

# North Carolina Electronic Mortgage Closing 101

A White Paper



**Electronic Mortgage Closing Advisory Committee**  
North Carolina Department of the Secretary of State

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## Message from N.C. Secretary of State Elaine F. Marshall



**Elaine F. Marshall**  
Secretary of State

*Electronic mortgage closing—or eClosing—is something the NC Secretary of State’s Office has worked toward for years. As North Carolina’s primary agency for business and financial capital formation as well as the administrator of NC’s Electronic Commerce Act, we have worked hard to grow our state’s electronic commerce footprint and marketplace.*

*North Carolina is prepared and uniquely positioned to lead the nation in this vital area of economic growth and development. For more than a decade the Secretary of State’s Office has helped construct a legal framework to give eCommerce the foundation to flourish in North Carolina by facilitating the implementation of electronic signatures, electronic notarization and electronic recording. The next step in that evolution is eClosing.*

*The aim of this white paper is to provide a clear roadmap for lenders, attorneys, realtors and other mortgage industry stakeholders to become early adopters. We designed this first-of-its-kind white paper with input from members of the NC Electronic Mortgage Closing Advisory Committee to give you a practical step-by-step guide to implementing eClosings.*

*I am asking North Carolina’s loan origination community to come on board as we work to make electronic mortgage closing easily available to homebuyers across our State. Change can seem daunting, but making electronic mortgage closings commonplace has tremendous potential to enhance consumer awareness and understanding of the process. Plus, the next generation of homebuyers expects to have the option to conduct such transactions electronically.*

*We want everyone to experience a “win” through a faster, better way to securely close mortgage loans. Now, I ask you to take the next step with us towards an even brighter future for eCommerce in North Carolina!*

*Elaine F. Marshall*

# Section 1.

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## Introduction

### EXECUTIVE SUMMARY

“Build it and they will come” is a widely embraced motto in the real estate industry. In North Carolina, the Department of the Secretary of State, joined by private sector participants in the mortgage industry, adopted the same rallying cry in establishing a legal and technological framework over the past 20 years for moving mortgages into the digital age. After some initial success, the housing crisis of 2008 and related federal disclosure requirements caused a hiatus in the spread of eMortgages. Now with home purchases rebounding, the eMortgage appears to be getting new life as industry participants discover that the digital process offers a quicker way to complete transactions safely and with all the legal validity of traditional closings. With the laws related to eSignatures, eRecordings and eNotaries now firmly established in North Carolina, **electronic mortgage closings are an idea whose time has come.**

To understand the growth of electronic mortgages in North Carolina, one must step back to 1998, when the North Carolina eCommerce Act was enacted. In passing that legislation, the Tarheel state became the first state to support eSignature service for all state agencies, municipalities and townships. That law remained on the books but had limited impact, as it applied only to state agencies and not to private parties. With the 2002 passage of the N.C. Uniform Electronic Transactions Act (UETA)<sup>1</sup>, private parties and state agencies could use electronic signatures to grant consent in the same manner as handwritten signatures. However, the UETA specifically exempted real estate transactions, so mortgages largely remained in the pen-and-paper world.

In 2005, several important pieces of legislation were passed in the N.C. General Assembly that equipped lenders and consumers to begin completing electronic mortgage closings. The Uniform Real Property Electronic Recording Act (URPERA) empowered the Secretary of State’s Office to begin drafting rules to allow various Registers of Deed offices to begin recording real estate transactions electronically. The Electronic Notarization Act also aimed to move the task of verifying the identity of individuals into the electronic age by allowing notarizations to be done electronically. However, this legislation did not modify the requirement that a notary be physically present at the time of the notarial act.

This set of laws form the framework of the eClosing process. Even while the legal structure was falling into place for North Carolina to enter the electronic mortgage age, the housing industry suffered a severe collapse. The number of existing homes sold annually in North Carolina in 2011 dropped to just 80,143 units, a 41 percent decline compared to annual home sales in 2005<sup>2</sup>. Foreclosures ballooned, and the number of mortgages written fell. However, since 2012 existing home sales have been on an upward trajectory. In 2017, existing home sales rose to 149,645 units, up almost 87 percent compared to 2011.

As the market continued to rebound, the previously built legal framework, combined with developments in technology, have revived the opportunity for entirely electronic processes. One venue to track the growth of eMortgages is the MERS eRegistry, which is the legal system of record for identifying the controller and location for the authoritative copy of a registered eNote. The number of electronic promissory notes (eNotes) recorded in the MERS eRegistry has steadily risen to 339,881 in October 2017. Currently, 40 eNotes are being registered every week.

In North Carolina, there have been three entirely electronic mortgage closings. The first occurred on May 5, 2017. The borrowers were a couple refinancing their home, the lender was North State Bank, and the closing attorneys were with the Hunoval Law Firm from Charlotte. A crucial element to completing eClosings is having enough notaries trained in electronic notarization across the state so buyers and sellers can find a notary nearby. North Carolina is well positioned in this regard as North Carolina has nearly 2,200 active electronic notaries, and the state’s many community colleges stand ready to train new ones as needed.

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<sup>1</sup> Uniform Electronic Transactions Act, N.C. Gen. Stat. § 66-311

<sup>2</sup> Data from NC Realtors, a trade association of real estate professionals. For more, go to: <http://www.ncrealtors.org/market-statistics-about-ncar-menu.html>

At a national level, a movement has burgeoned toward creating an entirely electronic mortgage process. Fannie Mae and Freddie Mac, the government-sponsored enterprises (GSEs) which are the largest buyers of mortgages, have been purchasing eMortgages for several years.

Lenders are required to obtain GSE approval to deliver eMortgages. Once approved, a lender's Master Selling and Servicing Contract is amended to authorize eMortgage deliveries and/or servicing. Both Fannie and Freddie offer an "eMortgage readiness review process," which includes a review and testing of a lender's processes and technology to ensure it complies with the GSE's requirements<sup>3</sup>. Additionally, the Mortgage Industry Standards Maintenance Organization, Inc. (MISMO), a wholly-owned subsidiary of the Mortgage Bankers Association, has created the standards and tools to create, transfer and record electronic mortgage documents. Finally, the eNotes get registered on the MERS eRegistry, which is owned and operated by MERSCORP Holdings, Inc., while an authoritative copy is stored in an electronic vault (eVault) with the holder of the note acting as the control party of the records.

In short, the standards, tools and legal framework have been built for North Carolina and other states to transition to electronic mortgages. It's time for the real estate industry to embrace the shift.

## PURPOSE

This white paper is designed to explain to industry participants (real estate agents, mortgage lenders, attorneys and title insurers) and consumers the steps required to create an end-to-end eMortgage without any paper, without wet signatures and without the need for consumers to travel to an attorney's office for a closing. It calls for mortgage industry participants to embrace electronic mortgages. With faster transactions come the possibility of an increased number of closings and the attendant possibility of greater volumes for attorneys, lenders, real estate agents and title insurance companies. Additionally, this white paper is meant to assure industry participants that electronic mortgages are just as safe and have the same legal validity as traditional mortgages. The process places a premium on security. Borrowers are required to present identifying documents to a notary, who must be in their physical presence. In addition, authentication steps are required to ensure that changes to a signed document are made evident. Of course, buyers and sellers always have the option of falling back on a traditional paper-based closing if the Internet connection is lost or technical issues derail an eClosing. It is also designed to survey the status of various "e" laws in other states and highlight the steps needed for these states to transition to electronic mortgages.

This white paper is designed to highlight the importance of maintaining North Carolina's traditional reliance on notaries being physically present for mortgage closings. Showing that a notary's personal appearance provides protections and does not delay the process is necessary to rebut the suggestion that remote or online notaries are more efficient. Physical appearance merely ensures that the borrower appears in person, his or her identity is confirmed, and the borrower attests that he or she is signing of his or her free will. A small number of states have allowed remote notarizations, where notaries located many miles away from the borrower video chat via an online connection and purport to verify the identity and intent of a borrower. North Carolina has built a robust electronic notarization framework without sacrificing the personal appearance requirement.

## CHALLENGES

As early industry participants have discovered, various hurdles must be overcome before all mortgages can be transitioned to the digital realm. Currently, 82 of 100 county Registers of Deeds in North Carolina record documents electronically. Among those that do, title gaps exist between information that can be updated online and at the time of completion of electronic recordings. These gaps are present even with paper recordings but take on greater prominence in the electronic realm. That can create nervous moments for buyers and sellers, especially in North Carolina, which remains a rare "race" recording state in the country.

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<sup>3</sup> [https://www.fanniemae.com/content/technology\\_requirements/emortgage-delivery-guide.pdf](https://www.fanniemae.com/content/technology_requirements/emortgage-delivery-guide.pdf)  
[http://www.freddie.com/singlefamily/sell/pdf/emortgage\\_seller\\_servicer\\_approval\\_requirements\\_checklist.pdf](http://www.freddie.com/singlefamily/sell/pdf/emortgage_seller_servicer_approval_requirements_checklist.pdf)

A “race” state means simply that the first buyer who records a deed at the Register of Deeds office in the county where the property is located gets priority of title over others recorded later in time, irrespective of whether the recording buyer was aware of an earlier buyer who may have purchased the property but did not record the transaction. It is thus a “race” to record the purchase of the property. In addition, the process of eRecording is not entirely seamless, and many attorneys choose to physically have an attorney or paralegal at the Register of Deeds office to update the title on-site, to alert the office when to submit if the title is clear and to address any issues in case an electronic recording does not go through as planned. Further, Registers of Deeds have variations in their technologies and processes, which can frustrate participants who would prefer a more uniform recording process across counties. For example, some Registers of Deeds only record deeds at particular times, so an untimely eClosing may mean the transaction is not recorded until the next day. The N.C. Electronic Recording Council is developing best practices to address these issues, and the Real Property section of the North Carolina Bar Association is also studying potential remedies.

Nationally, the move toward “e” remains steady, though challenges remain. A GSE survey of industry participants on the top challenges to transitioning to eMortgages faced by stakeholders identified the following<sup>4</sup>:

- Intra-industry dependencies. (Stakeholders seem to be waiting for someone else to make the first move.)
- The GSE requirement to deliver eNotes in MISMO SMARTDoc v1, and the complexity associated with this older technology.
- Lack of clarity and alignment among the enterprises’ policies and procedures.

All innovations face growing pains, and electronic mortgages are no different. Yet, the clear, unquestioned trend appears to be that eMortgages are the path forward. It’s only a matter of time before all industry participants embrace the change.



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<sup>4</sup> [http://www.freddiemac.com/singlefamily/images/emortgage\\_adoption\\_followup\\_report.pdf](http://www.freddiemac.com/singlefamily/images/emortgage_adoption_followup_report.pdf)

## DEFINITIONS AND FREQUENTLY USED TERMS

### CFPB

Consumer Financial Protection Bureau is an agency of the United States government responsible for consumer protection in the financial sector.

### Electronic Closing (“eClosing”)

An eClosing is the act of closing a mortgage loan electronically. This occurs through a secure environment(s) where one or more required closing documents are accessed, presented, and signed electronically.<sup>5</sup>

### Electronic Mortgage (“eMortgage”)

A mortgage loan where the closing documents -- through an eClosing process that includes, at a minimum, the Promissory Note -- are created, accessed, presented, executed, transferred and stored electronically.<sup>6</sup>

### Electronic Notary (“eNotary”)

A notary public who is authorized by the Secretary of State the capability of performing electronic notarial acts in conformance with law.<sup>7</sup>

### Electronic Note (“eNote”)

The electronic promissory note, or eNote, is often viewed as the most important piece of a digital mortgage because its validity is critical to the successful sale into the secondary market and the holders’ ability to legally enforce the eNote.<sup>8</sup> An eNote is a Transferable Record that can be registered on the MERS eRegistry. A Transferable Record created in conformity with the requirements of eCommerce laws is the functional equivalent of a paper negotiable promissory note and is just as enforceable against the borrower as its written counterpart.<sup>9</sup> (See Section 5. Future Issues and Contingency Plans).

### Electronic Record (“eRecord”)

A record created, generated, sent, communicated, received, or stored by electronic means.<sup>10</sup>

### Electronic Signature (“eSignature”)

An electronic sound, symbol, or process attached to, or logically associated with, a record and executed or adopted by a person with the intent to sign the record.<sup>11</sup>

### Electronic Vault (“eVault”)

An application that serves as an electronic repository for delivery and storage of eNotes and other mortgage-related files.<sup>12</sup> Once the eNote is created and executed, it needs to be managed correctly. Using an electronic vault, authorized users can perform key actions regarding the eNote including registration, eDelivery, transfer, and life of loan events. Additionally, the eVault that is designated as the location for a given note holds the “authoritative copy”, or electronic original. The eVault also allows for verification, authentication and auditability of the eNotes and provides mortgage originators, warehouse lenders, investors, services and custodians the control needed to manage their electronic assets.<sup>13</sup>

5 MISMO eMortgage Glossary available online at <http://www.mismo.org/Documents/MISMO/Doc-uments/eMortgageGlossary.pdf>

6 MISMO eMortgage Glossary available online at <http://www.mismo.org/Documents/MISMO/Doc-uments/eMortgageGlossary.pdf>

7 N.C. Gen. Stat. § 10B-101 (3)

8 "Digital disruption brings mortgage into the 21st Century" industry whitepaper by eOriginal <https://www.eoriginal.com/blog/white-papers/digital-disruption-brings-mortgage-21st-century/>

9 "Enabled by lenders, embraced by borrowers, enforced by the courts: what you need to know about enotes." By Margo H.K. Tank and R. David Whitaker, Buckley Sandler LLP <http://www.mersinc.org/mers-registry>

10 Uniform Electronic Transactions Act, N.C. Gen. Stat. § 66-312(8)

11 Uniform Electronic Transactions Act, N.C. Gen. Stat. § 66-312(9)

12 Mortgage Innovation: eNote and the MERS eRegistry (slide presentation)

13 "Digital disruption brings mortgage into the 21st Century" industry whitepaper by eOriginal <https://www.eoriginal.com/blog/white-papers/digital-disruption-brings-mortgage-21st-century/>

### Hybrid eClosing process

A signing process for documents in the mortgage industry in which certain documents are printed and signed on paper while other documents are signed electronically.<sup>14</sup>

### MERS Systems

Mortgage Electronic Registration Systems, Inc. A national electronic registry system that tracks the changes in servicing rights and beneficial ownership interests in mortgage loans that are registered on the system. MERSCORP Holdings, Inc. owns and operates the MERS System and the MERS eRegistry.

### MERS eRegistry

The system of record that identifies the owner (Controller) of a registered eNote and the custodian (Location) of the authoritative copy of the eNote.

### MIN

Mortgage Identification Number. The MIN is a unique 18-digit number that is permanently assigned to a mortgage loan registered on the MERS System or an eNote registered on the MERS eRegistry. The MIN is composed of a MERS System Member's 7-digit Org ID, a 10-digit sequence number, and a Check Digit.<sup>15</sup>

### MISMO

Mortgage Industry Standards Maintenance Organization, Inc. is the voluntary standards development body for the mortgage industry. MISMO is a wholly owned subsidiary of the Mortgage Bankers Association.<sup>16</sup>

### Notary's Electronic Signature

Forms of electronic signature which have been approved by the N.C. Secretary of State, as authorized in G.S. 10B-125, as an acceptable means for an electronic notary to affix the notary's official signature to an electronic record that is being notarized.<sup>17</sup>

### Streamlined eClosing

The process to eSign all the lenders documents, (non-notary) ahead of closing in the comfort of their home and the remaining legal title collateral documents are completed (eNotarized) the day of electronically.

### UETA

Uniform Electronic Transactions Act.<sup>18</sup>

### URPERA

Uniform Real Property Electronic Recording Act.<sup>19</sup>

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14 MISMO's eMortgage Glossary

15 MISMO's eMortgage Glossary

16 MISMO's eMortgage Glossary

17 N.C. Gen. Stat. § 10B-101 (7)

18 N.C. Gen. Stat. § 66-311

19 N.C. Gen. Stat. § 47-16.1.

## Section 2.

# Benefits of eClosing

### BENEFITS TO NORTH CAROLINA

eClosings of home mortgage transactions offer powerful new tools that speed transactions, ensure greater data and document compliance and control and create real world efficiencies and cost savings for North Carolina businesses and government services. These greater efficiencies and cost savings will in turn enable North Carolina to better compete in an increasingly competitive global marketplace. Driving down the cost of closings will trim the cost of doing business for lenders and consumers, making North Carolina's real estate prices more competitive and thereby the state's economy more productive compared to other states. Having a legal framework that enables eClosings will allow more lenders to operate profitably and reduce compliance risk thus drawing more businesses to use North Carolina's closing process over those of other states. Helping reduce the cost of closings will allow North Carolina registers of deeds to record transactions in a more timely and consistent manner. And of course digital filings will mean millions in saved postage and paper costs.

### BENEFITS TO CONSUMERS

Any borrower making a down payment for a house or refinancing a home must understand the risks and rewards of such an investment. In practice, consumers in traditional closings have not had the time to examine the various disclosures provided by lenders. Typically, closings are held at an attorney's office, with little time for a home buyer to review and understand the various documents he or she is signing. eClosings help change that by requiring lenders to provide closing documents to attorneys and allowing attorneys and lender to provide these documents well in advance of the closing. Consumers then have plenty of time to review and understand the risks involved in preparation of the closing.

**In an eClosing pilot conducted by the Consumer Financial Protection Bureau (CFPB), consumers who participated in an eClosing were better prepared and more informed as to the information and documents they were signing compared to consumers participating in a paper-based closing.<sup>20</sup>**

Among the key findings of the pilot study were the following:

- On average, eClosing borrowers in the pilot had higher scores than paper borrowers on measured outcomes, including perceived empowerment, understanding (perceived and actual), and efficiency. For purchase transactions in the pilot, borrowers experiencing an eClosing scored higher than consumers in the paper closing group on perceived understanding and actual knowledge, and the relationship was even more pronounced in measures of perceived empowerment.
- Consumers who received and reviewed documents before the closing meeting reported feeling more empowered in the closing process, with higher levels of perceived understanding and efficiency. Additionally, these consumers had higher scores on the actual understanding quiz relative to those who did not review documents before the meeting.
- eClosing transactions in the pilot exhibited shorter closing meetings and earlier document delivery, which matched higher scores on consumer perceptions of efficiency.
- First-time homebuyers, low/moderate income borrowers and borrowers with the most years of formal education all had the largest positive gains between paper and eClosing.

<sup>20</sup> "Leveraging technology to empower mortgage consumers at closing: Learnings from the eClosing pilot" report by the Consumer Financial Protection Bureau (2015)

## BENEFITS TO INDUSTRY

For attorneys involved in closings, once documents are recorded, the closing attorney must call the parties who then must return to the settlement office to pick up funds, commissions and keys. Using eClosing and eRecording may streamline this process and shorten the time frame, though the process is not without various legal and practical hurdles.

While the use of eClosing technology does not change any of the underlying state law requirements, these tools make it much easier to comply with them. For instance, the use of electronic documents and electronic recording eliminates the manual processes of sorting, scanning and e-mailing electronic documents for funding review after coming from the closing table, which can save up to 30 minutes per transaction.

There may be an initial cost for software registrations, equipment and notary set up. But over time, eClosings will cut down on overall costs for attorneys as well, because there will be no paper, toner, paper filing, storage, shipping and other related costs.

For lenders, the benefits may range from faster and more efficient closings to greater certainty and security in tracking the documents. For example, one private technology company that provides an eClosing application estimates its tools help lenders save as much as \$600 per loan while delivering faster and more accurate closings.<sup>21</sup> In addition, the MERS eRegistry identifies the party who is the controller who obtains rights equivalent to those granted to a holder of a promissory note, which includes the right to enforce the eNote against the borrower. The MERS eRegistry does not store the actual eNote, which is stored in an eVault, but instead only stores and tracks identifying information about it, including the eNote's digital fingerprint, which is provided at the time of registration and permits the testing to confirm that the authoritative copy has not been altered since it was registered on the MERS eRegistry. The party that maintains the authoritative copy of the eNote is designated as the Location on the MERS eRegistry. Using an eNote instead of a paper promissory note ensures lenders can operate with the assurance that a note can be retrieved if the borrower defaults on payment. Additionally, it helps preclude situations that arose during the housing crisis when several lenders had trouble producing the original note in a courtroom because the note had been resold several times.<sup>22</sup> The North Carolina Bankers Association pointed out in a recent article that lenders already keep many essential mortgage documents in electronic form, so a fully digital process simply allows lenders to sell these notes to investors much sooner, which can translate into more money per transaction, as investors pay a premium for speed.<sup>23</sup> In addition, a primary motivator for one lender participant to begin offering eClosings was to, “stay off of the Consumer Protection (CFPB) consumer complaint database.”

The benefits of digital mortgage are not limited to the closing process. Investors play an integral role in maintaining a robust secondary market and are the engines driving today's digital financial ecosystems. Technology can be used to verify the authenticity of the eNote and provide an online platform through which assets can be properly tracked and transferred. Having “certainty” is critical to funding and overall valuation, especially for organizations that require the ability to securitize, pool or pledge assets in the secondary market. For investors, the eClosing process ensures that there will not be any missing data, signatures or documents and virtually eliminates the post-closing issue of dealing with missing trailing documents before they can fund the loan. Reducing the time to fund allows investors to deliver a better service to originators, ensures earlier payment for all parties and creates significant secondary market efficiencies as well.

<sup>21</sup> <http://www.pavaso.com/lenders.html>

<sup>22</sup> <http://www.nytimes.com/2009/10/25/business/economy/25gret.html?mcubz=1>

<sup>23</sup> “The transition to electronic and digital mortgages as a new norm,” by Nathan Batts, Carolina Banker magazine, Fall 2017

## Section 3.

# How to Transition to eClosings for Each Stakeholder Group

## PRIMER ON RESIDENTIAL CLOSINGS IN NORTH CAROLINA

An eClosing does not change any of the traditional requirements of a real estate closing or the attorney's responsibilities to the various parties involved. In addition, all parties must comply with the laws of the state in which the property is located.

In North Carolina, a closing must be handled by a N.C. licensed attorney (or a non-attorney acting under the attorney's direct supervision). The North Carolina State Bar has defined the term "closing" in an Advisory Opinion.<sup>24</sup> The Opinion itemizes a list of tasks necessary to complete the transaction, as well as the particular actions which are, by statute the practice of law.<sup>25</sup> The opinion then summarizes by stating:

*"These and other functions are sometimes called, collectively, the "closing" of the residential real estate transaction. As detailed [therein], the North Carolina General Assembly has determined specifically that only persons who are licensed to practice law in this state may handle most of these functions."*

In a residential transaction involving a sale of property as well as mortgage financing, the North Carolina Bar Association and North Carolina Association of Realtors "Form 2T Offer to Purchase and Closing" (used in almost all residential transaction) defines a "closing" as:

*"The proper execution and delivery to the closing attorney of all documents necessary to complete the transaction contemplated by this Contract, including the deed, settlement statement, deed of trust and other loan or conveyance documents, and the closing attorney's receipt of all funds necessary to complete such transaction."*

The closing and certifying attorney must:

- Examine and provide an opinion on title to the real estate on the public records and obtain a title insurance commitment addressing requirements for the appropriate coverage (lender and owner). For title insurance purposes, the N.C. attorney certifying title must be on the "approved list" of the title insurer issuing the coverage.<sup>26</sup>
- Prepare all documents to be recorded (deeds, deeds of trust or others).
- Verify that all documentation, payoff verifications, lien waivers, etc. meet all requirements of the title insurance commitment. Assure all documents required for the closing are properly signed and properly notarized, and comply with all local requirements for recording. Scan documents and either fax or email them to the lender for Funding Approval.
- Update record title to the real estate on the public record to ensure that title has not been impaired since the date of their last title search.
- Submit or deliver the documents to be recorded to the applicable Register(s) of Deeds for recording, along with required certifications, recording fees, convenience charges, transfer/excise taxes and eRecording fees.
- Notify all parties when the documentation has actually been recorded and title priority assured.

Only after all the above, can funds be disbursed, under the Good Funds Settlement Act.<sup>27</sup>

24 Authorized Practice Advisory Opinion 2002-1 (adopted Jan. 24, 2004, revised Jan. 26, 2012)

<http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/authorized-practice-advisory-opin-ion-2002-1/>

25 N.C. Gen. Stat. §§ 84-2.1 and 84-4

26 N.C. Gen. Stat. § 58-26-1

27 N.C. Gen. Stat. Chapter 45A

## PRACTICE AND PROCEDURES FOR STAKEHOLDERS TRANSITIONING TO ECLOSINGS

### Attorneys

Checklist for attorneys wanting to transition to eClosings:

Below are some of the items a transitioning attorney will want to consider in moving into electronic mortgages. It would be wise to form a team internally. This team should train and handle the first eMortgage/eClosing, after which these individuals can train other team members. Lastly, consider whether the staff is prepared to enter the next phase of the industry with an enthusiastic and open mindset. If not, it is critical to quickly develop such a culture. Are you prepared for electronic mortgage closings?

- Review your workflows to make sure they meet your eMortgage/eClosing needs.
- Get the technology to support eMortgages. This includes scanners, laptops, eNotary commissions and signing devices. Consider integrating with the MERS eRegistry to obtain the necessary technology and connectivity.
- Learn the eCommerce terminology: eMortgage, eClosing, eNotary, eRecord, eCollaboration, eSigning, eVault.
- Research the electronic mortgage tools from a lender's perspective for the lenders with whom you anticipate doing business: Point of Sale (POS), Loan Origination Software (LOS), Doc Providers, eSigning devices.
- Prepare to communicate and integrate with multiple tech providers to process eMortgages and eClosings.
- Gain an understanding of the jurisdictions you operate in and their eRecording capabilities – current and anticipated.
- Review the counties you cover (and states) and understand which counties can do a complete eMortgage, an eClosing hybrid, or a traditional paper closing.
- Just because a county eRecords, it does not mean it eRecords all document types. If a county limits the types of documents it eRecords, encourage the office to open its process to recording more types of documents. If a county is set up to record one type, it can record them all.
- Ensure the eRecording platform(s) you currently use have the widest coverage for the counties in which you intend to handle eClosings. If not, perhaps you need to find additional vendors appropriate to those counties.
- Research whether the counties you work in are up to date or whether you need an abstractor at the Register of Deeds to update so you can eRecord. In a “race state” like North Carolina, where documents must be recorded to ensure priority, this is essential so the buyer and lender have good title to the real estate.
- Understand the parties with whom you would be working. For example, the lenders chose the tools; therefore you need to be prepared to work with them.
- Research various eSignature tools available, and be ready to sign up with the applications your lending partners are using. The three basic eSigning tools are:
  1. Borrower signs on a signature pad (biometric).
  2. Borrower uses machine generated font based electronic signature “click” sign document.
  3. Borrower signs via touch screen and stylus.
- Familiarize yourself with the N.C. Department of the Secretary of State's list of approved electronic notary solution providers at: [https://sosnc.gov/divisions/notary/e\\_notary\\_solution\\_providers](https://sosnc.gov/divisions/notary/e_notary_solution_providers).
- Determine if the real estate brokers with whom you transact business are up to date on Closing requirements, including approvals of their customers, both sellers and buyer-borrowers.
- Find out if they need education to work with you through the process.
- Determine if they understand the stricter time lines and the necessity for earlier delivery of information for closing.

## Lenders

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Steps to getting started:

Lenders originating eNotes must go through an integration effort with MERSCORP to become active on the MERS eRegistry and obtain a MERS Org ID number. For additional information, go to: <https://www.mersinc.org/products-services/mers-system>.

Ensure that your Loan Origination System has the needed data fields, i.e. the right software code, to identify the document package type (eMortgage). Qualifying questions:

**4. Do you:**

- Only originate and sell serviced release?
- Originate and retain?
- Self-fund or use warehouse credit line?

**5. Who do you primarily sell to?**

If Fannie or Freddie, you will need to fill out seller questionnaire to get approved.

**6. Who is going to do the closing?**

Will need to set them up for training and access.

Are they educated on the need to obtain and deliver documents and information earlier than in the past to meet the technological as well as legal timelines in getting completed documents for review to consumer-borrowers?

**7. Do you sell loans with the servicing rights retained or released?**

If retained, need to be sure servicing company has access to an eVault.

**8. Business Partner Readiness**

Confirm that the warehouse provider is ready to support eMortgages.

If you use a sub-servicer, check to see if they:

- Have an eVault through which they can perform MERS eRegistry updates
- Would rely on you to perform these updates based on information provided by them and create procedures accordingly

If you do not retain servicing, check with investor to see if their servicing release options have any servicers that can support eMortgage servicing.

## Real Estate Agents

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As representatives for buyers and sellers, real estate agents play a crucial role in the transaction. Beyond educating parties on the details of the real estate itself, the agent often guides the parties through the various steps involved in a real estate transaction. As the main go-between, the real estate agent can play a crucial role in facilitating eClosings. Quicker transactions and greater volumes means the agent can get his or her fees faster than in paper transactions.

Checklist for real estate agents to transition to eClosings:

- Get sellers' and borrowers' written approval early on to conduct an eClosing.
- The listing and selling agents must encourage the client to provide disclosures to the lender in an electronic format.
- Obtain all inspections and reports, addressing potential problems to closing, and providing all invoices for repairs, home warranties etc. well in advance of the closing so these do not trigger re-disclosures, which may delay an eClosing.
- Consider using the standard closing contract. The North Carolina Real Estate Commission has reviewed its Form 2T standard form contract and concluded that the form can be used to conduct an eClosing in North Caroli

## PROCEDURES AND TECHNOLOGY

Checklist of technical requirements:

- eVault Provider
  - Need an approved eVault and interface to MERS eRegistry.
  - Need storage and security for eNotes and ability to prove authenticity of documents.
- MERS eRegistry Relationship
  - Become a MERS System Member.
  - If already a MERS System Member, then sign the MERS eRegistry Addendum.
  - Must complete the MERS Testing Grid that is generated by MERS based on policies and procedures.
    - MERS requires all business partners (e.g. servicers, investors, eWarehouse) be defined and willing to test via the MERS testing grid.
- Document Provider
  - Technology solutions provider documents are integrated with both hosted and on premise software.
  - Technology solutions provider documents can now be uploaded to a hosted solution.
  - Other service providers are available on premise.
- Documents Execution
  - Electronically signed eNote is required for the MERS eRegistry.
  - All other closing documents can be eSigned.
  - Documents must be eNotarized using an eNotary solution approved by the N.C. Secretary of State.
  - To see a list of approved solutions, please visit [https://www.sosnc.gov/divisions/notary/e\\_notary\\_solution\\_providers](https://www.sosnc.gov/divisions/notary/e_notary_solution_providers).
- GSE Relationships
  - Fannie Mae and Freddie Mac have their own requirements for partnering with them on the MERS eRegistry.

Lender's Checklist	
Company	
Address	
Website	
Contact(s)	
LOS	
Average Monthly Closed Loans	
Scope	
Business Channel	
Existing Customer	
Proposed/Desired Completion Date	
Title Closing/Attorney Company	
eClosing Location/Jurisdiction	
Retain Servicing? (eVault)	
Investor Selling to (eWarehouse)	

## Implementation Details

Solution Dependencies	
• Industry	
• Company	
• Product	
• System	
Document Provider	
• Technology Solutions Provider	
• Proprietary	
• Other	
eSign Technology	
• Hosted	
• On Premise	
MERS Certification	
• Existing MERS Relationship	
○ MERS Org ID	
• MERS eRegistry Relationship	
○ MERS eRegistry Functionality	
▪ Registration	
▪ Transfer	
▪ eDelivery	
GSE Certifications	
• Freddie Mac	
• Fannie Mae	
eNote Strategy	
• eSign	
• Ink Sign	
• Specific Investors	
○ Specific Programs (or all)	
▪ Always eNote?	
Notarization Strategy	
• Electronic Notarization (Total eClosing)	
• Ink Signed Notarization (Hybrid eClosing)	
• Title Company/Closing Attorney	
Training Strategy	
• Approximate number of participants	
○ Define groups (i.e. Lenders, Agents etc.)	
• Describe eClosing process flow	

### Key Components of the Technology Solutions Provider's Technology

- **eVault:** The technology solutions provider eVault provides mortgage originators, warehouse lenders, investors, servicers and custodians the control needed to manage their electronic assets. The technology solutions provider eVault is proven at scale across a multi-asset client base and is both non-MERS eRegistry and MERS eRegistry enabled, offering flexibility to organizations needing to operate in both worlds.
- **eNote Creation:** Historically, mortgage originators were held back by a limited number of document providers that could create the MISMO SMARTDoc eNote and a lack of collaboration by these parties. The SMARTDoc format is the only format accepted by both Fannie Mae and Freddie Mac. This is no longer a roadblock, as the technology solutions providers are able to generate the eNote independent of an originator's document vendor capabilities.
- **Hybrid eClosing:** Hybrid eClosings are a reality in the complex world of state, county, investor and other third-party constraints. Rather than fighting to get the perfect solution, the hybrid closing can be embraced to achieve scale and reap the benefits now. The technology solutions provider's solution integrates into your closing process, and just as critically, the closing process of the engaged settlement party.
- **Full eClosing:** With gaining acceptance of eNotarization across the country, a full eClosing can be a reality. The technology solutions provider platform provides this capability through open integration to industry leading eNotary and eRecording solutions.

### GSE Requirements for Technology Platforms

The move to eMortgage can be expedited by using a platform that provides a flexible set of capabilities and workflows that fit the geographic and product footprint of the lender operation. At this time, eMortgage adoption is being led by participants selling to Government Sponsored Enterprises, i.e. GSEs, especially Fannie Mae and Freddie Mac. The GSEs have set forth a list of capabilities that technology platforms utilized by their lenders (sellers/servicers) must meet. At a high level, these requirements include:

#### eNote Creation and Closing Vaulting

Although these are the minimum requirements for a note to be sold to the GSEs, additional technology capabilities can be provided as part of an all-encompassing eClosing solution. The key components include:

- **Document creation:** The creation of the eNote version 1.02, moving to 3.0 in the near future. Standard PDF documents. Additionally, a technology vendor needs to provide these documents electronically, either pre-tagged or relying on the closing solution to apply the closing signature tags. eNotary: An approved eNotary solution must be used. eNotary solutions must be registered with the N.C. Secretary of State.
- **eClosing:** A platform is necessary that enables the participants, however broad or narrow, to execute the documents within a given mortgage package. This can include the note, documents not requiring notarization and documents requiring notarization.
- **eVaulting:** Once executed, the documents of the loan package, especially the eNote, must be transferred to the eVault.
- Vendor must be approved by Fannie Mae.

#### eClosing: Signing of eNote, Signing of Documents, Notarization of documents

- eSigning technology requirements vary by the provider of the signing solution. At a minimum, the signing room needs to have access to at least one device that has an Internet connection and can run a modern browser. Additional requirements might include additional devices (up to one per signer) and any specialized hardware required by specific vendors.
- If the loan is intended for sale to one of the GSEs, and the eClosing includes an electronic version of the Promissory Note, the originator will first need the capability (or a partner with the capability) to produce and sign an eNote in a SMARTDoc format. They will also need access to an eVault with access to the MERS eRegistry in which to store the eNote, then transfer it to investors.

## Section 4.

# Legal Framework for eClosings

Over the past 20 years, several pieces of legislation have been approved by the N.C. General Assembly that forms the legal basis for eMortgages and eClosings in the state. Chief among these are the three statutes and attendant rules that deal with electronic signatures, electronic notarizations and electronic recordings of real estate transactions.

### ELECTRONIC SIGNATURES

#### a) N.C. E-Commerce Act of 1998

In 1998, shortly after taking office for her first term, Secretary of State Elaine Marshall became an e-commerce trailblazer when she championed the N.C. E-Commerce Act. This law enabled electronic transactions by state agencies, determined whether or not the agency possessed specific authority to use electronic signatures or if they complied with the Electronic Commerce Act and the implementing rules. As ground-breaking as this Act was, its reach was limited, as it did not apply to transactions between private parties.

Business-to-business, private-to-private and similar transactions, where public agencies are not parties, were not affected by the Act or implementing rules.

#### b) Uniform Electronic Transactions Act (UETA)

In the late 1990's, the National Conference of Commissioners on Uniform State Laws had finalized their draft of the Uniform Electronic Transactions Act (UETA). The successful adoption of this uniform act by 47 states and the District of Columbia heralded the beginning of widespread legal recognition of electronic transactions, since this act did expressly apply to transactions between private parties. North Carolina passed UETA in 2000.

Essentially, UETA was designed to be agnostic; it allowed parties to agree, either expressly or by their actions, to conduct business electronically by making those transactions fully legally recognized and enforceable. UETA did NOT specify types of electronic signatures that were appropriate for differing types of transactions. Instead, it took the tack of allowing the parties to establish the level of assurance that they considered adequate for differing transaction types.

Following the approval of UETA, several types of electronic signatures developed to which we, as internet consumers or on-line banking customers, are accustomed but which we may not think of as a "signature" in the traditional sense. Usernames and passwords are widely adopted and understood concepts, as are signing pads in retail establishments or the "click through" used by a customer (such as clicking on an "I Agree" button) when accessing information on-line. For many applications, the security provided by the username and password approach is more than adequate for their purposes; this method also has the not-to-be-underestimated ease of adoption principle in hand. Usernames and passwords can be communicated via e-mail (with certain safeguards in place) and don't require the consumer to have any special digital certificate or other device to access services.

In the three states (Illinois, New York, and Washington) that have not passed a version of the UETA, participants can rely on the Electronic Signatures in Global and National Commerce Act (ESIGN), federal legislation that became effective October 1, 2000. ESIGN states that in any transaction affecting interstate or foreign commerce:

- A signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and
- A contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation.

### c) North Carolina Electronic Notary Act

NC UETA specifically exempted certain types of transactions from its jurisdiction, such as the execution of wills, codicils and trusts. Additionally, an important area on this new frontier was not fully addressed: electronic notarization.

So, while the necessity of placing a seal on paper by hand was removed, there was no specific authorization for electronic notarization to begin. This hole in e-commerce was filled in 2005 with the passage of the Electronic Notary Act (Chapter 10B of the General Statutes), which also specifically enabled electronic notarization in Article 2 of Chapter 10B.

## **URPERA: The Driving Factor Behind eNotarization**

The Uniform Real Property Electronic Recording Act was also passed in 2005 and aimed to do exactly what the title implies: allow real property documents to be electronically recorded in Registers of Deeds offices.

This new law authorized the Secretary of State to adopt standards to implement electronic recording upon recommendation of a council made up of various stakeholders. The Electronic Recording Council (ERC) consists of seven (7) Registers of Deeds and one (1) member each from the NC Bar Association, the NC Bankers Association, the NC Society of Land Surveyors, the NC Land Title Association, the NC Association of Assessing Officers and the NC Department of Cultural Resources.

The ERC toiled over these standards for many months and countless hours. By April 2007, the standards were complete and adopted by Secretary Marshall.

As of July 2018, 82 counties in NC have begun electronically recording pursuant to the ERC standards, with an additional 5 expected to begin eRecording in the next twelve (12) months.



## **eNOTARIZATION: A Primer**

When it came to authorizing electronic notarization, it was important to take special care in how this concept would actually be carried out – there was a necessary balance to strike between making eNotary transactions uncomplicated for the notary and signer but also safe and provable over time. To ignore or dismiss the important concerns over security and long-term retention and archivability would be to lead North Carolina down the wrong road as well as endanger adoption of these new electronic processes due to distrust of their reliability over time. These concerns, coupled with the historically essential duties of the notary, led to the following requirements:

- The eNotary must comply with all current notary laws;
- Personal appearance must be identical to ‘traditional’ notarizations;
- Proof of identity of the signer is required to be identical to the paper world;
- The eNotary must take an additional three hours of education in notarial law, procedures, technology, and ethics relating to electronic notarizations; and
- Additional, separate registration as an eNotary is required.

## **LIFE OF THE eNOTE: Where It Begins and How It Is Always Traceable**

The note is the agreement between the borrower and the lender where the borrower agrees to repay the lender the amount that has been loaned toward the purchase of the home. The eNote processes are supported by the key industry standards and infrastructure such as MISMO standards, MERS eRegistry, electronic vault, and others. The data is a part of the electronic document, eSigned, and tamper-evident sealed during eClosing. The tamper-evident seal is also registered with MERS eRegistry during the eNote registration transaction. The manual data re-entry and certification can be automated because the data can be trusted. This is one of the key steps toward a completely electronic mortgage environment. (For a visual representation of the eMortgage process, go to pages 33 and 34 in Section 7. Appendix)

## **eNote: A Step-by-Step Guide by MISMO<sup>28</sup>**

### **Origination, prior to closing**

- The lender generates the eNote electronic document with MERS MIN and the uniform eNote clause that includes MERSCORP Holdings as the operator of the eRegistry.
- The MIN is the same as for the security instrument. The lender delivers the eNote and other documents to the eClosing platform.

### **Closing**

- The borrower’s identity is authenticated. For example: The borrower may be using a User ID and a secret password. In addition, the notary checks the borrower’s credentials with a valid form of identification.
- The borrower reviews required eSignature disclosures and provides an affirmative consent to electronically sign the eNote and other electronic documents. A tamper evident seal is applied to the eConsent electronic document, and the document is stored in the compliant eVault.
- The borrower agrees to the eNote using a standard eSignature method.
- When all required signatures have been applied, a tamper-evident signature is applied to the eNote, and the eNote is stored in an electronic vault.
- Before a closing is completed, the closing agent registers the eNote on the MERS eRegistry through a system-to-system transaction.

(continued on page 22)

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<sup>28</sup> MISMO eMortgage guide available at [www.mismo.org](http://www.mismo.org)

### eNote INFORMATION

Summary			
9999317-0005790613-5	Active		
3704 Lorcom Lane		Reg Date:	04/16/2018
Arlington, VA 22207	County: Fairfax	First Lien	
Borrower	Homeowner, John	SSN	XXX-XX-6778
Controller	9999317 - eOriginal - theLender		
Servicing Agent	9999317 - eOriginal - theLender		
Location	9999317 - eOriginal - theLender		
Delegatee for Transfers			
Vault Identifier			
Registering Org ID	9999317 - eOriginal - theLender		
eNote Pending Transfers			
Transfer Type	Effective Date		
No Transfer Pending			
eNote Other Information			
Assumption	No	Tamperseal Date/Time	04/16/2018 12:49:47
Modification	No	SMART Doc Presented	Yes
Modifying MIN		SMART Doc Version	1.02
Modifying MIN			

Sample eNote - An eNote displays names of the borrower, controller and servicing agent, along with the date and time when the tamper-evident seal was applied.

### eNote View from eVault

with a record and executed or adopted by a person with the intent to sign a record; (iv) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form; and (v) "Transferable Record" means an electronic record that: (a) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing and (b) I, as the issuer, have agreed is a Transferable Record.

WITNESS THE HAND(S) AND SEAL(S) OF THE UNDERSIGNED



[Click here](#)

John Homeowner (Seal) - Borrower

*[Sign Original Only]*

Loan Originator Organization: theLender, NMLSR ID: 5555785

Individual Loan Originator's Name: Ollie Originator, NMLSR ID: 8675309

Form 3247e; Rev. 20170919  
Virginia Fixed Rate eNote -- Single Family  
Fannie Mae/Freddie Mac Uniform Instrument

eOriginal, Inc.  
www.eOriginal.com

By clicking **Apply Signature**, I agree to the terms and conditions of this document.

## After Closing

- The lender receives an authoritative copy of the eNote, eConsent, and other documents from the closing agent. The lender stores all eSigned documents in the compliant electronic vault.
- The lender performs usual post-closing processes using the eNote instead of the paper note.
- The lender sells the eNote loan to an investor, typically as part of a hybrid (paper and electronic mortgage) pool.
- To complete the sale, the lender delivers a copy of the eNote to the investor and initiates a transfer transaction to the MERS eRegistry to transfer control and location from the lender to the investor.
- Per the investor instructions, the lender delivers a copy of the eNote to the designated custodian and servicer as well as initiates transfer transactions to the MERS eRegistry to transfer location to the custodian and to update the Servicing Agent field.
- The designated custodian receives a copy of the eNote and accepts a transfer of location request from MERS eRegistry. At this point, the custodian's copy of the eNote is the authoritative copy and can be used for certification and safekeeping functions.

## Servicing

- The servicer performs their usual functions using a copy of the eNote instead of a paper or image copy.
- To complete a payoff request, the servicer initiates a Change Status transaction to the MERS eRegistry to report a payoff for the eNote record. Also, the servicer notifies the custodian and the investor using the usual processes.

eRegistry View from eVault		
TL1201744338		Actions ▾
<b>Documents:</b>		New Document
✓ eNote	Authoritative Copy	▾
📄 1003 - Loan application	Signed	▾
📄 Closing Disclosure	Signed	▾
📄 Fact Act Notice	Signed	▾
<b>SmartSign Participant Info:</b>		
<b>Name</b>	<b>Status</b>	<b>Order</b>
John Homeowner	Completed	0 ▾
<b>MERS Info:</b>		🔄
Controller	eOriginal - theLender (9999317)	
Location	eOriginal - theLender (9999317)	
Servicing Agent	eOriginal - theLender (9999317)	
Tampersealed At	03/08/2018 10:34:37 PM EST	
Registered At	03/08/2018 10:35:47 PM EST	
Registered By	eOriginal - theLender (9999317)	
Data Last Updated At	03/08/2018 10:35:49 PM EST	

## Life of the Deed of Trust: A Step-by-Step Guide

The second crucial document involved in the mortgage process is the “deed of trust,” the agreement between the borrower, lender and a trustee that the property may be foreclosed upon if the borrower defaults on payments. This document, also called the “security instrument,” goes through several steps before it ends up being recorded at the Register of Deeds office. MISMO’s standards lay out the process to be followed for completion.<sup>29</sup>

### Origination, prior to Closing

- The lender generates the eSecurity Instrument electronic document with MERS MIN. The MIN is the same as for the eNote. MERS, Inc. is named as the beneficiary as nominee for the Lender.
- The lender delivers the eSecurity Instrument and other documents to the eClosing platform.

### Closing

- The borrower’s identity is authenticated. (e.g.: The borrower uses their user ID and a secret password.) In addition, the closing agent checks borrower’s credentials with a driver’s license.
- A notary is physically present to verify borrower’s identity, capacity and willingness to sign.
- The borrower reviews required eSignature disclosures and provides an affirmative consent for the eSecurity Instrument and other electronic documents. A tamper-evident seal is applied to the eConsent electronic document, and the document is stored in a compliant electronic vault.
- The borrower signs the eSecurity Instrument using a standard eSignature method, the same for the eNote.
- The eSecurity Instrument is notarized using an approved eNotarization solution.
- If the closing agent is not a notary (or if an attorney is required to close the loan), then a closing agent or attorney must be authenticated by the system (using a username/password combination or some other acceptable authentication process).
- If the closing agent is also a notary, then the notary/closing agent is already authenticated by the eClosing system.
- The notary adds any required electronic notary seal to the electronic document and electronically signs the document (using an acceptable eSignature technology such as a “click-button” signature, signature pad, or even a digital signature).
- In addition, the notarial act is recorded in an electronic notary journal if required for compliance with appropriate state laws and regulations.
- After the last required signature is obtained, a tamper-evident signature is applied to the eSecurity Instrument.
- The eSecurity Instrument must be transmitted to a closing attorney, through an e-recording vendor, recorded at the registry, returned to the vendor, back to the submitter and then on to the lender, all as part of the Closing.
- The electronic document is stored in an electronic vault along with the eNote.
- The closing agent reviews all documents and initiates the eRecording process.

### After Closing

- The lender receives the authoritative copy of the eNote, unrecorded eSecurity Instrument, eConsent for both documents, and other documents from the closing agent. The lender stores eSigned documents in a compliant electronic vault.
- The lender receives the recorded eSecurity Instrument as a trailing document post-closing.
- The lender performs the post-closing processes using the eSecurity Instrument instead of the paper note and paper security instrument.
- The mortgage loan is registered on the MERS System

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<sup>29</sup> MISMO eMortgage guide available at [www.mismo.org](http://www.mismo.org)

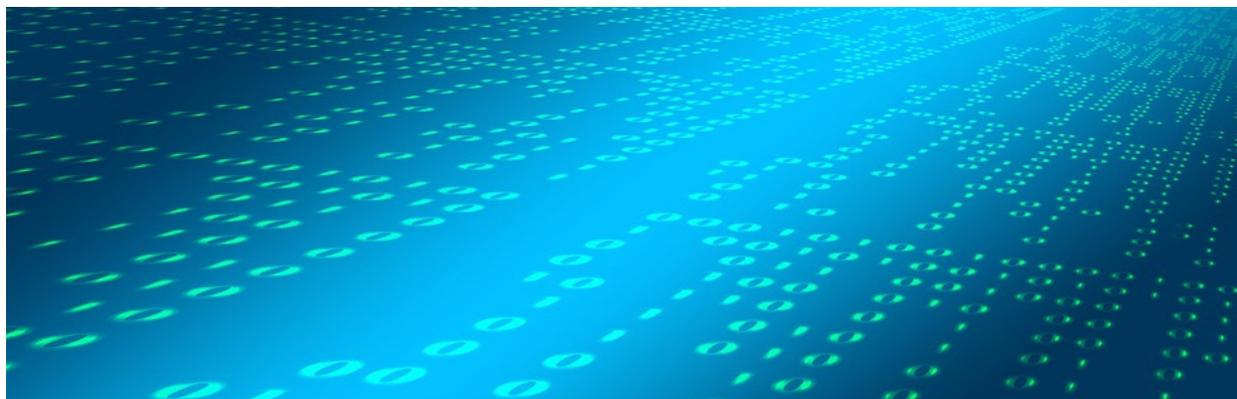
## Sales and Delivery

- The lender sells the eNote/eSecurity Instrument loan to an investor as part of a typical hybrid loan delivery.
- To complete the sale, the lender delivers a copy of the eSecurity Instrument to the investor and initiates a transfer on the MERS System to report the sale of the loan from the lender to the investor.
- Per investor instructions, the lender delivers a copy of the eSecurity Instrument to the designated custodian and servicer as well as initiates a transfer on the MERS System to report the sale of servicing rights to the new servicer.
- The designated custodian receives a copy of the eSecurity Instrument.
- The servicer performs the usual functions using a copy of the eSecurity Instrument instead of a paper or image copy.
- To complete a payoff, the servicer deactivates the MIN record as paid in full on the MERS System. The servicer also sends an electronic and notarized request for satisfaction to the County Recorder.
- The servicer notifies the custodian and investor using the usual processes.
- Other consumer laws require additional steps. For example, lenders must provide borrowers with legal disclosures describing their online practices, and must obtain the borrower's consent to receive the eDisclosures prior to sending such documents. Lenders can show a borrower's ability to access information electronically by sending a PDF with a message or by sending consent by email and having a borrower acknowledge these documents.

## Servicing

- The servicer performs the usual functions using a copy of the eSecurity Instrument instead of a paper or image copy.
- To complete a payoff, the servicer deactivates the MIN record as paid in full on the MERS System. The servicer also sends an electronic and notarized request for satisfaction to the County Recorder.
- The servicer notifies the custodian and investor using the usual processes.

Other consumer laws require additional steps. For example, lenders must provide borrowers with legal disclosures describing their online practices, and must obtain the borrower's consent to receive the eDisclosures prior to sending such documents. Lenders can show a borrower's ability to access information electronically by sending a PDF with a message or by sending consent by email and having a borrower acknowledge these documents.



## Section 5.

# Future Issues & Contingency Plans

If the eNote is created through a secure electronic environment and the closing is performed electronically, the process is entirely electronic and it leads to the creation of an eNote. An eClosing produces an eNote where the promissory note is electronically signed. However, most eMortgages are currently created through a hybrid process, where some parts of the closing are done digitally while others are completed using paper and wet signatures.

Even within entirely electronic notes, variations exist. Fannie Mae and Freddie Mac require lenders to use a SMARTDoc, a type of electronic note that automatically stores both data and values and includes mechanisms to make evident any tampering. If a lender intends to sell the notes to the GSEs, they are required to use the SMARTDoc. However, many lenders may never sell their loans or may sell to investors other than the GSEs. The legal framework built by ESIGN and UETA allows for electronic notes to be created separate and apart from the SMARTDoc.

Below are some common questions/concerns among mortgage industry participants about electronic closings:

### What is the legal basis for creating an eNote?

A whitepaper written by the law firm of Buckley Sandler explains the legal basis for creating an eNote that complies with federal and state laws:<sup>30</sup>

*“The eCommerce laws technical term for the eNote is a “transferable record” (“Transferable Record”). The eCommerce Laws provide that a Transferable Record created in conformity with their requirements is the functional equivalent of a paper negotiable promissory note and is just as enforceable against the borrower as its written counterpart.*

*The sections of the eCommerce Laws governing Transferable Records establish the conditions that must be met for an eNote to serve as the equivalent of a negotiable paper promissory note. In order to qualify as a Transferable Record at the time of creation and issuance, an eNote must be electronically created, presented to the borrower and executed entirely on information processing systems. Further:*

- *The eNote must otherwise qualify as a negotiable promissory note under Article 3 if it were in writing.*
- *The issuer (the borrower) must expressly agree that the instrument is a Transferable Record.*
- *In order to obtain equivalent treatment as a negotiable promissory note:*
- *The eNote must be signed; and*
  - *The method used to record, register, or evidence a transfer of interests in the eNote must reliably establish the identity of the person entitled to “control” the eNote (“Control” or “Controller”). Once these criteria are met, the person identified as the Controller obtains rights equivalent to those granted a holder of a paper promissory note, which includes the right to enforce the eNote. The Controller can either be the owner of the eNote, a person entitled to ownership (i.e., a beneficial owner), or a person entitled to enforce the eNote. Being the Controller therefore means having the right to enforce the eNote against the borrower and transfer the eNote to a third party, with the third-party transferee becoming the new Controller. The eCommerce Laws provide a safe harbor for satisfying the rules establishing Control (“Safe Harbor”). Under the Safe Harbor provisions, the Transferable Record must be created, stored, and assigned so that the following conditions are met:*
    - *A single authoritative copy of the record exists that is unique, identifiable, and (except for permitted revisions under UETA), unalterable;*
- *The authoritative copy identifies the person asserting control as either the person to whom the Transferable Record was issued or the person to whom the Transferable Record was most recently transferred;*

<sup>30</sup> “Enabled by lenders, embraced by borrowers, enforced by the courts: what you need to know about enotes.” By Margo H.K. Tank and R. David Whitaker, Buckley Sandler LLP <http://www.mersinc.org/mers-registry>

- *The authoritative copy is communicated to and maintained by the person asserting control or his 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 person asserting control;*
- *Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and*
- *Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.*

*The general rule that Control exists can also be met if the Controller's identity may be reliably established by the method used to manage transfers of interests."*

### **Legal acceptance of eSigned notes**

Lenders hesitant to dive into eClosings question whether notes completed electronically will have the same legal validity as paper-based notes, especially when the borrower falls behind on payments and the lender has to foreclose on the property. In an article, "Originators largest concern of 'eClosings' – legal acceptance of e-signatures-addressed by New York, Florida Courts," North Carolina attorney Matt Hunoval discusses related court decisions:<sup>31</sup>

*"With mortgage loan origination costs more than doubling since the housing collapse, many lenders and originators are looking to 'eClosings' as a way to leverage paperless mortgages to slash manufacturing costs and loan production cycles. The single largest concern among originators in moving to e-Closed Mortgages, however, is legal acceptance.*

*Good News! In separate cases decided in April 2017, courts in New York and Florida upheld the validity of e-Signed notes in the foreclosure context. The New York court held that an e-Note is a "transferable record" under U.S. code: "The transfer history, together with the copy of the e-Note itself, (are) sufficient 'to review the terms of the transferable record and to establish the identity of the person or entity having control of the transferable record....This evidence (is) sufficient to establish the plaintiff's standing as holder of the e-Note and rendered the lack of proof of valid assignment irrelevant.'" The Florida court noted that the servicer provided "competent, substantial evidence that Fannie Mae owned the e-Note and authorized the bank to pursue the foreclosure."*

*With the CFPB and both GSE's support, and now courts upholding what is perhaps the key element of an 'eClosing'—the e-Signature and e-Note—the path to commercial acceptance and viability has become that much more clear."*

### **eRecordings in North Carolina**

eRecordings have been going on in North Carolina for several years now, but a truly paperless process requires all parts of the process (the signatures, notarization and recording) to be done electronically. Since 18 counties in North Carolina currently do not record electronically, industry participants need alternative ways to complete eMortgages in these jurisdictions. One solution could be to locate an attorney or paralegal on site at a Register of Deeds office to record in case an eRecording does not go through immediately.

Moving to eClosings is not an all or nothing effort. eClosings can be implemented in stages, starting with moving to eSignatures, then adding the capability to do eNotarization and finally eRecording these transactions.

### **Who holds the original of the note?**

In the eMortgage context, the MERS eRegistry points to who the Controller is ... that is, the party who has the authoritative copy of the eNote, which is stored in an eVault. Being the Controller means having the right to enforce the eNote against the borrower and transfer the eNote to a third party, with the third party transferee becoming the new Controller. Since there can be multiple copies of an electronic note, the value of the MERS eRegistry is to point to who has that one authoritative copy. In the traditional closing, an original paper promissory note was used which was physically delivered to and stored by a document custodian. In the electronic world, the MERS eRegistry also points to the Location, which is where the eNote is located, which is typically the document custodian, or the eVault.

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<sup>31</sup> By Matt Hunoval, Hunoval & Associates PLLC, Aug. 11, 2016

## Section 6.

# Roadmap for Other States

Three state laws that are important in implementing eMortgages are the Uniform Electronic Transactions Act (UETA), the Uniform Real Property Electronic Recording Act (URPERA), and the Electronic Notary Act. The chart below was prepared by the Center for Banking and Finance at the UNC School of Law<sup>32</sup> and shows the progress each state has made toward enacting the three fundamental pieces of legislation needed for eMortgages and eClosings. It shows that just 15 states, including North Carolina, appear to have all three statutory schemes or equivalents in place.<sup>33</sup> Of the remaining 35 states without all three laws, every state has UETA (or similar legislation), 24 states do not have an Electronic Notary Act (or equivalent), and 20 states are yet to adopt the Uniform Real Property Electronic Recording Act (URPERA).

The CFPB has examined the use of technology in increasing the efficiency of the mortgage closing process. In a 2014 Report, *Mortgage Closings Today*<sup>34</sup>, the CFPB acknowledged that different state laws and requirements were part of the legal barriers to greater adoption of electronic closings, noting the confusion this creates for “large lenders and other stakeholders that operate in many states.”

The following chart lists each state’s progress toward adopting the three essential statutes required for eClosings (updated as of April 25, 2018):

State	Uniform Electronic Transactions Act (UETA)	Uniform Real Property Electronic Recording Act (URPERA)	Electronic Notary Act (or equivalent)
Alabama	Adopted (Ala.Code 1975 § 8-1A-1 through § 8-1A-20)	Adopted (Ala. Code 1975 § 35-4-120 through § 35-4-127)	No Electronic Notary Act
Alaska	Adopted (AS § 09.80.010 through § 09.80.195)	Not adopted	No Electronic Notary Act; authorization from Sec. 44.50.060; 44.50.063-44.50.066
Arizona	Adopted (A.R.S. § 44-7001 through § 44-7016)	Adopted (A.R.S. § 11-487.01 through § 11-487.05)	Title 41, Chapter 2, Article 3, Sec. 41-351 through 41-370; Arizona Administrative Code, Title 2, Chapter 12, Article 12
Arkansas	Adopted (A.C.A. § 25-32-101 through § 25-32-121)	Adopted (A.C.A. § 14-2-301 through § 14-2-307)	Chapter 14. Notaries Public; Subchapter 3. The Electronic Notary Public Act -- Sec. 21-14-301 through 21-14-308; Title 25 Chapter 31 Sec. 25-31-101 through 25-31-105; Sec. 25-32-111; Arkansas Administrative Rules -- Rule 116.00.13-003
California	Adopted (Cal.Civ.Code § 1633.1 through § 1633.17)	Not adopted	No Electronic Notary Act or equivalent; UETA Sec. 1633.11; § 27391
Colorado	Adopted (C.R.S.A. § 24-71.3-101 through § 24-71.3-121)	Not adopted	Sec. 12-55-106.5. Notary's electronic signature -- secretary of state; 8 CCR 1505-11
Connecticut	Adopted (C.G.S.A. § 1-266 through § 1-299)	Adopted (C.G.S.A. § 7-35aa through § 7-35gg)	No Electronic Notary Act

<b>State</b>	<b>Uniform Electronic Transactions Act (UETA)</b>	<b>Uniform Real Property Electronic Recording Act (URPERA)</b>	<b>Electronic Notary Act (or equivalent)</b>
Delaware	Adopted (Del. C. § 12A-103 through § 12A-117)	Adopted (25 Del.C. § 180 through § 184)	Chapter 43. Title 29. Subchapters I and II
District of Columbia	Adopted (DC ST § 28-4901 through § 28-4918)	Adopted (DC ST § 42-1231 through § 42-1235)	No Electronic Notary Act; Sec. 2407.3 specifically says that no electronic signatures shall be accepted for Notary Public Records
Florida	Adopted (F.S.A. § 668.50)	Adopted (F.S.A. § 695.27)	Florida Admin Code - Chapter 1. Chapter 1N. Chapter 1N-5; Florida Code - Title X. Chapter 117 -- specifically 117.021
Georgia	Adopted (G.A. Code Ann. § 10-12-1 through § 10-12-20)	Adopted (G.A. Code Ann. § 44-2-35 through § 44-2-39.2)	No Electronic Notary Act
Hawaii	Adopted (H.R.S. § 489E-1 through § 489E-19)	Adopted (H.R.S. § 502-121 through § 502-125)	No Electronic Notary Act
Idaho	Adopted (I.C. § 28-50-101 through § 28-50-120)	Adopted (I.C. § 31-2901 through § 31-2907)	No Electronic Notary Act
Illinois	Not adopted - has a similar law Electronic Commerce Security Act (5 ILCS 175/1-101 through 175/99-1)	Adopted (765 ILCS 33/1 through 33/99)	No Electronic Notary Act
Indiana	Adopted (I.C. § 26-2-8-101 through 26-2-8-302)	Adopted (I.C. § 32-21-2.5-1 through § 32-21-2.5-11)	In February 2018, the Indiana General Assembly passed Senate Bill 372, which allows electronic notarization.
Iowa	Adopted (I.C.A. § 554D.101 through § 554D.124)	Not adopted	Title I, Subtitle 4, Chapter 9B -- Revised Uniform Law on Notarial Acts; Iowa Admin. Code -- Division IV. Chapter 43. 43.5(9B)
Kansas	Adopted (K.S.A. § 16-1601 through 16-1620)	Adopted (K.S.A. § 58-4401 through § 58-4407)	Kansas Statutes Chapter 16, Article 16; Kansas Administrative Regulations, Agency 7, Article 43
Kentucky	Adopted (KRS § 369.101 through § 369.120)	Not adopted	No Electronic Notary Act
Louisiana	Adopted (LSA-R.S. 9:2601 through 9:2621)	Not adopted	No Electronic Notary Act
Maine	Adopted (10 M.R.S.A. § 9401 through § 9420)	Not adopted	No Electronic Notary Act
Maryland	Adopted (MD Code, Commercial Law, § 21-101 through § 21-120)	Not adopted	No Electronic Notary Act
Massachusetts	Adopted (M.G.L.A. 110G § 1 through M.G.L.A. 110G § 18)	Not adopted	No Electronic Notary Act
Michigan	Adopted (M.C.L.A. § 450.831 through § 450.849)	Adopted (M.C.L.A. § 565.841 through § 565.847)	Michigan Compiled Laws 55.287

State	Uniform Electronic Transactions Act (UETA)	Uniform Real Property Electronic Recording Act (URPERA)	Electronic Notary Act (or equivalent)
Minnesota	Adopted (M.S.A. § 325L.01 through § 325L.19)	Adopted (M.S.A. § 507.0941 through § 507.0949)	Chapte 325K - Electronic Authentication Act; 358.47; 359.01 Subdivision 5; 359.03 Subdivision 4
Mississippi	Adopted (Miss. Code Ann. § 75-12-1 through § 75-12-39)	Adopted (Miss. Code Ann. § 89-5-101 through § 89-5-113)	No Electronic Notary Act
Missouri	Adopted (V.A.M.S. § 432.200 through § 432.295)	Not adopted	Revised Statutes of Missouri Chapter 432 - 432.250; 486.275
Montana	Adopted (MCA § 30-18-101 through § 30-18-118)	Not adopted	Montana Code 1-5-615; 44-15-108*
Nebraska	Adopted (Neb. Rev. St. § 86-612 through § 86-643)	Not adopted	Neb. Admin. R. & Regs. Tit. 433, Ch. 7, § 010
Nevada	Adopted (N.R.S. § 719.010 through § 719.350)	Adopted (N.R.S. § 111.366 through § 111.3697)	Electronic Notary Public Authorization Act -- NRS 240.181 et seq.
New Hampshire	Adopted (N.H. Rev. Stat. § 294-E:1 through § 294-E:20)	Not adopted	No Electronic Notary Act
New Jersey	Adopted (N.J.S.A. § 12A:12-1 through § 12A:12-26)	Not adopted	12A:12-11. Notarized signatures or records.
New Mexico	Adopted (N.M.S.A. 1978, § 14-16-1 through § 14-16-21)	Adopted (N.M.S.A. 1978, § 14-9A-1 through § 14-9A-7)	Title 12, Chapter 9, Part 2 of New Mexico Administrative Code
New York	Not adopted - has a similar law (NY State Tech § 301 through § 309)	Not adopted - has a similar law (NY State Tech § 540.1 through § 540.7)	Article 9, § 291-I; 9 NYCRR 540.7. Electronic Recording of Instruments Affecting Real Property.
North Carolina	Adopted (N.C.G.S.A. § 66-311 through § 66-330)	Adopted (N.C.G.S.A. § 47-16.1 through § 47-16.7)	Chapter 10B Article 22 §§ 10B-100 et seq.
North Dakota	Adopted (NDCC § 9-16-01 through to § 9-16-18)	Not adopted	North Dakota Century Code 44-06.1 (various sections)
Ohio	Adopted (Ohio Rev. Code Ann. § 1306.01 through § 1306.23)	Not adopted	No Electronic Notary Act
Oklahoma	Adopted (12A Okl. St. Ann. § 15-101 through § 15-121)	Adopted (16 Okla. St. Ann. § 86.1 to § 86.7)	No Electronic Notary Act
Oregon	Adopted (O.R.S. § 84.001 through § 84.063)	Not adopted	Oregon Administrative Rules, Division 100, § 160-100 et seq.
Pennsylvania	Adopted (73 P.S. § 2260.301 through § 2260.312)	Adopted (21 P.S. § 483.1 to § 483.9)	No Electronic Notary Act
Rhode Island	Adopted (42 R.I. Gen. Laws Ann. § 42-127.1-20 through § 42-127.1-20)	Not adopted	No Electronic Notary Act
South Carolina	Adopted (Code 1976 § 26-6-10 through § 26-6-210)	Adopted (Code 1976 § 30-6-10 through § 30-6-70)	No Electronic Notary Act
South Dakota	Adopted (S.D.C.L. § 53-12-1 through § 53-12-50)	Adopted (S.D.C.L. § 7-9A-1 through § 7-9A-10)	No Electronic Notary Act

State	Uniform Electronic Transactions Act (UETA)	Uniform Real Property Electronic Recording Act (URPERA)	Electronic Notary Act (or equivalent)
Tennessee	Adopted (T. C. A. § 47-10-101 through § 47-10-123)	Adopted (T. C. A. § 66-24-201 through § 66-24-206)	In April 2018, the state's General Assembly approved legislation that would allow online remote electronic notarization.
Texas	Adopted (V.T.C.A., Bus. & C. § 322.001 through § 322.021)	Adopted (V.T.C.A., Property Code § 15.001 through § 15.008)	Subchapter G. Electronic Submissions of Notary Applications and Bonds, 1 TAC § 87.60 Electronic Submission
Utah	Adopted (U.C.A. 1953 § 46-4-101 through § 46-4-503)	Adopted (U.C.A. 1953 § 17-21a-101 through § 17-21a-403)	46-1-16. Official signature -- Official seal -- Seal impression.
Vermont	Adopted (9 V.S.A. § 270 through § 290)	Not adopted	No Electronic Notary Act
Virginia	Adopted (V.A. Code Ann. § 59.1-479 through § 59.1-497)	Adopted (VA Code Ann. § 55-142.10 through § 55-142.15)	Title 46-1-16. Notaries and Out-of-State Commissioners, Chapter 1. General Provisions & The Virginia Electronic Notarization Assurance Standard Published by Secretary of the Commonwealth Richmond, Virginia January 21, 2013 Version 1.0
Washington	Not adopted	Adopted (RCWA § 65.24.901 through § 65.24.010)	WAC 434-661-020 et seq.
West Virginia	Adopted (W. Va. Code, § 39A-1-1 through § 39A-1-17)	Not adopted	West Virginia Code of State Rules, §153-45-1 et seq.
Wisconsin	Adopted (W.S.A. § 137.11 through § 137.26)	Adopted (W.S.A. § 706.25)	Subchapter II. 137.19 Notarization and acknowledgment.
Wyoming	Adopted (W.S. 1977 § 40-21-101 through § 40-21-119)	Adopted (W.S. 1977 § 34-1-401 through § 34-1-407)	No Electronic Notary Act

32 Chart was compiled by Center Director Lissa Broome, the Burton Craige Distinguished Professor, and the Center's research assistants, Samantha Hovaniec (UNC Law 2018) and Jake Rifkin (UNC Law 2019)

33 Arizona, Arkansas, Delaware, Florida, Kansas, Michigan, Minnesota, Nevada, New Mexico, New York, North Carolina, Texas, Utah, Virginia, and Wisconsin

34 CFPB, Mortgage closings today: A preliminary look at the role of technology in improving the closing process for consumers (April 2014)

## Section 7.

# Appendix

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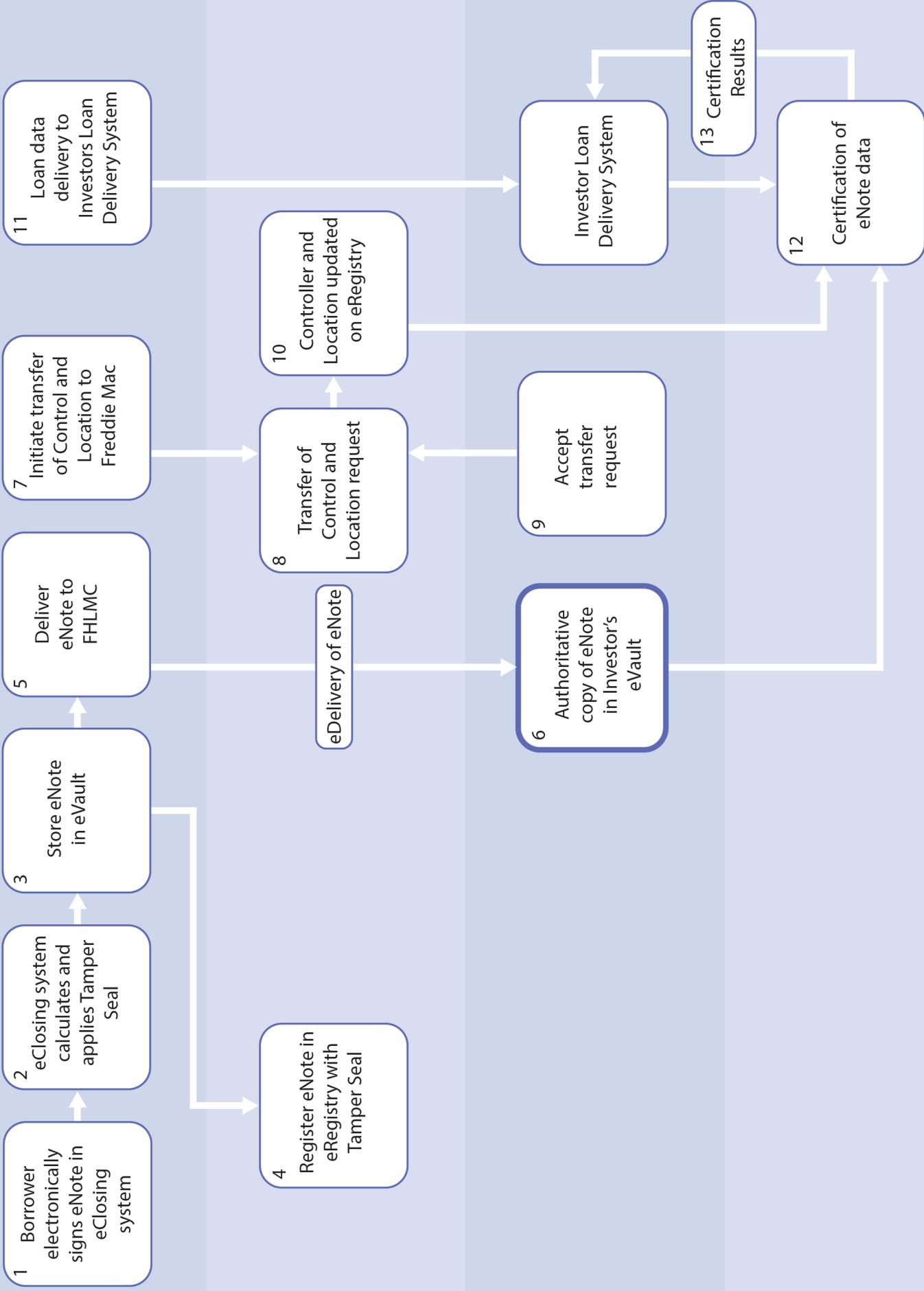
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# eMortgage Delivery Process



Seller

MERS

Investor

Certification Engine / Document Custodian

## eMortgage Delivery Process - Warehouse Provider (provided by Freddie Mac)

