

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL**



ATTORNEY GENERAL

**Questions and Answers from the Attorney General on the October 27, 2010
Statement of Enforcement Intent Regarding Deceptive Foreclosure Sale Notices**

November 16, 2010

The following questions and answers were drafted by the Office of the Attorney General, following discussions with professionals involved in the foreclosure process, to provide practical guidance as to how the general principles set forth in the Statement of Enforcement Intent will be applied.

Q. Does the District of Columbia's requirement that the foreclosing noteholder's "economic" or "security" interest be recorded apply to the note itself or only to the mortgage or lien interest?

A. The obligation to record applies both to the note and to the mortgage or lien interest.

Q. Can a foreclosure be initiated on behalf of a noteholder if conveyances of the note, or of the mortgage or lien interest, have not previously been recorded?

A. Yes. An acknowledged copy of the document or documents "by which" the interest was conveyed from the original noteholder to the foreclosing noteholder may be recorded with the Recorder of Deeds immediately before the foreclosure sale notice is served on the borrower. Alternatively, a copy may be attached to, and recorded and served with, the foreclosure sale notice.

Q. How should a copy of the note be "acknowledged"?

A. An affidavit stating that the attached copy is a true copy of the original document, and that the original document is currently held by the noteholder, will suffice. An affidavit must be accurate as of the time of filing.

Q. If the note was conveyed from noteholder to noteholder through a series of endorsements on the back of the note, should the note itself be recorded?

A. If the final endorsement is to the noteholder, then an acknowledged copy of the note, including a copy of all the endorsements, may be attached to, and recorded with, another filing, such as the foreclosure sale notice.

Q. May the noteholder's interest be demonstrated by attaching to the foreclosure sale notice a copy of information downloaded from Mortgage Electronic Registration Systems (MERS)?

A. No. The noteholder's interest must be demonstrated by recording the document or documents by which the interest was conveyed. As to the note, an acknowledged copy of the note, including the endorsements, should be recorded. Any assignment of the mortgage or lien interest to the noteholder should also be recorded.

Q. What if the note in question was endorsed in blank and is now a bearer note?

A. An acknowledged copy of the bearer note, along with an affidavit identifying the current holder and location of the original, may be recorded. The copy of the bearer note should include a copy of all the endorsements.

Q. What if the note was endorsed in blank and then lost?

A. An acknowledged copy of the bearer note, along with an affidavit describing its loss, may be recorded. The Attorney General takes no position on the legal issue of whether, or under what conditions, a foreclosure may be valid under District of Columbia law if the noteholder's interest is based on a lost bearer note. It is important, however, that the fact of the note's loss be clearly and conspicuously disclosed in a recorded document.

Q. Does a failure to record the note prior to the foreclosure sale invalidate the foreclosure?

A. No. A failure to record the note, by itself, will not invalidate the foreclosure.

Q. Does the Attorney General intend to enforce the Consumer Protection Procedures Act against noteholders or trustees who, prior to issuance of the Attorney General's October 27, 2010 Statement of Enforcement Intent, completed foreclosure sales without having recorded the noteholders' interests?

A. No, assuming that there are no other grounds for invalidating the foreclosures. The Act prohibits material misrepresentations that have "a tendency to mislead." If the foreclosures are ultimately determined to be valid, then the use of foreclosure notices on behalf of noteholders with unrecorded security interests did not in fact mislead the consumers who received them. But if the foreclosure sales are ultimately determined to be invalid, and if the use of deceptive foreclosure sale notices misled consumers into believing that the foreclosures were proper, then, in addition to remedies otherwise available, the Attorney General may seek consumer protection remedies under the Act.

Q. Does the Attorney General intend to enforce the Consumer Protection Procedures Act against noteholders or trustees who, after the issuance of the Attorney General's

October 27, 2010 Statement of Enforcement Intent, are continuing to notice foreclosure sales without having recorded the noteholders' interests?

A. Yes. A homeowner is entitled to assume that the note and the mortgage or lien interest supporting a noticed foreclosure are properly recorded, as provided by District law. The Attorney General is prepared to seek preliminary injunctive relief and, if appropriate, civil penalties to ensure that deceptive foreclosure sale notices are not now causing homeowners to acquiesce in foreclosures that may later be ruled invalid. The loss of a home, even for a limited period of time, is a form of irreparable injury that justifies a preliminary injunction.