistent with the criteria of UETA and E-SIGN for establishing a system that reliably evidences the transfer of interests in a transferable record.

II. ANALYSIS

A. The eRegistry As Designed Satisfies the UETA/E-SIGN "Safe Harbor"

E-SIGN and UETA supplemented the traditional concept of "possession" of a paper instrument by a holder with an analogous concept of "control" over an electronic record.[11] "Control" in these circumstances serves as "the substitute for delivery, indorsement and possession" of a paper instrument.[12] In order for such control of an electronic record to be given meaning and effect, it is necessary pursuant to UETA and E-SIGN to establish a single, unique version of the electronic record with respect to which the rightful holder may assert "control."

Specifically, under E-SIGN and UETA, "[a] person has control of a transferable record if a 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."[13] The statutes also contain a "safe harbor" provision, enumerating criteria according to which a system may be deemed as a matter of law to establish reliably the identity of the controller, provided that the criteria are satisfied. These criteria are:

- a single authoritative copy of the transferable record exists that is unique, identifiable, and unalterable (except as provided below);

- the authoritative copy identifies the person asserting control as the person to whom the record was issued or (if the authoritative copy indicates that a transfer has occurred) the person to whom the transferable record was most recently transferred;

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11 *See* UETA § 16 cmt. 3.

12 *Id.*

13 UETA § 16(b); 15 U.S.C. § 7021(b).

- the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

- copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the controller;

- any copy that is not the authoritative copy is readily identifiable as such; and

- any revision of the authoritative copy is readily identifiable as authorized or unauthorized.[14]

Given the novelty of these issues, we think it likely that courts will seek to measure any eRegistry system against these criteria. Moreover, we expect that most courts will be reluctant to conclude that a system falling outside the safe harbor nonetheless reliably establishes "control" for purposes of the statutes. In this regard, we believe that the design of the eRegistry system created by MERS, in which MERS operates a single, authoritative registry of controllers nationwide, satisfies the foregoing safe harbor criteria.

Specifically, the eRegistry system, as we understand it:

(i) identifies a single authoritative copy of the transferable record that is unique, identifiable, and unalterable – which the system accomplishes by storing information regarding the controller and the custodian of the authoritative copy of the eNote;

(ii) verifies that the person asserting control is the person to whom the record was issued or to whom the transferable record was most recently transferred – which the system accomplishes by confirming the validity of the issuer upon initial registration, and validating both the transferor and transferee in the event of any transfer;

(iii) ensures that the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian – which the system accomplishes by storing information regarding the controller and the custodian of the eNote, and requiring validation and confirmation for any transfer request;

(iv) ensures that copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the controller – which the system accomplishes by requiring validation by the controller for any transfer request, as well as confirmation by the transferee within a designated time period;

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[14] UETA § 16(c); 15 U.S.C. § 7021(c).

(v) ensures that any copy that is not the authoritative copy is readily identifiable as such – which the system accomplishes by storing information regarding the location of the eNote, regulating access to the eRegistry, and requiring confirmation from the controller for any requested transfer; and

(vi) ensures that any revision of the authoritative copy is readily identifiable as authorized or unauthorized – which the system accomplishes by assigning hash values, MINs, and registration records to each eNote, which are verified upon any transfer request.

Notably, although the safe harbor provisions require that the system "identif[y] the person asserting control,"[15] the transferable record itself need not identify the individual by name. Rather, "[t]he control requirements may be satisfied through the use of a trusted third party registry system."[16] As we understand it, in the MERS® System the authoritative copy of the eNote identifies the rightful controller by reference to the eRegistry. Based on our review of the legislative history and commentary to UETA and E-SIGN, it is our view that this design is consistent with the statutory criteria that the system "idenift[y] the person asserting control;" indeed, the comments to UETA state that "[a] system relying on a third party registry is likely the *most effective* way to satisfy the requirements of [the safe harbor provision] that the transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified."[17]

Accordingly, it is our view that MERS's eRegistry system establishes a reliable method for identifying the controller of a transferable record through the use of a trusted third party registry system, and that its design is consistent with the requirements of E-SIGN and UETA.[18]

B. Entities Permitted to Operate eRegistry

Separately, neither UETA nor E-SIGN imposes any conditions upon the types of entities that may establish or operate a system evidencing control over transferable records. Likewise, nothing in the background or implementation of E-SIGN or UETA suggests any such conditions. Indeed, E-SIGN and UETA were drafted in reaction to early state electronic signature laws, which generally required electronic signatures to be certified by a certificate

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15 UETA § 16(c)(2); 15 U.S.C. § 7021(c)(2).

16 UETA § 16 cmt. 3.

17 *Id.* (emphasis added).

18 *Id.* ("The control requirements may be satisfied through the use of a trusted third party registry system.")

authority licensed by the state. The statutes were designed to remove such government control in order to minimize restrictions on the use of electronic records and signatures.

We note that a state potentially could adopt legislation restricting operation of mortgage note registries to trust companies or similar entities;[19] however, such a law would only be valid if it applied equally to electronic and paper mortgage notes.[20] We are unaware of any state having imposed such a requirement, nor are we aware of any particular public interest or constituency that supports imposing such a requirement.

In these circumstances, we conclude that MERS may permissibly establish and operate the MERS® eRegistry for recording interests in electronic mortgage notes.

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We trust that the foregoing is responsive to your inquiry. Should you have any further questions, please do not hesitate to call me.

Very truly yours,

Mark E. Plotkin

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[19] *See* UETA § 3(d) ("A transaction subject to this [Act] is also subject to other applicable substantive law."); *see also* 15 U.S.C. § 7001(b)(1) (providing that E-SIGN does not "limit, alter, or otherwise affect" any rights or obligations under any other law or regulation).

[20] *See* UETA § 7(a); 15 U.S.C. § 7001(a) (providing that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form).