

# MERS to the 33<sup>rd</sup>

## 1. Thirty Three Questions to ponder.

MERS is an illusion to the masses. MERS works as designed. MERS members create the litigation issues for MERS. However, policies and procedures are a requirement for those whom in membership join MERS.

## 2. What do E-SIGN<sup>1</sup> and UETA<sup>2</sup> and MERS<sup>3</sup> have in common?

Answer: A common factor for E-SIGN and UETA's are that both of these acts deal with electronics, whether it is an *electronic* signature, or an *electronic* record that is created, generated, sent, communicated, received, or stored by electronic means in the a MERS eRegistry system or by other electronic information processing systems. MERS is designed to meet the guidelines of both E-SIGN and UETA. See [E-SIGN](#); [UETA](#); MBA 2004 presentation on the "[Legal issues in Mortgage Technology](#)".

## 3. Does UETA require an *electronic* digital signature?

Answer: UETA states nothing about requiring a digital signature or a security procedure, but does apply to the use of electronic signatures and electronic records.

A digital image or copy of a physical signature is not an electronic signature. See [UETA in Texas](#).

## 4. What is the MERS eRegistry?

Answer: MERS eRegistry is an eMortgage tool for the eMortgage world. It saves money and prevents confusion about who owns an eNote. It allegedly is the legal system of record that identifies the owner (Controller) and custodian (Location) for registered eNotes See [MERS eRegistry FAQ's](#).

## 5. What laws govern the MERS eRegistry?

Answer: E-SIGN, UETA. See [MERS eRegistry FAQ's](#).

## 6. Does MERS eRegistry have procedures or requirements?

Answer: Yes, and access for using MERS eRegistry requires membership.

---

<sup>1</sup> Electronic Signatures in Global and National Commerce

<sup>2</sup> Uniform Electronic Transactions Act

<sup>3</sup> Mortgage Electronic Registration Systems, Inc.; MERS eRegistry, MERS SPE, Inc.

# MERS to the 33<sup>rd</sup>

## 7. How can Members of MERS benefit by using MERS?

Answer: MERS members allegedly close on eNotes and sell them to the secondary market. Fannie Mae and Freddie Mac require that lenders use the MERS eRegistry. See [MERS eRegistry FAQ's](#).

## 8. What do MERS members create, transfer, assign, purchase or sell?

Answer: electronic promissory Notes, a.k.a. eNotes See [MERS eRegistry FAQ's](#).

## 9. What are eNotes?

Answer: Private labeled secondary electronic obligations called “*transferable records*” and governed by 15 U.S.C. [§ 7021](#); section [§ 322.016](#), and/or possibly by [§ 9.105](#), Tex. Bus. & Com. Code,

## 10. What is a transferable record?

Answer: A transferable record is an electronic oriented obligation governed by 15 U.S.C. . [§ 7021](#); section [§ 322.016](#), and is not a direct obligation of an underlying real property mortgage loan.

***Transferable Records.** (a) In this section, "transferable record" means an electronic record that: (1) would be a note under Chapter 3, or a document under Chapter 7, if the electronic record were in writing; and (2) the issuer of the electronic record expressly has agreed is a transferable record.*<sup>4</sup>

## 11. What law governs Transferable records?

Answer: E-SIGN; 15 U.S.C. [§ 7021](#); UETA; section [§ 322.016](#), Tex. Bus. & Com. Code.

## 12. What law governs electronic signatures?

Answer: 15 U.S.C. [§ 7001](#); section [§ 322.016](#), Tex. Bus. & Com. Code

## 13. How does an eNote [transferable record] originate?

Answer: By agreement between the party's. See 15 U.S.C. [§ 7001](#); section [§ 322.016\(a\)\(2\)](#)

---

<sup>4</sup> 15 U.S.C. [§ 7021](#); section [§ 322.016](#), Tex. Bus. & Com. Code

# MERS to the 33<sup>rd</sup>

## 14. Does the eNote create an equivalent of a negotiable instrument?

Answer 1: In a certain sense, yes. E-SIGN & UETA provides similarities for an electronic record as the equivalent of a negotiable promissory note in aspects only related to electronic laws governing the eNote. eNotes are not governed by [Chapter 3, Negotiable Instruments](#), Texas Bus. & Com. Code.

Answer 2: Section § 9.105, Texas Bus. & Com. Code provides for electronic chattel paper. See [§ 9.105](#)

Answer 3: Both E-SIGN, 15 U.S.C. [§ 7021](#); and UETA section [§ 322.016](#), are the governing laws for an electronic promissory note or *transferable record* that is created, generated, sent, communicated, received, or stored by electronic means.

## 15. What is electronic chattel paper?

Answer: The Uniform Commercial Code defines electronic chattel paper as chattel paper evidenced by a record or records consisting of information stored in an electronic medium. See [§ 9.105\(a\)\(b\)](#)

## 16. What is chattel paper?

Answer: The Uniform Commercial Code defines chattel paper as a record or records that evidence both a monetary obligation and a security interest in specific goods. If a transaction is evidenced by records that include an instrument or series of instruments, the group of records taken together constitutes chattel paper. See [§ 9.102\(a\)\(11\)](#)

## 17. What is a “general intangible”?

Answer: "General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software. See [§ 9.102\(42\)](#)

## 18. What is a “payment intangible”?

Answer: "Payment intangible" means a general intangible under which the account debtor's principal obligation is a monetary obligation. See [§ 9.102\(62\)](#)

# MERS to the 33<sup>rd</sup>

## **19. Doesn't a MERS member hold the tangible promissory note and deed of trust?**

Answer: E-SIGN & UETA are electronic laws and provide the requirements for electronic transactions. The commercial tangible business transactions for the tangible note and deed of trust consist of governing laws for the requirements of note negotiation according to Chapter 3, Negotiable Instruments and also the requirements for perfection of the deed of trust in section § 192.007, Tex. Loc. Gov. Code which would also need to meet the requirements for recordation eligibility in certain sections of chapters §5, §11, §12, and §13, Tex. Property Code.

Answer: No. All MERS mortgages (or deeds of trust) registered on the MERS System are recorded in the public land records. The MERS System is not a system of public record nor a replacement for the public land records. No interests in those mortgages (or deeds of trust) are transferred on the MERS System; they are only tracked. See [MERS FAQ's](#).

## **20. Can an eNote be admissible in evidence?**

Answer: Admissibility In Evidence. In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form. See section [§ 322.013](#)

Answer: Admissibility of electronic transactions to prove for enforcement of electronic contracts cannot be denied legal affect. However, the electronic contract is not an enforceable contract between a *tangible* residential mortgage loan borrower and lender.

## **21. How does the MERS eRegistry function?**

Answer: Electronically. As a bankruptcy remote, a special purpose entity/vehicle, an electronic agent. See section [§ 322.002](#)(3), (5), (6), (7), (11)

## **22. What functional actions take place in the MERS eRegistry?**

Answer: Transfers of interests in transferable records, a.k.a. electronic promissory notes that are created, generated, sent, communicated, received, or stored by electronic means. See section [§ 322.002](#)(3), (6), (11); section [§ 322.016](#)

# MERS to the 33<sup>rd</sup>

## **23. What is the function of the transferable record?**

Answer: A transferable record is an electronic equivalent of a negotiable instrument, but only used in an electronic world of eMortgages. A transferable record is not an Article 3, negotiable instrument.

## **24. What is the function of MERS eRegistry:**

Answer: MERS eRegistry is a system that electronically tracks transferable records, a.k.a. electronic promissory notes<sup>5</sup>, that are created, generated, sent, communicated, received, or stored by electronic means.

## **25. Does MERS track the paper promissory note?**

Answer: No. MERS only tracks electronic obligations [eNotes] registered on the MERS eRegistry.? MERS is electronic! See MERS procedures manuals.

## **26. Can MERS be a beneficiary of a deed of trust?**

Answer: Yes, as an agent MERS can be a beneficiary, but only if MERS is an agent of a lawful obligee of the paper promissory note, and the same with any subsequent tangible obligee, which is dependent upon assignment of rights according to law.

Answer: MERS acts as an electronic agent for the originating lender.

## **27. Can MERS be a nominee of a deed of trust?**

Answer: Yes, as an agent MERS can be a nominee, but only if MERS is an agent of a lawful obligee<sup>6</sup> of the paper promissory note, and the same with any subsequent obligee, which is dependent upon assignment of rights according to law.

Answer: MERS acts as an electronic agent for the originating lender.

## **28. Can MERS be a mortgagee in a deed of trust?**

Answer: Yes, but MERS is a mortgagee of an electronic personal property record.

Answer: MERS acts as an electronic agent for the originating lender.

---

<sup>5</sup> eNotes

<sup>6</sup> Proven lawful owner of paper promissory note

# MERS to the 33<sup>rd</sup>

## 29. Can MERS be an originating payee?

Answer: It may be possible for MERS to be an originating payee if it is noted in a transferable record.

Answer: Yes if it is noted on a tangible promissory note

Similar question: Could MERS be a subsequent payee?

Answer: Yes, if the eligible value of the transferable record was paid or credited according to E-SIGN; UETA; or § 9.105, Tex. Bus. & Com. Code.

Answer: Yes if the value was paid and the tangible instrument was eligible for negotiation,

## 30. Can MERS be an assignor or assignee?

Answer: Yes, MERS can be an assignor or assignee of a transferable record.

Answer: Yes, MERS is the assignor or assignee of a personal property mortgage, created by and with agreement, of an account debtor, an electronic obligee and MERS is the electronic agent for that intangible pledgor<sup>7</sup>.

## 31. Are assignments required by MERS members?

Answer: According to 15 U.S.C. 7021; and/or section § 322.016(4) Tex. Bus. & Com. Code, copies or revisions that add or change an identified assignee of an authoritative copy can be made only with consent of the person asserting control.

Answer: A transferable record is not an “instrument” for the purposes of perfection and priority because it is not an instrument in writing. See [§ 3.104](#).

## 32. Can an electronic record be retained as an original?

Answer: “(a) If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which:

- (1) accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and
- (2) remains accessible for later reference. See [§ 322.012\(a\)](#)”

---

<sup>7</sup> Account debtor

# MERS to the 33<sup>rd</sup>

Answer: “(f) A record retained as an electronic record in accordance with Subsection (a) satisfies a law requiring a person to retain a record for evidentiary, audit, or like purposes, unless a law enacted after January 1, 2002, specifically prohibits the use of an electronic record for the specified purpose”. See [§ 322.012\(f\)](#)

Answer: “(g) This section does not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction”. See [§ 322.012\(g\)](#)

### **33. Can assignments by MERS members be perfected?**

Answer: a security interest in a transferable record may be perfected by filing. See [§ 9.310\(a\)](#); and [§ 9.312\(a\)](#)

Answer: A security interest in a deed of trust is not governed by the UCC. See [§ 9.109\(d\)\(2\),\(11\)](#)

Answer: Non-UCC security interest in a deed of trust is perfected by recordation. See [§ 192.001](#)

Answer: A subsequent non-UCC security interest in a deed of trust is perfected by a subsequent recordation. See [§ 192.007](#)

**NOTE:** Article 9, Uniform Commercial Code is exempt from both E-SIGN & UETA.<sup>8</sup>

So, how does the alleged lender claim UCC 9 by using a transferable record governed by E-SIGN or UETA?

Now can you understand the difference between a *transferable record* and a secured residential mortgage loan?

---

<sup>8</sup> See [15 U.S. C. 7003](#); See section [§ 322.003](#), Texas Business and Commerce Code