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Responding to Questions on the Transfer of Residential Mortgage Loans in Securitizations

Recently, in addition to questions regarding certain residential mortgage foreclosure processing improprieties, concerns have been expressed regarding the validity of certain transfers of residential mortgage loans in securitization transactions. We believe that these concerns are unfounded. To help clarify issues regarding the assignment process for residential mortgage loans, we have prepared the following questions and answers. These questions and answers are not intended to be comprehensive or to address every issue or situation but, rather, are intended to provide a general overview and explanation of matters related to mortgage loan transfers.

Q: What is securitization?

A: Securitization is the process of financing a pool of loans or other financial assets by means of the issuance of securities that represent entitlement to payment of amounts collected on those financial assets.

Q: How is securitization effected?

A: Generally, the financial assets are pooled and transferred to a new special purpose entity, often a trust (a “securitization trust”), whose only purpose is to issue securities backed by those financial assets.

Q: In a residential mortgage loan securitization, how are the mortgage loans typically transferred?

A: In the typical securitization, a financial institution enters into a contract under which it identifies and transfers and assigns the mortgage loans to the securitization trust and, at the same time, delivers the mortgage loan documents as required by the contract.

Q: What mortgage loan documents does the contract require to be delivered?

A: It varies, but typically the financial institution transfers possession of at least the following documents evidencing each mortgage loan: (i) the original mortgage note, endorsed to the transferee or in blank, and (ii) either (A) a recordable assignment of mortgage in blank or to the transferee or (B) a recorded assignment of mortgage to the transferee or to Mortgage Electronic Registration Systems (MERS), which in turn reflects the transferee as assignee in its records.

Q: Who typically holds the mortgage loan documents that are delivered?

A: The trustee for the investors in the securities or a custodian on behalf of the trustee.

Q: Why are the mortgage loan documents delivered?

A: The mortgage loan documents are delivered to protect the rights of the securitization trust in the transferred loans (e.g., to avoid the possibility of competing claims to the same mortgage loan). Also, delivery of the mortgage loan documents makes it easier to commence foreclosure proceedings if necessary.

Q: Is the transfer to the securitization trust effective even if the mortgage note is endorsed in blank rather than to the transferee?

A: Yes, a mortgage note endorsed in

blank is legally effective under a typical securitization contract and under the Uniform Commercial Code (or UCC), which is applicable in all fifty states and the District of Columbia. If a mortgage note is endorsed in blank, then under the UCC it is payable to the bearer, which is the transferee to whom the mortgage note is delivered.

Q: Is the transfer effective even if an assignment of mortgage is not recorded?

A: Yes, the UCC provides that the transfer of an obligation secured by a lien on real property also transfers the lien, which makes it unnecessary to record an assignment of mortgage in order to transfer ownership of the related mortgage loan. In the event of a default on the mortgage loan, however, it may be necessary in some states to record the assignment of mortgage to foreclose or to exercise other remedies.

Q: What is MERS?

A: The Mortgage Electronic Registration Systems, or MERS, is a company created by mortgage industry participants to streamline the process for assigning mortgages by having record title to mortgages recorded in the name of MERS, as nominee for the owner of the related mortgage loan from time to time. The beneficial owner's interest is reflected on the books and records of MERS, rather than in the records of the local real estate recording office.

Q: Why would an assignment of mortgage be recorded in the name of MERS?

A: Many mortgage lenders use MERS to ensure that holders of ownership interests, servicing rights and security interests with respect to mortgage loans receive all notices to holders of record to avoid the expense and the delay that would result from recording numerous mortgage assignments in the local real estate records, which is particularly important when the ownership interest in a mortgage loan may change from time to time.

Q: Is it permissible to fill in a blank mortgage note endorsement?

A: Yes, the UCC allows the person in possession of a mortgage note to complete the endorsement.

Q: Is it permissible to fill in a blank assignment of mortgage, if necessary, and record an assignment of mortgage after the related mortgage loan is transferred?

A: Yes, a mortgage assignment in blank typically is completed in the name of the transferee prior to recordation.

Q: Is it permissible to record an assignment of mortgage from MERS to the transferee after the related mortgage loan is transferred?

A: Yes, the rules of MERS permit an assignment of mortgage to be recorded in favor of the transferee reflected as owner of the mortgage on MERS' books and records in order to facilitate the foreclosure process.

Q: If all of this is true, then why have concerns been expressed about whether transfers of securitized mortgage loans failed to occur because of delivery of mortgage note endorsements and unrecorded mortgage assignments in blank?

A: Some of the confusion apparently relates to foreclosure process issues that recently have been reported. In some states, mortgage loan documents must be presented to courts or other authorities as evidence at the time of foreclosure. Those authorities require the mortgage loan documents to be presented in a certain form, consistent with applicable state and local law, in order to establish that the related foreclosures may proceed. Mortgage loan servicers who are unable to produce mortgage loan documents or who are unable to present them in the required form often are said not to have evidence of title sufficient to permit foreclosure. However, this does not mean that the related mortgage loans were not properly transferred to the securitization trust in the first place. Rather, it means only that the related foreclosures may not proceed until the mortgage loan documents are produced or are presented as required. Depending on the facts of the particular transaction and applicable law, in order to meet these requirements and proceed with a foreclosure, mortgage loan servicers may need to complete blank note endorsements and blank assignments of mortgage (if necessary), record unrecorded mortgage assignments and have mortgages transferred by MERS to the related mortgage loan servicer or securitization entity.

Q: So, is there any validity to the claim that delivery of mortgage notes with endorsements in blank and unrecorded mortgage assignments in blank does not adequately transfer the related mortgage loans in connection with a securitization transaction?

A: In our view, no. In a typical transaction, it is not necessary to satisfy all conditions to completing a foreclosure in order to fully and properly transfer a residential mortgage loan to the securitization trust. The standard practices described above for transferring residential mortgage loans are legally sufficient to effect the transfer and are consistent with established law and practice.