

Legal Core Subgroup
of
MISMO eMortgage
Workgroup

Outline

- Purpose
- Members
- List of Issues
- Proposed Resolutions of Certain Issues
- How to Participate
- Questions and (Possible) Answers

Purpose of Legal Core Subgroup

- Provide general legal guidance concerning issues and questions posed by other subgroups comprising the MISMO eMortgage Workgroup
- Use Electronic Signatures in Global and National Commerce Act (ESIGN) and Uniform Electronic Transactions Act (UETA) as a base reference for legal guidance
- Guidance does not constitute a **LEGAL OPINION**

Members of Legal Core Subgroup

- Ann vom Eigen, American Land Title
- Bill Hultman, MERS
- David Whitaker, Goodwin Procter
- Dennis Priebe, Citigroup Mortgage
- Donald Brewster, Freddie Mac
- John Lajoie, First American
- Gabe Minton, MISMO
- Harry Gardner, MISMO
- John A. Richards, Fannie Mae
- Stephen Ornstein, Thacher Proffitt
- Steve Morrison, Wells Fargo
- Phyllis Slesinger, MBA
- Rodrigo Alba, MBA
- Tom Greco, Digital Signature Trust
- Tom Wells, iLumin Corporation

Legal Core Subgroup Issues

- How do you void an eMortgage
- Do you need to store variable data with the template boilerplate language
- When does a Transferable Record need to be stored in a particular format
- How would you create and operate a National Registry
- How do you transfer and accept an interest in an eMortgage
- Is an “Authoritative Copy” legend allowed for a Transferable Record
- Can a Transferable Record be converted to, and replaced by, a paper note
- When does an electronically signed note become a Transferable Record
- What is the evidentiary trail for the transfer of a Transferable Record
- How do you handle a lost Transferable Record (i.e., lost data)
- How do you transfer an interest in an eMortgage

Voiding an eMortgage

- Not addressed by ESIGN or UETA
- Integrate industry “Best Practices” as they are developed
- Possible solutions
 - Transfer ownership to borrower on ownership registry and prevent future transfers
 - Electronically sign and transfer Transferable Record to “VOID” by owner
 - Evidentiary message transmitted to interested parties

Legal Storage Requirements for eMortgage Variable Data and Template

- No requirement under ESIGN or UETA to store variable data with template
- KEY: ability to accurately reproduce the record and data integrity
- Reproduce what was presented to borrower but not pixel-by-pixel
- Importance of “Translator” when storing variable data separately

Maintaining Transferable Record in Designated Format

- MISMO 3-part “SMART document” format
- No requirement under ESIGN or UETA
- KEY: ability to accurately reproduce the record and data integrity
- Recommendation to maintain same format through life of loan

Creation and Operation of a National Registry

- National Registry: serves as an audit trail of where Transferable Record is maintained, who owns it, who owns servicing rights and any subsequent transfers or releases
- No requirement under ESIGN or UETA for a National Registry
- Similarities to The Depository Trust Company for book-entry securities
- Could provide efficiency for accessing information maintained by registry at local e-vaults and tracking location of Transferable Records
- See eVault Subgroup's Registry White Paper for discussion of specific benefits

“Authoritative Copy” Legend

- Allowed to add legend to a Transferable Record without affecting enforceability
- Unlike paper records, need to designate ownership through audit trails, logs and registries – do not rely on easily duplicated legends
- Suggestion for MISMO to specify standard for legend

“Papering Out” a Transferable Record

- Allowed to create paper non-authoritative copies of Transferable Record (i.e., provide borrower with paper copy of eMortgage at closing)
- Consider authentication and certification process for paper copy
- ESIGN and UETA do not prohibit converting Transferable Record to a paper note and enforcing paper record in lieu of Transferable Record
 - Need to eliminate all copies of authoritative copy of Transferable Record
 - Need to update any applicable registry, audit trail or log
- Use of SWIFT system with international letters of credit for precedent of taking electronic data and converting it to paper document

Creation of Transferable Record

- Becomes a Transferable Record at moment of electronic signing
 - Even if loan is voidable because of 3-day right of rescission with refinancing transaction
 - Even if loan is not yet funded

Evidentiary Trail for Transfer of Transferable Record

- Audit logs are important
- Monitor and limit access to logs and Transferable Records
- Implement physical security, network security, logical security and data security (e.g., data encryption/digital signatures/one way hash values)
- Separate individuals with access to logs and access to Transferable Records
- Consider designation of electronic document system custodian to testify as to systems and processes
- **KEY:** Systems and processes for determining ownership of Transferable Record – need to satisfy evolving industry standard

Restoring Lost Transferable Record

- eVault Subgroup's Lost or Destroyed Data Memo
www.mismo.org/mismo/docs/drftspc/draft/EM_EV_LostDestroyedDataIssues_V1-0.pdf
- Possible to restore lost data with a similar process to a lost paper note
 - “Lost data” only triggered by catastrophic restoration (not normal, periodic back-ups and restorations)
 - Send affidavit to owner of Transferable Record
- Key is implementing and maintaining system to avoid lost data
 - Disk redundancy/offline storage
 - Backups and Version Control
 - Data archiving
 - Security procedures
- Consider including restoration process in trading partner agreements and mortgage/other non-note record executed by borrower

Transferring an Interest in an eMortgage

- Depends on adoption and role of a National Registry
- Could embed transfer information/audit trail with Transferable Record enveloped with a digital signature from transferor
- Could maintain audit trail separate from Transferable Record at registry of local e-vault
- Migration Issue: Hybrid Transactions with both paper and electronic records for same mortgage require integration of different systems and processes

How to Participate

- Join MISMO – become subscriber/join email listgroup and telephone conference calls/attend face-to-face meetings
- Legal Core Subgroup
 - Two software vendor slots elected for 1 year term
 - Possible rotation of independent law firm participation
- Join eMortgage Subgroup
 - eVault Subgroup (lost data, National Registry, Best Practices Guidelines)
 - eDelivery Subgroup (transfer and acceptance of record, evidentiary trail)
 - eClosing Subgroup (electronic consent, Federal Reserve electronic disclosure rules)
- www.mismo.org

Questions and (Possible) Answers