



The Mythology of MERS 2.0: S.B. 1834 is Harmful for the Land Title Insurance Industry and Worse for Local and County Governments.

Senator Bob Corker (R-TN) has introduced S.B. 1834 a bill known as the “The Residential Mortgage Market Privatization and Standardization Act of 2011”. The bill would unwind government-sponsored enterprises Fannie Mae and Freddie Mac and end dependence on the government for housing finance.

According to Senator Corker’s press release, the Mortgage Market Privatization and Standardization Act would gradually reduce the portfolio of mortgage-related assets guaranteed by Fannie Mae and Freddie Mac and take steps to bring uniformity and transparency to the housing market so that private capital can begin to replace the GSEs. Taken into government conservatorship at the height of the 2008 financial crisis, Fannie Mae and Freddie Mac currently own or guarantee half of all mortgages in the United States, worth \$5 trillion, and back 90 percent of all new home loans.

The legislation contains the following elements:

- **Wind Down of Fannie Mae and Freddie Mac:** Reduces each year the percentage of newly issued mortgage-backed securities’ (MBS) principal that is guaranteed by Fannie Mae and Freddie Mac. The percentage guaranteed must be reduced to zero within 10 years, at which point MBS will be wholly privatized.
- **Mortgage Market Transparency:** Creates an industry-financed database that makes uniform performance and origination data on mortgages available to the public through the Federal Housing Finance Agency.
- **Creation of a new TBA Market:** Initiates a process for creating deliverability rules and technology necessary for the “to-be-announced” (TBA) futures market with no government guarantee.
- **Monetization of Business Assets:** Directs the sale of any technology, home price indices, and systems currently owned by the GSEs to private investors.

- **Uniform Underwriting Standards:** Replaces the Qualified Residential Mortgage and risk retention with a 5 percent minimum down payment and full documentation requirement.
- **Residential Mortgage Market Uniformity:** Creates a uniform pooling and servicing agreement (PSA) and a new electronic registration system (MERS 2) where all loans are transferred under one system regulated by the FHFA and instructs federal regulators to develop uniform practices and streamline mortgage regulations.

What Does the MERS 2.0 Bill Actually Say?

In 2010, and again in 2011, Congresswoman Marcy Kaptur (D-OH) introduced H.R. 6460 and H.R. 2425 which also sought to address problems with the GSE relationship to MERS. Those bills were reviewed by NAILTA in previous position papers.¹ S.B. 1834 packages the MERS issue into a broader bill that attempts to address GSEs and loan servicing issues.

NAILTA’s primary concern in this position paper is the language pertaining directly to the creation of a new MERS registry under the auspices of the federal government. That language reads as follows:

“The [FHFA] Director shall establish, by rule, a Mortgage Electronic Registration System (in this section referred to as "MERS2") based on the Mortgage Electronic Registration System in use on the date of enactment of this Act. MERS2 shall incorporate a single national database for all mortgage title transfers, to be maintained and operated by FHFA. The rules of the Director shall ensure that property title is transferred in accordance with all applicable provisions of law. All mortgage transfers shall take place according to national standards and shall be recorded in the MERS2 system.”

Again, it must be pointed out that MERS is a flawed system created by the mortgage finance, banking, and national title underwriting industry and is currently embroiled in nationwide lawsuits concerning its creation of land title record defects, its subversion of state recording laws and customs and its participation as a cause of the national foreclosure crisis. Therefore, any consideration of creating a new MERS without having successfully resolved the well-known flaws and inadequacies of the previous MERS system is a foolhardy exercise. S.B. 1834 proposes no solution to the prevalent flaws with the current MERS system. Instead, it merely seeks to establish MERS 2.0 “based upon the MERS in use on the date of enactment”. This terminology is the legislative equivalent of replacing a failed business with a new entity run by the management of the failed business. Without significant changes, the result is likely to be the same.

¹ “Looking at the Forest Through the Trees: Why H.R. 6460 May Not be Such a Bad Idea After All?” written December 8, 2010 and “Why Congress Should Examine H.R. 2425 and MERS Together” written July 13, 2011. All available on NAILTA’s website at www.nailta.org.

Why is MERS 2.0 Harmful for the Land Title Insurance Industry?

- **MERS 1.0 Failed to Protect Land Title Records:** A single national database for all mortgage title transfers will make worse an already growing problem with our land title records. In light of the ongoing robo-signing scandals and fraudulent recording issues throughout the United States, the public cannot rely upon industry to maintain accurate land title records. The present MERS system has no penalty to its members for the entry of inaccurate mortgage assignment information and no present ability for the public to access the information contained in the system without paying fees to view the data.

If a lender or servicer is unknown to the registry, how is a settlement agent supposed to be able to rely upon the MERS system to track ownership of a particular mortgage for a closing? How do small businesses afford the added costs associated with the registry? How would an interested consumer find out who really holds their mortgage if they have to be a member of a national database in order to do it? The current MERS system has no answer. Public land title records are not meant to be opaque and inaccessible and this bill only compounds this inequity. If MERS records deserve the public trust, they must be accessible to the public the same way they are at the county recorder's office.

- **MERS 1.0 and 2.0 is Designed to Cede the Business of Title Insurance to Banks:** When MERS was originally founded in the 1990's by the banks, mortgage finance companies, GSEs and the national title insurance underwriters it was sold as a product "built by the mortgage industry, for the mortgage industry." MERS is not meant to protect consumers nor improve the title insurance industry. MERS is only meant to hasten the exchange of mortgage-backed securities by removing another layer of oversight from the process – the necessary oversight of the land title records. MERS 2.0 will compound a currently flawed system by giving the new registry federal immunity to insulate it from the known harms currently plaguing the old system.

The recordation of mortgage assignments, in one form or another, is the norm in every state in the United States. Generally speaking, it requires the assignor or assignee to pay a fee to the county recorder each time the mortgage is assigned in the county records. The county recorder is then responsible for maintaining the public records with accurate mortgage assignment information that any member of the public could reasonably access in their local county office. MERS short-circuits this effort by creating an off-record assignment process maintained by the participants in the MERS system. They keep the mortgage assignment data separate from the local county records and profit from the fees. Title insurance professionals under the MERS system must rely upon the industry to accurately reflect the state of land title, not the public record. Where the local county records have always been the province of title professionals, the MERS system is the province of the banks. At a macro level, MERS 2.0 is undemocratic.

If the local county recorder fails to uphold their duty to the public to accurately reflect the land title records, a citizen can choose to vote them out of office or sue them for mandamus. Under MERS 2.0, if the banks fail to accurately reflect the current status of

mortgage holder or assignee, not only is there no penalty for the failing, the government is immune from the remedy. You cannot vote a bank out of office, but you can stop paying them to make mistakes. Rejecting MERS 2.0 and focusing on improving the land title record system from the inside is a better use of our legislative efforts.

- **MERS 2.0 is a Federal Torrens System:** Proponents of MERS are sure to suggest that there is a difference between land title records for deeds and mortgages and land title records for securitized mortgage assignments. This is meant to divide attention away from the fact that these proponents are also shareholders in the MERS system and derive a large percentage of income from the use of the system. However, this suggestion is pure subterfuge.

One of the many failings of MERS 1.0 is the fact that it fails to reconcile 50 states worth of mortgage recording and foreclosure law. Rather than create a viable alternative to the complex fabric of state law, the MERS proponents chose to ignore the problem never realizing that their combined actions would result in the financial crisis that soon followed. NAILTA has previously addressed this failing in prior position papers. Critics of NAILTA's position noted that Congresswoman Marcy Kaptur's MERS bill (H.R. 6460 and H.R. 2425) was an attempt to create a Federal Torrens system because her bill proposed to study whether such a federal system was feasible.² Senator Corker's bill, S.B. 1834, does not propose a feasibility study for the creation of a federal recording system like Rep. Kaptur, but rather his bill goes much further and actually requires the creation of a federal recording system.

If those like the American Land Title Association who opposed Kaptur's bills because they would create a federal recording system similar to Torrens do not also oppose Corker's bill for doing the same, they are being dishonest. S.B. 1834 is the absolute creation of a federalized land title recording system for securitized mortgage instruments and a direct attack of the title insurance industry's ability to properly protect and insure America's land title records. The expense of transitioning to such a system and reconciling fifty states laws into the registry is the same failing that currently exists with MERS 1.0. The original MERS was a failure to all those except the profiteers who made hundreds of millions of dollars from the registry. Consumers who paid more money to defend real estate-related litigation tied to MERS failures, counties across the United States that lost out on much-needed local revenue from MERS and title agents who were unable to close real estate transactions because MERS clouded titles did not fare as well.

Why is MERS 2.0 Worse for Local and County Governments?

- **MERS 1.0 and 2.0 Has Siphoned Away Hundreds of Millions of Dollars From County Recorders:** Every time a mortgage assignment is entered into the MERS system without payment to the local county recorder for the recordation of same, the county loses revenue and the ability to accurately track the information. To the land title records, the impact is definite and negative. Faulty information, fraud and gaps in the

² <http://www.oaita.org/blog/2010/12/alta-continues-disingenuous-campaign-against-h-r-6460/> (visited November 21, 2011).

records. However, the impacts to the community are even greater. Estimates from across the county would total into the hundreds of millions of dollars if each county recorder were to tally the loss of overall revenue.

Say what you will about the value of government and its place in our society, but there is no debating the local impact of this loss of government revenue. Most fees for the filing of land title records are “general fund” dollars meaning they do not go directly to the county recorder for only their use. These funds go directly to the maintenance of county government as a whole. The money lost prevents local and county governments from being able to hire personnel, reserve for necessary capital expenditures such as fire protection, police or EMS, or even prepare for disaster relief. It cannot be understated. Not only did the owners of MERS help contribute to the mortgage meltdown and the financial crisis by packaging bad mortgages and selling them around the world, they also made it more difficult for local governments to fix their communities by siphoning off the revenues that help make your local municipality a great place to live.

About NAILTA

The National Association of Independent Land Title Agents (NAILTA) is a non-profit trade association that represents the interests of independent title insurance agents and independent real estate settlement professionals from across the United States. It was created by independent real estate settlement professionals to further the agenda of small business owners from within the title insurance, abstracting, surveying, and real estate community who lack representation at local, state and national levels.

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