

## **MERS - The Mortgage Electronic Registration System issues an Announcement that appears to be an attempt to put the genie back into the bottle**

**Summary:** MERS has told its members not to **foreclose** in its name on **home loans**, effective immediately.

As a recap for those not closely following the issues surrounding **MERS** and **foreclosures**, this is hopefully a clear summary of an extremely complicated situation:

### **The MERS-Mortgage Foreclosure story**

In the old days a **potential borrower** would go to their **local bank**, **apply for a mortgage**, **qualify for the mortgage (or not)** and then enter into an agreement with the bank. The transaction consisted of a **note or an IOU** representing a promise to repay the bank and the **mortgage that pledged the property as collateral**. After the closing the **mortgage** would be recorded in the county records. The bank would then typically "**portfolio**" the loan or keep it on its books until it was paid off.

Then came the age of **easy money** with **no-income check loans**, **no-income no-asset check** loans and other **creative financing** techniques where if you had a pulse you had yourself a loan. Whether you could actually afford it or not did not really come into play. This worked for a while because **home prices** were going up fast and the borrower who couldn't afford the home in the first place would **flip it** and make some cash along with the **mortgage broker** and everyone else up and down the **real estate food chain**.

**Wall Street** investment banks had developed **REMICS** or **collateralized mortgage obligations (CMO's)** as a conduit for making money, a lot of money. Loans were made, quickly resold by the bank originating it, then maybe resold five more times until it was packaged along with thousands of other similar loans and resold to investors all over the world often with AAA ratings (a story for another time).

All of this worked just fine until prices stopped going up and then started to actually decline. As the influx of **foreclosures** grew, along with them came serious questions about the process and paperwork involved in all of these mortgage transfers. These questions would most likely never have come up if those damn real estate prices just kept going up like they were supposed to do and foreclosures were few and far between.

Questions surrounded **MERS**, the **electronic database** that served to take the place of **recording mortgages** in the **county records** (along with a lot of saved filing fees). Could **MERS** be the **foreclosing entity**? Were **assignments of mortgages** actually done in **MERS** and were they done correctly? Issues surrounding **robo-signers** and **fraudulent notarizations** of documents. Questions over whether the entity initiating the **foreclosure** actually had the **standing to foreclose** and if the **chain of title** was intact and provable? Who actually had the **original note or IOU**?

From this came a variety of other **legal issues** such as completed **foreclosures** getting

reversed, a moratorium on **foreclosures**, **attorney's** being required to sign **affirmations** that all of the paperwork was done correctly and demands by some underwriters of **title insurance** that in a **foreclosure sale** the seller **indemnify** the **title insurer** against the **foreclosure** being reversed due to incorrect paperwork.

At the heart of the matter is **MERS**, a database put into place to help streamline the process of **mortgage assignments** and to save filing costs in the **securitization** age.

This brings us back to the **Announcement MERS** issued to its **Members** yesterday. A short summary below followed by the **Announcement** in full:

"... In recent months legal challenges have arisen regarding alleged inadequacies and improprieties in the foreclosure process including allegations of insufficient or incorrect supporting documentation and challenges to the legal capacity of parties' right to foreclose. MERS is committed to reevaluate and strengthen its systems and procedures to protect against these types of legal challenges...

During this period we request that Members do not commence foreclosures in MERS' name. If a Member determines that it will commence a foreclosure in MERS' name during this 90-day period, two weeks advance notice must be given to MERS to permit verification of the appointment and current status of the Certifying Officer proposed to participate in the foreclosure. No foreclosure may be processed in MERS' name without first obtaining this verification. We encourage Members to bring foreclosures only in the name of the holder of the note, in the name of the trustee or the servicer of record acting on behalf of the trustee..."

The steps discussed in the announcement do not seem to address the majority of the issues swirling around MERS and foreclosures. This is the complete announcement:

Announcement  
Number 2011-01

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To: All MERS Members February 16, 2011  
Re: Foreclosure Processing and CRMS Scheduling

MERS is providing the following guidance to all Members to strengthen business practices, and minimize reputation, legal and compliance risk to MERS and its Members. In recent months legal challenges have arisen regarding alleged inadequacies and improprieties in the foreclosure process including allegations of insufficient or incorrect supporting documentation and challenges to the legal capacity of parties' right to foreclose. MERS is committed to reevaluate and strengthen its systems and procedures to protect against these types of legal challenges. Consistent with this approach we have enhanced the Corporate Resolution Management System (CRMS) and instituted related policies and procedures designed to strengthen MERS' business practices and limit compliance risks. To comply with this guidance, MERS Members should implement the following practices, effective immediately.

1. MERS is planning to shortly announce a proposed amendment to Membership Rule 8. The proposed amendment will require Members to not foreclose in MERS' name. Consistent with the Membership Rules there will be a 90-day comment period on the proposed Rule. During this period we request that Members do not commence foreclosures in MERS' name. If a Member determines that it will commence a foreclosure in MERS' name during this 90-day period, two weeks advance notice must be given to MERS to permit verification of the appointment and current status of the Certifying Officer proposed to participate in the foreclosure. No foreclosure may be processed in MERS' name without first obtaining this verification. We encourage Members to bring foreclosures only in the name of the holder of the note, in the name of the trustee or the servicer of record acting on behalf of the trustee.
2. MERS Members shall have a MERS Certifying Officer (also known as MERS Signing Officer) execute assignments out of MERS' name before initiating foreclosure proceedings. Assignments out of MERS' name should be recorded in the county land records, even if the state law does not require such a recording (see MERS Membership Rule 8).
3. For all future assignments and the execution of other documents in the name of MERS, Members must use a MERS Certifying Officer who has been appointed under our new certifying officer process, which, after November 1, 2010, uses a new form of corporate resolution. Under our new process, all Certifying Officers are also being tested and appointed under the enhanced CRMS. Only Certifying Officers appointed under the new form of corporate resolution, tested, and transitioned onto CRMS after November 1, 2010 should execute assignments. We are in the process of ensuring that all Members are transitioned onto CRMS in compliance with our new policy, and we will work with all Members to ensure the transitions can be accomplished in an orderly and expeditious way. For those Members who have not undergone this transition onto the CRMS, you will receive login credentials and further instructions from MERS on how to complete this process. It is important that you follow all instructions and that you complete this process as quickly as possible. MERS will be communicating with you to notify you when your Company will be transitioned onto the CRMS under our new policy. Once your Company has access to the CRMS, all of your existing and potential Certifying Officers should work quickly to complete the certification process. Once all of your existing and potential Certifying Officers have successfully completed the certification process, you will need to submit your request to MERS for approval. Submissions from your Company will only be accepted during the phase-in period assigned to you. Because it will take some time to transition under our new policy, Certifying Officers can continue to execute documents in MERS' name under existing resolutions until the new corporate resolution is issued to your Company. However, if your Company does not submit the request to MERS through the CRMS in the timeframe assigned to you, you will not be issued a new corporate resolution and any prior corporate resolutions issued to your company will be

revoked.

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4. MERS Members should ensure the accuracy of the information in the complaint and foreclosure affidavit that addresses, where applicable, the authorization under which a MERS Certifying Officer validly assigned the mortgage to the foreclosing note-holder.

5. Other business practices Members should perform on a periodic basis include: Conduct a review of employees designated as Certifying Officers and reconcile to the CRMS to ensure MERS has an up-to-date and accurate list of Certifying Officers; Ensure employees designated as Certifying Officers receive appropriate training to carry out their duties and responsibilities as Certifying Officers; and Reconcile with CRMS to update corporate resolutions and signing authority agreements to ensure appropriate Certifying Officers are validly appointed.

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