

innovation

Minimize risk. Save money.
Reduce paperwork.



HERE'S HOW MERS® COMMERCIAL WORKS FOR YOU

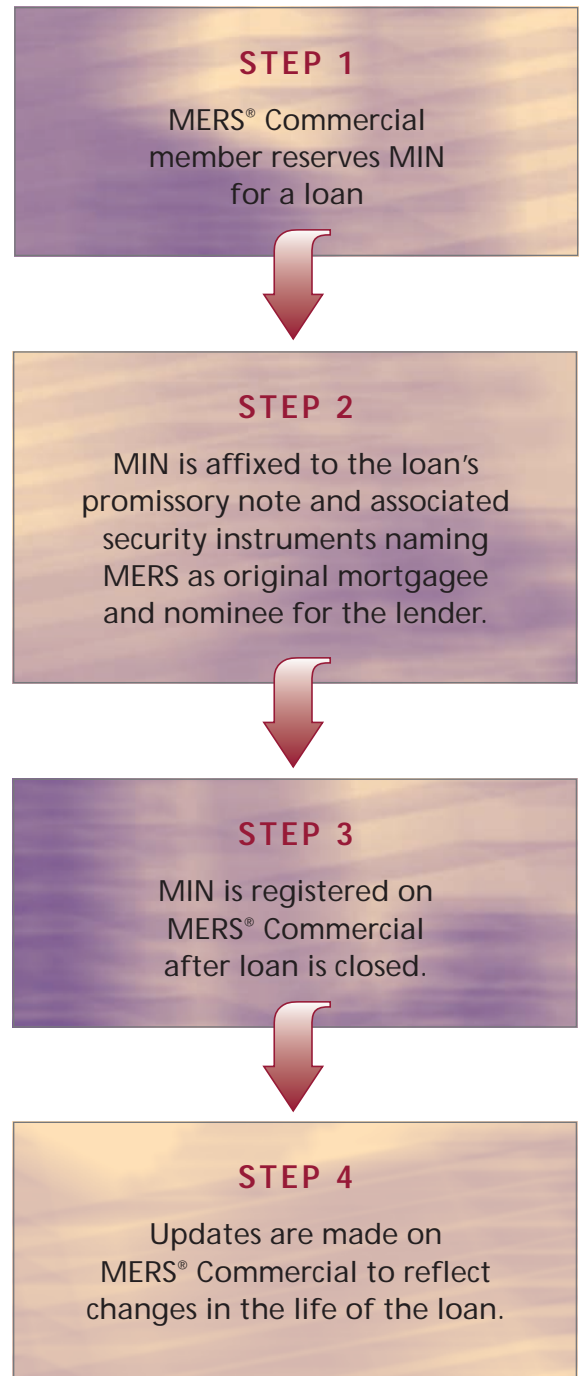
>> **Step 1:** MERS® Commercial member reserves a unique, 18-digit Mortgage Identification Number (MIN) from MERS for the loan they wish to register on the system.

>> **Step 2:** The MIN is affixed to the promissory note and associated security instruments that name MERS as original mortgagee and nominee for the lender, prior to closing the loan.

>> **Step 3:** The MIN, along with loan identifying information, is then registered on MERS® Commercial after closing the loan.

>> **Step 4:** Once registered, the member then updates MERS® Commercial to reflect changes in ownership due to securitization, foreclosure, repurchase or payoff. All parties with an interest in the loan can easily monitor major events in the life of the loan.

With the recording of the security instruments, MERS becomes the mortgagee in the county land records, and no assignments are required during any subsequent sale and transfer of the loan between MERS members. Reports are available that reflect the interest of all parties to loans registered with MERS.



NOTE: An assignment out of Mortgage Electronic Registration System Inc.'s (MERS) name is required before the initiation of a foreclosure action.

EVERY COMMERCIAL LOAN NEEDS MOM

— MERS AS ORIGINAL MORTGAGEE

WHAT IS MERS?

MERS saves lenders money and reduces paperwork by eliminating the need to prepare and record assignments when trading mortgage loans. MERS does this by acting as mortgagee for all MERS members in the county land records. That way, the legal mortgagee interest in the county land records never changes just because the loan is sold.

Almost half of all newly originated residential loans have been registered on the MERS residential system, and this has opened the door for its use in the commercial sector.

MERS® COMMERCIAL—MINIMIZING RISK

MERS® Commercial for the CMBS marketplace is designed to eliminate the repurchase risk and costs associated with preparing, recording and tracking assignments.

Assignments impose unnecessary costs on commercial originators and issuers of CMBS pools. Plus, they expose servicers, special servicers, custodians and trustees to operational problems caused by incorrect, unrecorded and missing assignments over the life of the loan.

MERS® Commercial has been endorsed by the Commercial Mortgage Securities Association (CMSA) and the MBA's Commercial Real Estate/Multifamily Finance Board of Governors (COMBOG).



MERS® COMMERCIAL BENEFITS

- **Minimize risk.** MERS® Commercial eliminates the threat of loan repurchase due to defects in loan documentation related to missing, incorrect or improperly recorded assignments.
- **Save money.** Commercial originators and issuers save hundreds of dollars in preparing and recording assignments. In the case of cross-collateralized loans, the savings can be in the thousands.
- **Become more efficient.** Missing interim assignments are eliminated, making the lien release process more efficient for commercial servicers.
- **Foreclose more quickly and efficiently.** MERS® Commercial allows special servicers to foreclose more efficiently by eliminating the problem of missing interim assignments.

WHAT DOES MERS® COMMERCIAL DO FOR YOU?

FOR ISSUERS...

- Streamlines paper processes
- Eliminates risk that an incomplete chain of assignment will lead to a repurchase demand from bond investors

FOR MASTER SERVICERS...

- Eliminates interim assignments
- Shortens time needed to obtain title policy
- Reduces recording fees and labor costs

FOR CUSTODIANS...

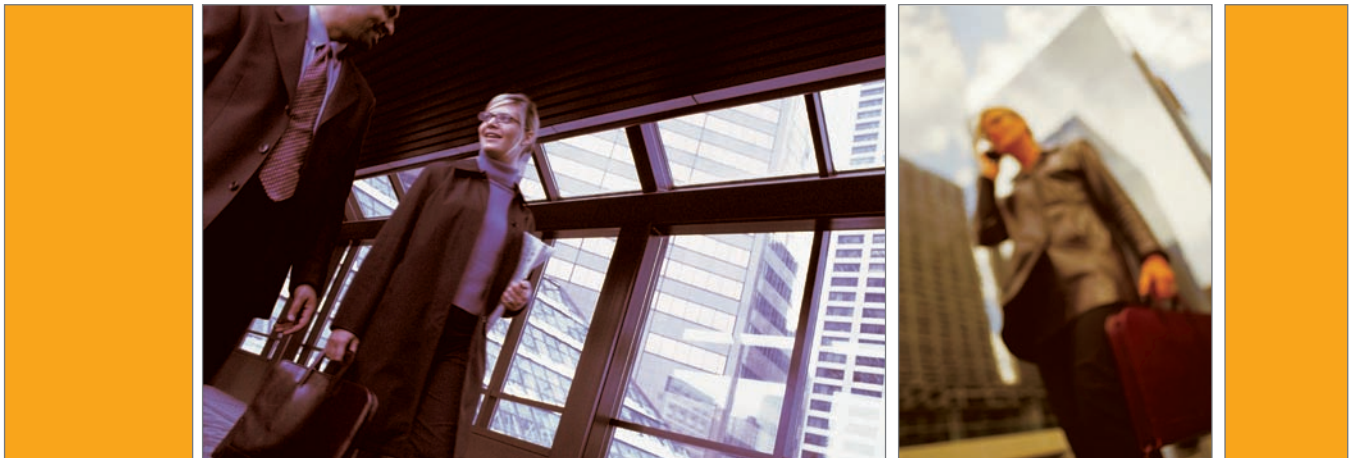
- Eliminates the need to record assignments in the name of the Trustee
- Reduces follow-up documentation to monitor

FOR ORIGINATORS...

- Streamlines paper processes
- Reduces instances of issuers returning with missing chains of title

FOR SPECIAL SERVICERS...

- Eliminates risk of incomplete chain of title stopping foreclosure process
- Improves delivery of service of process

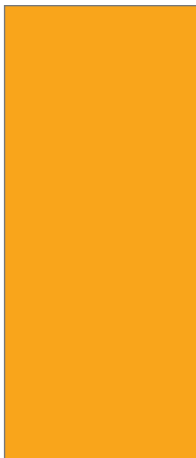


MERS® COMMERCIAL HIGHLIGHTS

- **Designed specifically for the commercial marketplace**, addressing the unique needs of all aspects of commercial mortgage lending.
- **Easy access through the Internet.** Members can gain access to all loan information through a secure, password-protected web-based interface.
- **Supports loan structures with multiple promissory notes and multiple properties** in the collateral structure.
- **Provides a method to identify** how many security instruments and UCC documents were present at time of loan closing.
- **Utilizes Mortgage Identification Number (MIN) as the primary identifier of all loan components**, linking information such as the note amount and borrower, security instruments and UCCs used as collateral, and the relationship of various business parties to the loans (i.e., note holders, servicers and custodians).
- **Generates loan history record of critical events.**

MERS SUPPORT

- **Website.** (www.mersinc.org). Convenient online source for what's new at MERS.
- **Regional Sales Directors.** Available nationwide for on-site sales and visits for members and their clients. Call **800-646-MERS** for more information.
- **User Conference.** Annual conference for both new and experienced MERS members that provides educational information on legal, regulatory and system enhancements.
- **Business Integration Directors.** Guides in the implementation of MERS within the business and technical environment, providing a point of contact for the MERS integration process.
- **Help Desk.** Answers questions for systems, procedural and technical questions for active members.
- **Training.** Offered via telephone, on-site and online, at the customers' choice.



MERS® COMMERCIAL

COMMONLY ASKED QUESTIONS

Q: Who has access to information about a MERS registered loan?

A: Any MERS member who has a legal interest in a transaction, or has been granted an interest by another member, may access loan information. Members can also use the MERS® Link system to identify the current servicer of a loan registered on the MERS® Commercial system.

Q: Who is named as the insured on a title policy for a MERS registered loan?

A: The recommended named insured is: the Lender, its successors and assigns, and Mortgage Electronic Registration Systems, Inc., as their interests may appear.

Q: Will the ratings of the securities issued with MERS registered loans be affected?

A: Standard & Poor's, Moody's and Fitch have all reviewed MERS. Neither the rating of the securities, nor the level of the credit enhancement, is adversely affected by MERS registered loans being in a securitization trust. The primary reason is that title to the mortgage lien is held by a special purpose bankruptcy remote subsidiary.

Q: Why did the MERS® System have to be modified for commercial lenders?

A: Commercial loans are frequently "cross collateralized," which means that there can be more than one security instrument per promissory note. The MERS® System for residential lenders allows for only one security instrument per promissory loan. For ease of use, we also segregated commercial loans from residential loans since most companies do not mix origination and servicing of commercial and residential loans.

Q: How will signatory authority be granted to members to service MERS registered loans?

A: Designated officers of the servicers will be elected officers of MERS under a corporate resolution that gives them the appropriate authority to execute documents and perform actions on behalf of the parties with an interest in the loan.



1595 Spring Hill Road • Suite 310 • Vienna, VA 22182
Tel. 800.646.MERS (6377) • Fax. 703.748.0183 • www.mersinc.org



MEMBERSHIP APPLICATION



MERS-ASSIGNED ORGID #

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 (MERS USE ONLY)

TYPE OF MEMBERSHIP (This form can be completed by using Adobe Acrobat Reader)

- GENERAL MEMBER COMMERCIAL** (E.G. ISSUER, CUSTODIAN, TRUSTEE) \$7500 ANNUAL FEE
- CORRESPONDENT MEMBER** (E.G. SELLS CLOSED LOANS) \$1000 ANNUAL FEE
- PATRON MEMBER** (E.G. LAW FIRMS, TECHNOLOGY VENDORS) \$1000 ANNUAL FEE

COMPANY INFORMATION (Please print or type):

COMPANY NAME:		
ADDRESS:		
CITY:	STATE:	ZIP:
MAIN PHONE:	MAIN FAX:	
TOLL-FREE NUMBER:	CORP. WEB SITE: WWW.	

CONTACT INFORMATION:

	NAME	TITLE	PHONE	EMAIL (REQUIRED)
MERS PROJECT MGR				
EXECUTIVE SPONSOR				
OFFICE OF THE CEO				
SALES EXECUTIVE				
CLOSING EXECUTIVE				
SERVICING EXECUTIVE				
GENERAL COUNSEL				

PERSON TO RECEIVE ALL COMMUNICATION FROM MERS				
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PLEASE CHECK ALL THAT APPLY:

- | | |
|---|---|
| <input type="checkbox"/> ISSUER | <input type="checkbox"/> CORRESPONDENT LENDER OR BROKER |
| <input type="checkbox"/> MASTER SERVICER | <input type="checkbox"/> CLOSING COUNSEL |
| <input type="checkbox"/> SPECIAL SERVICER | <input type="checkbox"/> RATING AGENCY |
| <input type="checkbox"/> PRIMARY SERVICER | <input type="checkbox"/> TRUSTEE / CUSTODIAN |
| <input type="checkbox"/> ORIGINATOR | <input type="checkbox"/> OTHER: _____ |

CLOSING PREPARATION:

DO YOU CLOSE LOANS IN YOUR NAME?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
DO YOU USE OUTSIDE COUNSEL?	<input type="checkbox"/> YES	<input type="checkbox"/> NO
IF YES, WHAT ARE THE MAIN FIRMS USED (IF MORE ROOM IS NEEDED, PLEASE LIST USING SEPARATE SHEET)?		
FIRM NAME	MAIN CONTACT	PHONE NUMBER

ORIGINATION AND EXECUTION ACTIVITY:

VOLUME (IN UNITS):	_____ GSE MULTIFAMILY	_____ CMBS	_____ OTHER
YOUR BUSINESS CHANNELS:	_____ RETAIL	_____ CORRESPONDENT (CLOSES IN CLIENT'S NAME)	
PRODUCTION SOLD SERVICING-RELEASED?	<input type="checkbox"/> YES	<input type="checkbox"/> NO	

ONLY TO BE COMPLETED IF YOU ARE APPLYING FOR "CORRESPONDENT MEMBERSHIP":

INVESTOR RELATIONSHIPS: (IF MORE ROOM IS NEEDED, PLEASE LIST USING SEPARATE SHEET):			
COMPANY NAME	MAIN CONTACT	PHONE NUMBER	EMAIL ADDRESS

HOW DID YOU HEAR ABOUT MERS?	
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Please note that we may use one or more of your listed investors above to obtain a reference.

By completing, signing and submitting this application, the Applicant is agreeing to be a MERS Member. The Applicant hereby agrees to pay all fees and expenses set forth in the MERS Fee Schedule, which may change from time to time; abide by all existing MERS Rules and Procedures, which are incorporated herein by reference and may be amended from time to time; and comply with the terms and conditions set forth in the attached addendum entitled Terms and Conditions.

NOTE: The Applicant will be billed the membership fees as stated in the MERS Commercial Fee Schedule. Please do not send payment at this time.

Applicant Signature: _____

Date: _____ **Email Address:** _____

Print and sign form, and fax or mail completed form to:
MERS
Attention: Customer Division
1818 Library Street, Suite 300, Reston, Virginia 20190
800.646.6377 Fax 703.748.0183 Telephone 800.646.MERS (6377)
www.mersinc.org



TERMS AND CONDITIONS

1. MERS, which shall include MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc., and the Member shall abide by these Terms and Conditions, the Rules of Membership and Procedures for the MERS® Commercial System (collectively, the “Governing Documents”), copies of which will be supplied upon request. The Governing Documents shall be a part of the terms and conditions of every transaction that the Member may make or have with MERS or the MERS® Commercial System either directly or through a third party. The Member shall be bound by any amendment to any of the Governing Documents.
2. The Member, at its own expense, shall promptly, or as soon as practicable, cause Mortgage Electronic Registration Systems, Inc. to appear in the appropriate public records as the mortgagee of record for all mortgages and secured party for other security instruments (as may be defined in the Rules) collateralizing each commercial mortgage loan that the Member registers on the MERS® Commercial System. MERS shall serve as mortgagee of record and secured party with respect to all such commercial mortgage loans solely as a nominee, in an administrative capacity, for the beneficial owner or owners thereof from time to time. MERS shall have no rights whatsoever to any payments made on account of such commercial mortgage loans, to any servicing rights related to such commercial mortgage loans, or to any commercial properties securing such mortgage loans. MERS agrees not to assert any rights (other than rights specified in the Governing Documents) with respect to such commercial mortgage loans or properties. References herein to “mortgage” and “mortgagee of record” shall include deed of trust and beneficiary under a deed of trust and any other form of security instrument pledging real property under applicable state law.
3. MERS shall at all times comply with the instructions of the holder of promissory note or notes secured by commercial mortgages or other security instruments where MERS is the mortgagee or secured party. In the absence of contrary instructions from the note holder, MERS shall comply with instructions from the Servicer shown on the MERS® Commercial System in accordance with the Rules and Procedures of MERS.
4. No rights or obligations of the Member with respect to any data or information supplied to MERS by or on behalf of the Member shall be altered or affected in any manner by the provision of such data or information to MERS (except as otherwise specifically provided in these Terms and Conditions or the Rules of Membership).
5. If the Member uses MERS as mortgagee or secured party on any security instrument, the loan secured by such security instrument must be registered in accordance with the Rules of Membership and Procedures for the MERS® Commercial System.
6. MERS and the Member agree that: (i) the MERS® Commercial System is not a vehicle for creating or transferring beneficial interests in commercial mortgage loans, (ii) transfers of servicing interests reflected on the MERS® Commercial System are subject to the consent of the beneficial owner of the commercial mortgage loans, and (iii) membership in MERS or use of the MERS® Commercial System shall not modify or supersede any agreement between or among the Members having interests in loans registered on the MERS® Commercial System.
7. If the Member has a third-party register loans (the “Registrar”) on the MERS® Commercial System on behalf of the Member, the Registrar shall not be deemed an agent of MERS. The Registrar shall be solely an agent for the Member, and MERS is only giving consent to the Member to use a Registrar to enter information on the MERS® Commercial System on behalf of the Member. The Member agrees that MERS is not liable to the Member for any errors and omissions, negligence, breach of confidentiality, breach of the Rules and Procedures, or willful misconduct of the Registrar, or any employee, director, officer, agent or affiliate of the Registrar in performing its services to the Member.
8. The Member shall promptly pay to MERS the compensation due it for transactions registered on the MERS® Commercial System and other services rendered to the Member based on the then current MERS® Commercial fee schedules, which may change from time to time. The Member shall promptly pay to MERS any interest and penalties on delinquent fee payments at the rate set by MERS from time to time. MERS shall have the authority to impose reasonable penalties and fines on Members for breach of the Governing Documents, and the Member shall promptly pay such fines in accordance with the terms of their imposition.
9. MERS shall indemnify and hold harmless the Member, and any employee, director, officer, agent or affiliate of the Member (“Member Party”), from and against any and all third-party claims, losses, penalties, fines, forfeitures, reasonable attorney fees

and related costs, judgments, and any other costs, fees and expenses (“indemnified Payments”) that the Member Party may sustain directly from the negligence, errors and omissions, breach of confidentiality, breach of the Terms and Conditions, breach of the Rules and Procedures, or willful misconduct of MERS, or any employee, director, officer, agent or affiliate of MERS (“MERS Indemnified Claim”). Notwithstanding the foregoing, MERS shall not be liable or responsible under the terms of this Paragraph for any losses or claims resulting from the actions or omissions of any person other than an employee, director, officer (who is also an employee of MERS), agent or affiliate of MERS.

The Member shall indemnify and hold harmless MERS, and any employee, director, officer, agent or affiliate of MERS (“MERS Party”), for any Indemnified Payments which do not result from a MERS Indemnified Claim and which such MERS Party incurs (i) from the negligence, errors and omissions, breach of confidentiality, breach of the Terms and Conditions, Rules and Procedures, or willful misconduct of a Member Party, (ii) with respect to a transaction on the MERS® MERS® Commercial System initiated by such Member, or (iii) as a result of compliance by MERS with instructions given by the Member, or its designee, as beneficial owner, servicer or secured party shown on the MERS® Commercial System (“Member Indemnified Claim”).

MERS shall promptly notify the Member if a claim is made by a third party against either MERS or the Member with respect to any mortgage loan registered on the MERS® System in which the Member is shown on the MERS® Commercial System as beneficial owner, servicer or secured party in accordance with the Rules and Procedures. The Member shall promptly notify MERS if a claim is made against the Member that may be subject to the indemnification provisions of this Paragraph.

The obligations of MERS and the Member under this Paragraph shall survive the termination of the Member’s use of the MERS® Commercial System.

10. MERS and the Member shall maintain appropriate insurance coverage that shall include an errors and omissions insurance policy and a fidelity bond. MERS shall not be required to maintain coverage for persons who may be appointed at the request of the Member as certifying officers of MERS. The Member’s policies shall protect and insure MERS against losses in connection with the release or satisfaction of a commercial mortgage loan without having obtained payment in full of the indebtedness secured thereby. Upon request, MERS or the Member shall cause to be delivered to the other a certified true copy of such errors and omissions insurance policy and fidelity bond.

In the event of any loss of principal or interest on a mortgage loan or any Indemnified Payments for which reimbursement is received from a fidelity bond or any errors and omissions insurance policy or other insurance policy, the proceeds from any such bond or insurance shall be held in trust for and be promptly paid to the Member who is shown as the servicer on the MERS® Commercial System on behalf of the beneficial owner unless otherwise requested by the beneficial owner.

11. Any notice or other communication which is required or permitted to be given or made to MERS pursuant to any provision of the Governing Documents shall be given or made in writing and shall be sent by nationally recognized overnight courier, or facsimile followed by delivery of the original via first class mail, addressed as follows: MERS, Corporate Secretary, 1818 Library Street, Suite 300, Vienna, Virginia, 20190.
12. These Terms and Conditions and all transactions effected by the Member with MERS shall be governed by and construed in accordance with the laws of the Commonwealth of Virginia without regard to its choice of law provisions.
13. Neither the Member nor MERS shall institute a proceeding before any tribunal to resolve any controversy or claim arising out of or relating to these Terms and Conditions, Rules and Procedures, or the breach, termination or invalidity thereof (a “Dispute”), before such party has sought to resolve the Dispute through direct negotiation with the other party. If the Dispute is not resolved within thirty (30) days after a written demand for direct negotiation, the parties shall attempt to resolve the Dispute through mediation. If the parties do not promptly agree on a mediator, either party may request the then chief judge of the Circuit Court of Fairfax County, Virginia to appoint a mediator. All mediation proceedings hereunder shall be held in Washington, D.C. If the mediator is unable to facilitate a settlement of the Dispute within a reasonable period of time, as determined by the mediator, the mediator shall issue a written statement to the parties to that effect and the aggrieved party may then seek relief in accordance with the arbitration provisions of this Paragraph. The party initiating the Dispute shall pay the fees and expenses of the mediator.

In the event that the Member and MERS are not able to resolve a Dispute in accordance with the mediation provisions of this Paragraph, such Dispute shall be settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof; provided, however, that the place of arbitration shall be Washington, DC, and fees and expenses for the arbitration proceedings shall be paid by the party initiating arbitration.

MERS: Every Commercial Loan Needs a MOM

During its lifetime, the average mortgage loan will be sold and assigned a multitude of times, from initial lender to perhaps a wholesaler/trustee and then on to an agency such as Fannie Mae or Freddie Mac. Each time the loan is sold or assigned, it's possible the identity of the actual owner will be lost during the assignment process.

This problem exists because the actual assignments must be properly prepared and then recorded with the local filing office. Loan servicers will often rely on a title company or another outside service to ensure that these documents are properly recorded, only to find out later there are serious gaps in the recorded history of ownership for the loan.

The mortgage banking industry addressed this problem for residential loans by creating Mortgage Electronic Registration Systems Inc. (MERS), Vienna, Virginia. It is a system designed to streamline the mortgage loan process by having MERS act as a single mortgagee of record, thereby eliminating the need for assignments. MERS is also designed to pro-

The system that established an electronic registry for ownership of home mortgages and servicing rights seems perfect for the commercial mortgage-backed securities (CMBS) industry. Here's what MERS Commercial has to offer, and the obstacles that must be overcome to get there.

vide a system whereby members could electronically access key information about a loan that was originated through the MERS® System. MERS is now saving residential lenders and servicers millions of dollars annually.

Although MERS was initially developed and used for residential loans, the thinking was MERS would eventually be adapted for use with commercial mortgages. MERS is currently in the process of launching MERS® Commercial, which is based on the residential MERS System but modified to handle the specific requirements of the commercial mortgage-backed securities (CMBS) market.

BY DEBORAH A. SCHIAVO, GARY S. SMUCKLER AND HENRY LIU

MORTGAGE BANKING · JANUARY 2003

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MERS Commercial is scheduled for release in the late summer of 2003. Because such a high proportion of commercial loans eventually end up in CMBS pools and due to the more complex servicing structures in CMBS transactions, MERS Commercial users are expected to realize even greater savings than their residential counterparts. MERS has said its long-term goal is to have every mortgage loan in the United States, whether residential or commercial, registered in the MERS system.

This article illustrates the potential benefits and impact MERS Commercial will have on the commercial mortgage industry. The article starts with a look at the impact MERS has had on the residential mortgage loan industry. Then we examine the limitations of the current system in the CMBS world, where assignments must be recorded each time a mortgage loan is sold and assigned. Then we discuss the basics of how MERS Commercial will work and the benefits it will provide to the commercial mortgage industry. We conclude by outlining some of the major issues and hurdles MERS Commercial must overcome in order to be successful.

Behind MERS

MERS was developed in 1996 as a result of a joint effort of members of the mortgage banking industry to combat the problem of missing assignments and defective loan files. Currently there are more than 700 companies registering residential loans through the MERS system. Loan registrations are averaging more than 25,000 per day and are expected to continue to increase as more companies use MERS.

In September 2002, MERS registered its 10 millionth loan. MERS executives and directors represent leaders in the fields of electronic commerce, mortgage banking and the title insurance industry. Companies in the mortgage banking industry also form the majority of the shareholders of MERS.

The problem with assignments

There are several major problems with the current process. Under that process, mortgage loans are assigned via paper assignments each time a mortgage loan is sold or transferred. The first and most obvious problem is the sheer hassle and cost of preparing an assignment each time a mortgage loan is sold or servicing is transferred, which can occur multiple times during the life of a loan.

Each time an assignment is prepared, the lender or servicer incurs costs. These expenses stem from the manpower required to prepare the assignment documentation, postage and other delivery costs; fees such as legal fees; and actual recording or filing fees and expenses. If the assignments are not prepared correctly the first time, more costs are incurred from having the assignment redone and resent for filing.

Not having a proper chain of assignments may cause disruptions in the servicing of a loan. To the extent previous

assignments have not been properly filed, the loan file must be corrected. This is done by locating prior lien-holders and then having assignments prepared and refiled. In addition, the identity of the lender must be correctly filed before any modification or release documents can be filed. This can result in delays in processing servicing requests, resulting in customer service-related issues (and possible liability)

MERS was developed in 1996 as a result of a joint effort of members of the mortgage banking industry to combat the problem of missing assignments and defective loan files.

for lenders and their loan servicers.

The biggest problem with missing assignments, however, is they can have a serious financial impact on lenders. The majority of pooling and servicing agreements for securitized loans allow trustees to remove any loans from a securitization pool that do not meet the pooling and servicing agreement's document delivery requirements. The trustee or issuer may then force a repurchase of the defective loan. Missing assignments and a defective chain of title are among the items that can trigger a loan repurchase. This takes on added significance in the CMBS market. In the residential market the threat of a \$150,000 residential loan repurchase may not be that devastating, but the prospect of repurchasing a \$150 million commercial loan is quite another matter. Another drawback of improperly recorded assignments is gaps in the ownership records may adversely impact the rating and trading of the CMBS.

The birth of MERS Commercial

MERS Commercial was created in the latter half of 2002 as a way to tackle the issue of incomplete and/or defective loan files in the commercial mortgage industry. A MERS Commercial Business Requirements Development Meeting was held on Sept. 24-26, 2002, at the MERS offices in Vienna, Virginia. At that meeting, industry leaders met to discuss the needs of the commercial mortgage industry as well as the basic business requirements for MERS Commercial, such as Mortgage Identification Number (MIN) generation, document preparation, the registration process, maintenance and updating of records and other necessary features of MERS Commercial.

Major players in the mortgage banking industry such as Wells Fargo, Bear Stearns, Bank of America, GE Capital, GMAC Commercial Mortgage Corporation and John Hancock have provided initial funding to MERS Commercial, while the venture has been endorsed by the Commercial Mortgage Securities Association (CMSA) and the Mortgage Bankers Association of America's (MBA's) Commercial Real Estate/Multifamily Finance Board of Governors (COMBOG).

MERS also has been approved by Fannie Mae, Freddie Mac, Ginnie Mae and the Federal Housing Administration (FHA), as well as all of the major Wall Street rating agencies. MERS Commercial will initially be targeted toward CMBS loans, with future plans to include agency multifamily loans.

How MERS Commercial works and the potential benefits

MERS Commercial will operate much like MERS functions for residential loans. MERS will act as the lender in the local recording office for the lender and servicer. Future assignments do not need to be prepared, because MERS remains the mortgagee no matter how many times a loan is sold or servicing is transferred.

Every time a commercial loan is sold, MERS will maintain an electronic record showing the loan's ownership history as well as pertinent information about the loan. MERS will remain the mortgagee of record until the mortgage lien is extinguished. All monthly mortgage payments, however, are made payable and sent directly to the loan servicer.

MERS Commercial will be Web-based and will provide the additional benefit of being a storehouse where information on MERS-originated loans will be collected in a centralized location. MERS will collect, maintain and display loan information such as the note amount and borrower; the properties, security instruments and Uniform Commercial Codes (UCCs) used as collateral for the loans; and the various parties to the loan transaction (note holders, servicers, custodians, etc.) and their relationship to each other. All of these components will be linked by an 18-digit MIN that will be the primary key to all of the records maintained within the MERS system.

When preparing loan documentation, lenders will designate MERS as the lender of record or, in MERS terminology, MERS as Original Mortgagee (MOM). Document preparers must include the loan's MIN on each document. They also will incorporate MOM language on all of the recordable documents and, at the option of the lender, the remaining loan documents. Immediately after the loan closing, the originating lender will enter the MIN, along with the required information to identify a loan and its collateral, into the MERS system.

Once a loan has been registered with MERS, authorized users will have the ability to access the MERS system and update a particular loan's records to track changes in the loan's ownership, servicing and collateral rights. All of the information mentioned earlier will be available online, but only to authorized users. Critical loan events will generate a loan history record known as a "milestone." This electronic registry has the added benefit of reducing the amount of time that lenders need to respond to servicing requests such as

loan assumption requests, since all the information for a particular loan will be readily available.

In the event of servicing issues, such as a required modification to a security instrument, MERS, as the mortgagee of record, normally would be required to sign any modification instruments. MERS has remedied this problem by providing each MERS member with a corporate resolution authorizing the servicer's officers to execute certain documents on behalf of MERS. This allows servicers to perform basic servicing functions without having to go to MERS each time, even though MERS remains the lender of record. In fact, the MERS system contemplates that all servicing obligations, responsibilities and liabilities will lie with the servicer or noteholder, as those parties allocate such responsibilities and liabilities in their pooling and servicing agreement.

The process for foreclosing loans entered into the MERS system will vary from state to state, because each state handles the foreclosure process differently. In most states, the trustee's/sheriff's deed can be issued directly to the servicer or investor, so that MERS does not end up with fee title at the conclusion of the foreclosure. Some states, however, require a strict foreclosure where MERS ends up with title to the foreclosed property. In these instances, MERS members will be required to issue a subsequent deed from MERS to themselves or the investors as soon as possible after the foreclosure.

To assist with troubleshooting and answering questions about MERS conveniently, MERS offers an online Forum. Anyone can access the Forum and ask questions and review answers related to MERS. These questions are posted online and answered by an in-

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house attorney at MERS. The MERS Forum also allows participants to learn about issues they may face in the future based on other users' experiences with MERS. MERS has also set up a help desk to answer questions.

Potential obstacles facing MERS Commercial

Although the success of MERS residential has largely paved the way for the success of MERS Commercial, there are several issues with MERS that must be resolved, as well as unique problems that MERS Commercial will face in the CMBS market.

One of the greatest difficulties facing the MERS system is general unfamiliarity with its system. There have been instances where local recording offices and title insurance offices did not understand the MERS system, resulting in confusion, rejected recordings and other delays in the loan process. In some instances, documents naming MERS as mortgagee have initially been rejected where the beneficial ownership of a loan has changed, but the local recording offices will note the absence of any assignments, thus raising a red flag when documents need to be recorded.

For example, MERS documents were rejected by several recorders' offices in the state of New York based on an opinion from the attorney general of New York. The opinion stated in substance that documents will only be recorded under the name of the actual parties in interest. The attorney general's opinion was based on the incorrect assumption that MERS in fact had no legal interest in the documents, even though MERS is named as mortgagee (this fact was unknown to the attorney general at the time the opinion was issued). Thus, several jurisdictions in New York interpreted the attorney general's opinion to mean that all MERS documents should be rejected for recording.

MERS was forced to litigate this issue, and in June 2002 obtained a temporary order requiring that MERS documents be recorded. MERS is confident that the current state of the law is in its favor and that it will prevail in the litigation. This problem, although atypical, may yet appear in other jurisdictions that are unfamiliar with MERS.

Borrowers may also be unfamiliar with MERS. This may cause confusion when, for example, MERS appears as the plaintiff rather than the actual noteholder or servicer in a foreclosure action or condemnation proceeding. Borrowers then may become confused as to where to send payments or correspondence. These problems may persist until such time as there is a greater recognition of MERS and how the MERS system operates.

There is also the question of how MERS will function with complex commercial loan transactions—for example, where the loan security is cross-collateralized or where there are multiple notes per property. None of these issues appears in the residential loan context. MERS is currently developing methods whereby the MERS system will be able to accommodate complex or irregular transactions—such as Maryland's indemnity deed of trust structure, where the identity of the borrower and owner of the collateral are different—which may provide users with incomplete or confusing information about that particular loan.

Another area of concern relates to third parties that are involved in the loan process, such as borrower's counsel and title insurance companies. For example, in commercial loans, as opposed to residential loans, opinions of counsel are usually required whereby the borrower's attorney must opine that the loan documentation is enforceable against the borrower subject to certain customary qualifications. Attorneys may be hesitant to give such opinions where

MERS, as opposed to the original lender, is the mortgage holder of record. Although the answer to this question largely depends on state law, it would seem that the identity of the mortgage holder of record is largely irrelevant for a basic enforceability opinion. The fact that MERS is named as mortgagee in a document would generally not affect the underlying terms and enforceability of the docu-

One of the greatest difficulties facing the MERS system is **general unfamiliarity with its system.**

ments. Nevertheless, it should be expected that a fair number of the borrower's counsel may be unfamiliar with MERS and may raise MOM as an issue when delivering their opinions.

Similarly, title insurance companies may show resistance in providing lenders with a mortgagee's title insurance policy where the mortgage securing the original lender's loan shows MERS as the mortgagee. Title companies in the residential market have dealt with the problem by naming the "insured" in one of four ways: (1) the lender, its successors and assigns appearing of record as Mortgage Electronic Registration Systems Inc.; (2) the lender, its successors and assigns; (3) Mortgage Electronic Registration Systems Inc. as the beneficiary and the lender as the beneficial lender; and (4) the lender and/or Mortgage Electronic Registration Systems Inc. solely as nominee for the lender, its successors and assigns, as their interests may appear. Presumably, these approaches will be available and acceptable in the commercial market. Note that, here again, local title insurance law may alter this analysis.

The majority of these issues center on the novelty of MERS and will be remedied over time. Yet until MERS Commercial becomes a household name in the mortgage industry, these issues will need attention to bring about the smooth operation and success of MERS.

Considering the success MERS has enjoyed in the residential loan context, it seems likely it will experience the same success in the CMBS world. Much like in the residential context, the biggest hurdle facing MERS is a lack of understanding and unfamiliarity with the MERS system. Yet at the same time, MERS Commercial will undoubtedly face issues unique to the CMBS market.

Nevertheless, we believe the time will come when MERS Commercial will be a backbone of the CMBS world, and everyone will understand that every commercial loan needs a MOM. **MB**

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