



# Meeting the Burden of Proof

It's possible to **legally manage** and enforce electronically signed loan documents through advanced electronic vaulting.

**ELECTRONIC DOCUMENTATION AND SIGNATURES** are finally moving beyond discussion to adoption in the mortgage industry, many years after enabling legislation was enacted. The Uniform Electronic Transactions Act and the Electronic Signatures in Global and National Commerce Act (E-SIGN) serve as the framework for electronic mortgages, but once electronic documents are signed, how are they to be retained and managed to ensure the ability to produce the document and enforce its terms? Whether the document is an electronic promissory mortgage note (e-note) or other binding agreement, lenders need to be able to prove the e-note or document in question is the unaltered, legally enforceable original document.

While the intent of e-commerce legislation was to establish that electronic signatures and records carry the same legal weight as their paper counterparts, proving that an e-note is the original unaltered version could come down to a question of the vaulting process.

There are concrete steps lenders should be taking today to protect the legal enforceability of e-notes and other electronic loan documentation. One of them is to register e-notes with MERS. With the availability of the MERS eNote Registry, lenders have the benefit of an established, industry-recognized and validated system with which to register ownership and transfer ownership of e-notes. Another step is e-vaulting. Those that register e-notes with MERS, or offer custodial services for e-notes, are still required under the MERS integration guidelines to provide an e-vault for e-notes and a secure process for moving e-notes between such vaults. Not every lender will register every electronic loan with MERS. Those lenders who don't take advantage of the e-note Registry will still need a secure process to establish the originality, ownership and integrity of e-notes and other electronic documents, as well as to manage, sell, transfer, cancel or terminate them.

A common misconception in the mortgage and other financial services industries is that electronic vaults are static mechanisms, where lenders and other mortgage players securely lock away sensitive electronic documents after the fact, out of sight and effectively out of mind. This is simply not the case. Advanced electronic vaulting is a dynamic environment, actively managing the maintenance, protection, access to and transfer of electronic loan documents in a legally compliant manner and enabling direct online processes not available in paper vaulting. The technology meets legal requirements and process needs at every stage of the mortgage lifecycle: from origination to closing and on into the extended post-closing life of the loan, which can sometimes stretch longer than 30 years.



Already widely used in other industries with similar business needs, including automotive finance and equipment leasing, electronic vaulting affords the financial institution the necessary protections to securely manage e-mortgages. The very same legal counsels and ratings agencies that support mortgage backed securities have already established and accepted advanced electronic vaulting solutions as meeting all of their requirements for securitization purposes.

Once an electronic mortgage has been closed and the e-note electronically signed, a percentage of lenders will then register the ownership of that loan with MERS. While MERS does an outstanding job of enabling and maintaining the industry registry of e-notes, more is required to both ensure compliance and legal protection as well as meeting the often more stringent requirements for resale within the secondary market. MERS requires the lender have the ability to store e-notes and transfer them to investors. And though vaulting can begin earlier in the mortgage process, its strongest value comes into play at this point.

So, what then is an electronic vault? A true electronic vault should create irrefutable proof that the document in the institution's possession is the original, unaltered document. To ensure an electronic contract remains negotiable and legally enforceable, an advanced electronic vault permanently binds electronic signatures to the document and creates a tamper-evident audit trail demonstrating ownership (control) and compliance. As document interaction occurs throughout multiple stages along the mortgage lifecycle, the vault controls access and tracks all document activity from closing, through servicing, and finally to sale or payoff.

The electronic vault should allow privileged access to the documents without compromising the integrity of the originals. However, all activity must be tracked, including any and all access

to the document and any copies made, by whom and for what purposes. Movement should be tracked as well. Financial institutions must ensure several needs are met to maintain the integrity of e-notes, regardless of whether a loan is registered with MERS:

- Documents should be protected, encrypted and time-date stamped.

- The documents should be wrapped in a tamper-evident seal that will instantly identify and reject any changes to the document since signing.

- Privileged access rights to documents must be granted and maintained.

- An extensive audit trail must be

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kept on each document.

- Regular integrity checks of the docs must be performed, ensuring that, byte-for-byte, there has been no alteration or degradation since signing.

- There must be some manner to destroy an Electronic Original while creating a paper document which will thereafter be recognized as the authoritative copy.

- Likewise, destruction of the electronic document after predetermined periods of time or status changes must be addressed as well.

To prepare for the widespread transition to e-notes, financial institutions need to think through every stage of a mortgage from origination through sale and payoff. Any vault intended to manage e-mortgages should include vault-to-vault transfer capability. Vault-to-vault transfers facilitate the transfer

of ownership upon sale of the loan. This transfers not only the authoritative copy itself, but also may register the new legal control of the e-note with MERS.

As e-mortgages evolve it is important that technology be able to keep pace. An electronic vault should support current and evolving MISMO document and e-vault standards as well as the new Transfer of Location of Electronic Contracts ANSI X-9 standard for moving the authoritative copy from one vault to another. It's also in the institution's best interest to choose a vaulting solution that can easily interface and/or adapt to existing systems already in use. Look for vaulting solutions that allow for interfacing or integration with existing systems.

A single vaulting solution should meet compliance and security needs in a cross section of industries. Since the electronic signature is the key to a completely electronic process, the electronic vault must support integration with available e-signature vendors and their technologies.

By leveraging electronic vaulting to meet the burden of proof for an electronically signed document's integrity and originality and systematically tracking any access, copying or other use of e-notes and other electronic loan documents, a financial institution can ensure its compliance with the various legislative statutes governing electronic contracts and signatures. Vaulting provides a means to protect electronic evidence and prepare for legal challenges that could arise. **MT**

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*Stephen Bisbee, president and CEO of eOriginal, is the co-inventor of the eOriginal process and supported the NCCUSL and American Bar Association committees establishing the legal standards for electronic commerce. More information on the legal issues surrounding creation, signing, notarization, recordation, registration, custody and servicing can be found at [www.eOriginal.com](http://www.eOriginal.com) as well as in *The Business Lawyer*: Vol 62, November 2006, "Coming to a Screen near you - eMortgages."*

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