November 7, 2017

Ms. Stephanie Heller
Deputy General Counsel & Senior Vice President
Federal Reserve Bank of New York
33 Liberty Street
New York NY 10045
Re: Proposed National Mortgage Note Repository Act of 2018 – September 2017 draft

Dear Stephanie:

Thank you for providing the most recent draft of proposed National Mortgage Note Repository Act of 2018 ("Proposal"). In addition to prior comment letters submitted by MERSCORP Holdings, Inc. ("MERSCORP") on the Proposal,[1] we would like to share additional comments which, similar to our prior comments, focus on the explicit and implicit policy positions reflected within the Proposal.

MERCORP appreciates that several of our previously raised comments have been addressed. For example, the elimination of the use of "gateways" and allowing for an alternative to a federally charted operator of the repository are improvements to the Proposal. However, we remain concerned by other aspects of the Proposal. In particular, we believe that the Proposal seeks to provide a solution in search of a problem, and lacks a cost-benefit analysis justifying the risk borne by taxpayers in adopting a proposal similar to what has been outlined to date. For that reason, we believe the Federal Reserve Bank of New York or the Federal Reserve Board should conduct a cost-benefit analysis before making recommendations. Based on 20 years of operating mortgage loan registries, we believe without a quantifiable value proposition, the fiscal sustainability of the proposed repository remains questionable.

In addition, we have outlined several other aspects of the proposal for your review and consideration.

Section 2:

While we understand the finding in Section 2(a)(5), we find the conclusion in Section 2(a)(6) to be misleading. The mortgage industry is working towards a solution to maintain residential mortgage notes electronically using existing laws under the Electronic Signatures in Global and National Commerce Act ("ESIGN") and Uniform Electronic Transaction Act ("UETA"). This effort does not permit the conversion of existing mortgage

[1] Letters to Stephanie Heller, Federal Reserve Bank of New York, dated May 9, 2016 and April 10, 2017. https://www.mersinc.org/media-room-docman/1190-merscorp-holdings-comment-to-frb-new-york-on-proposed-national-mortgage-repository-act/file. https://www.mersinc.org/media-room-docman/1374-mers-comment-letter-dated-4-10-17-national-mortgage-note-repository-act-of-2017/file.

notes to electronic notes (without a change in existing law), but the notion that the industry would convert all existing notes to electronic notes would come at a very high cost to market participants, and ultimately be passed on to borrowers. Instead, industry participants would likely wait until the small percentage of loans that end up in foreclosure become delinquent to register the loans given it would be cost prohibitive to submit the other 99% of their portfolio.

Section 3:

It is not clear why the definition of "record" in Section 3 of the Proposal needs to be changed from the definition of that term found in Uniform Commercial Code § 1-201(b)(31), ESIGN Section 106(9) and UETA Section § 2(13). Industry and the courts have become accustomed to these definitions and changing it now would be counterproductive.

Section 4, Alternative B (non-government chartered repository operator):

Please clarify that sub-section (b)(1) is not intended to prevent the repository operator from being a subsidiary or an affiliate of other organizations that are engaged in other businesses (beyond that of repository operator). Potential regulator imposed restrictions on fees, returns and distributions will inhibit interest from for-profit institutions becoming the repository operator, particularly since they are not permitted to use the appropriated source of funding available to other entities under the Proposal.

Section 7:

As we learned at the recent Uniform Law Commission drafting committee meeting, Fannie Mae and Freddie Mac (collectively, the "GSEs") have contemplated a use case where the original executed note might not be submitted to the repository, relying on the submitter to deal with the trailing note. We appreciate that there may be costs and risks associated with transmitting original notes to the repository (particularly for a portfolio of mortgage loans); however, we believe that there are greater costs and risks in not doing so, such as a double sale or pledging of the old paper note that is not submitted. Clarification on this point in the act should be included

Should other "eligibility requirements" be contemplated for inclusion in sub-section (a)(2)? Without further guidance, the regulator could use this provision to restrict the ability of small institutions to access the repository, which we would consider inappropriate.

In sub-section (c)(1)(C), the term "mortgagee of record" is introduced, but not defined. This lack of definition makes it difficult to fully analyze the proposal. Further, it will be an undue burden for the repository operator to have to track and verify whether a person who has submitted records to the appropriate recorder's office resulted in the person becoming a mortgagee of record.

In sub-section (c)(2)(B)(iii), under what circumstances would the identity of the "mortgagee of record" not be evident on the face of a mortgage or deed of trust?

The warranty obligations imposed on the repository operator in Section 7(d) are a significant departure from the existing secondary market process, where the trading partners in a sale transaction determine what warranties are to be made and by whom.

Imposing these warranty obligations on the repository operator will create additional costs and risks that are difficult to quantify, and may decrease the pool of private sector candidates willing to operate the repository. In the case of a federally chartered repository operator, providing such warranties may expose taxpayers to bear the burden of liability if the operator is under-capitalized.

Section 13:

In Section 13(f)(1)(A), the word "note" should be inserted after the words "electronic mortgage".

Section 14:

As we noted in our last comment letter, there may also be an unintended consequence arising from Section 14 (c), which establishes the registrant of the electronic mortgage note as the mortgagee of record for all purposes, including receipt of service of process. Most investors are not structured to receive service of process and other mail required by state law to be delivered to the "mortgagee of record". Today, it is a requirement of the GSEs and Ginnie Mae that either Mortgage Electronic Registration Systems, Inc. ("MERS") or the servicer be the "mortgagee of record". While we understand that the GSEs contemplate that the servicer will be the registrant (and the investor would be the authorized transferor) for loans submitted to the registry on their behalf, we note that this would obviate the role of MERS for 75% of all existing mortgages, resulting in a costly structural change that has not yet been agreed to by the industry.

Section 23:

Section 23 expands the power of state attorney generals to bring actions against any person if they believe that "the interests of borrowers whose electronic mortgage notes secures property in [their] State have been or are being threatened or adversely affected by a practice that violates [the act] or any regulations promulgated [thereunder]". Additional exposure to actions by state attorney generals will inhibit interest in being the repository operator. A clarification of what "interests of borrowers" might encompass would assist potential operators in understanding the potential costs and risks that they may be assuming by operating the repository. A better approach would be to let the regulator deal with violations of the act or regulations.

As always, we remain committed to working with you as a domain expert and appreciate your willingness to consider our comments.

Respectfully,

Bill Beckmann
President & CEO
MERSCORP Holdings, Inc. & Mortgage Electronic Registration Systems, Inc.