

## eHELOC SAMPLE TERMS FOR USE OF THE MERS® eREGISTRY

### INTRODUCTION

These are sample terms that counterparties to an electronically-executed home equity line of credit (eHELOC) may voluntarily use in order to agree to:

- Maintain a record of ownership, and assignments and transfers of ownership, of the eHELOC on the MERS® eRegistry; and
- Qualify the eHELOC as a “controllable payment intangible” under the proposed 2022 Amendments to the Uniform Commercial Code, and in particular the new provisions under proposed Uniform Commercial Code (UCC) Article 12.<sup>1</sup>

These eHELOC SAMPLE TERMS have been developed to address the requirements for establishing control under UCC Article 12 and are provided solely for purposes of education and information, and do not constitute legal advice. The user should consult its own legal counsel to review and approve the use of the eHELOC SAMPLE TERMS.

### SAMPLE TERMS

[INSERT PARAGRAPH NUMBER] Registration and Control of this [Electronically Executed Home Equity Line of Credit Agreement].<sup>2</sup>

(a) **Definitions.** The following terms used in this paragraph are defined as follows:

- 1) "eHELOC" means a home equity line of credit agreement evidenced by an Electronic Record and signed using an Electronic Signature;
- 2) "MERS® eRegistry" means a registry system maintained by MERSORP Holdings, Inc., or its affiliate, that is used to record the issuance and transfer of interests in eHELOCs; and
- 3) “eHELOC Controller” means us or any person we assign an interest in this eHELOC that is recorded on the MERS® eRegistry.

The terms “Electronic Record” and “Electronic Signature” have the meaning assigned to them under the laws governing this eHELOC.

(b) **Status as eHELOC; Identification of eHELOC Controller; Enforcement of eHELOC.** [Borrower] and [Lender] agree that:

- 1) This [Electronically Executed Home Equity Line of Credit Agreement] is an eHELOC;
- 2) This eHELOC may be transferred or assigned from one eHELOC Controller to another;
- 3) All transfers and assignments of this eHELOC shall be recorded on the MERS® eRegistry;
- 4) The identity of the originating Lender of this eHELOC, and the identity of any person to whom this eHELOC is later transferred or assigned, will be recorded on the MERS® eRegistry;
- 5) Any transfer or assignment of this eHELOC on the MERS® eRegistry shall require the authorization of the then-current eHELOC Controller;
- 6) The person identified as the current party in control of this eHELOC Agreement on the MERS® eRegistry shall be (i) the eHELOC Controller, and (ii) the person entitled to enforce all the terms of

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<sup>1</sup> Amendments to the Uniform Commercial Code (2022), as Approved and Recommended for Enactment in All the States, Uniform Law Commission, July 2022 (“Amendments”). The Amendments include the new proposed UCC Article 12, and corresponding amendments to UCC Article 9 and related provisions throughout the UCC. See the Practice Notes below with respect to adoption of UCC Article 12 and related choice of law issues.

<sup>2</sup> The title of home equity line of credit agreement or the other defined term used to identify the agreement should be inserted here.

this eHELOC and any security instrument granting a security interest in the property securing the obligation evidenced by this eHELOC; and

- 7) Reasonable proof of the identity of the then-current eHELOC Controller may, at the option of the person asserting that they are the current eHELOC Controller, include providing to [Borrower]:
  - i) A true and correct copy of any transfer disclosure required pursuant to 12 CFR § 1026.39 notifying [Borrower] of the sale and purchase of the eHELOC, or a copy of any similar notice or disclosure provided to Borrower in the regular course of business in connection with the sale and purchase; or
  - ii) A true and correct copy of a letter, notice or disclosure signed or issued by the prior eHELOC Controller confirming transfer of control of the eHELOC to the current person asserting that they are the eHELOC Controller.

(c) **eHELOC Controller entitled to receive payment.** [Borrower] also agrees that by signing this eHELOC, [Borrower] is promising to pay the amounts owed under this eHELOC to the eHELOC Controller, pursuant to the terms of this eHELOC.

#### PRACTICE NOTES

- In most jurisdictions, eHELOCs cannot qualify as “transferable records,” as that term is used in the federal ESIGN Act, 15 USC § 7021, or the Uniform Electronic Transactions Act (“UETA”), Section 16. This means that “control” of an eHELOC cannot be established under the ESIGN Act or the UETA in those jurisdictions.
- The Sample Terms are intended to meet the requirements under § 12-105 of Article 12 to establish “control” of the eHELOC as a “controllable payment intangible” under UCC Article 12 and UCC Article 9.
- Until UCC Article 12 is widely adopted by the states, it is likely that choice of law issues will prevent many eHELOCs from being treated as a “controllable payment intangible” under UCC Article 12 for purposes of establishing a first-priority interest in the eHELOC. Special attention should be paid to the application of the choice of law provisions in UCC Article 12 § 12-107 and UCC Article 9 §§ 9-301 and 9-306B (as amended).
- Unless UCC Article 12 applies, recording transfers of control on the MERS® eRegistry enables parties to track assignments of ownership of the eHELOC, but does not, under the applicable terms of existing UCC Article 9:
  - Establish that an enforceable interest has “attached” (as that term is used in UCC Article 9) to the eHELOC;
  - Affect the priority of previously perfected interests of third parties (such as a secured lender of the assignor) in the eHELOC; or
  - Establish a perfected, first priority interest in favor of an assignee in the eHELOC.
- Notwithstanding use of the MERS® eRegistry to track control of the eHELOC, it is still necessary to file the eHELOC security instrument, and any assignment of the eHELOC security instrument, in the appropriate public real property records.
- Note that these Sample Terms do not meet the requirements for creation of a transferable record under the ESIGN Act or the UETA.