

D R A F T

FOR DISCUSSION ONLY

**AMENDMENTS TO UNIFORM COMMERCIAL CODE
ARTICLES 1, 3, AND 9**

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SIXTH YEAR
SAN DIEGO, CALIFORNIA
JULY 14 - JULY 20, 2017

**AMENDMENTS TO UNIFORM COMMERCIAL CODE
ARTICLES 1, 3, AND 9**

Copyright © 2017

By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporter. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

June 13, 2017

**DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM COMMERCIAL CODE
ARTICLES 1, 3, AND 9**

The Committee appointed by and representing the Uniform Law Commission in preparing this Act consists of the following individuals:

EDWIN E. SMITH, One Federal St., Boston, MA 02110-1726, *Chair*

KRISTEN D. ADAMS, 1401 61st St. S., Gulfport, FL 33707, *ALI Representative*

BORIS AUERBACH, 5715 E. 56 St., Indianapolis, IN 46226

AMELIA H. BOSS, Drexel University School of Law, 3320 Market St., Philadelphia, PA 19104,
ALI Representative

THOMAS J. BUITEWEG, 3025 Boardwalk St., Suite 120, Ann Arbor, MI 48108

NEIL B. COHEN, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201-3700, *ALI Representative*

MICHAEL A. FERRY, 200 N. Broadway, Suite 950, St. Louis, MO 63102

PATRICK A. GUIDA, One Financial Plaza, 18th Floor, Providence, RI 02903-2419

TERESA W. HARMON, One S. Dearborn St., Chicago, IL 60603, *ALI Representative*

WILLIAM H. HENNING, Texas A & M School of Law, 1515 Commerce St., Fort Worth, TX
76102

RONALD J. MANN, Columbia Law School, 435 W. 116th St., New York, NY 10027, *ALI Representative*

H. KATHLEEN PATCHEL, 5715 E. 56th St., Indianapolis, IN 46226

NORMAN M. POWELL, Rodney Square, 1000 N. King St., Wilmington, DE 19801, *ALI Representative*

SANDRA S. STERN, 43 W. 43rd St., Suite 125, New York, NY 10036-7424

STEVEN O. WEISE, 2049 Century Park E., Suite 3200, Los Angeles, CA 90067-3206, *ALI Representative*

STEVEN L. HARRIS, Chicago-Kent College of Law, 565 W. Adams St., Chicago, IL 60661-
3691, *Reporter*

EX OFFICIO

RICHARD T. CASSIDY, 1233 Shelburne Rd., Suite D5, South Burlington, VT 05403-7753,
President

JOHN T. MCGARVEY, 401 S. 4th St., Suite 1200, Louisville, KY 40202, *Division Chair*

NEIL B. COHEN, Brooklyn Law School, 250 Joralemon St., Brooklyn, NY 11201-3700, *PEB for UCC, Director of Research*

AMERICAN LAW INSTITUTE DIRECTOR

RICHARD L. REVESZ, New York University School of Law, 40 Washington Sq. S., Room
411, New York, NY 10012-1005, *ALI Director*

AMERICAN BAR ASSOCIATION ADVISOR

EILEEN S. EWING, 16 Country Way, Needham, MA 02492, *ABA Advisor*

EXECUTIVE DIRECTOR

LIZA KARSAI, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this act may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.uniformlaws.org

AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLES 1, 3, AND 9

TABLE OF CONTENTS

SECTION 1-201. GENERAL DEFINITIONS.....	1
SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES' POWER TO CHOOSE APPLICABLE LAW.	3
SECTION 3-103. DEFINITIONS.	4
SECTION 3-103A. POSSESSION AND HOLDER OF ELECTRONIC MORTGAGE NOTE..	4
SECTION 3-104. NEGOTIABLE INSTRUMENT.	5
SECTION 3-104A. CONVERSION OF MORTGAGE NOTE TO ELECTRONIC MORTGAGE NOTE.	6
SECTION 3-201. NEGOTIATION.	6
SECTION 3-203. TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY TRANSFER..	7
SECTION 3-204. INDORSEMENT.....	8
SECTION 3-301. PERSON ENTITLED TO ENFORCE INSTRUMENT.	9
SECTION 3-302. HOLDER IN DUE COURSE.....	9
SECTION 3-308. PROOF OF SIGNATURES AND STATUS AS HOLDER IN DUE COURSE.....	11
SECTION 3-309. ENFORCEMENT OF LOST, DESTROYED, OR STOLEN INSTRUMENT.....	12
SECTION 3-415. OBLIGATION OF INDORSER.	14
SECTION 3-416. TRANSFER WARRANTIES.....	14
SECTION 3-421. RECOVERY OF POSSESSION OF MORTGAGE NOTE.....	15
SECTION 3-504. EXCUSED PRESENTMENT AND NOTICE OF DISHONOR.	16
SECTION 3-602. PAYMENT.....	16
SECTION 8-103. RULES FOR DETERMINING WHETHER CERTAIN OBLIGATIONS AND INTERESTS ARE SECURITIES OR FINANCIAL ASSETS.	19
SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.	19
SECTION 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUISITES.....	22
SECTION 9-307A. LOCATION OF ELECTRONIC MORTGAGE NOTE.....	23
SECTION 9-308. WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS PERFECTED; CONTINUITY OF PERFECTION.....	23
SECTION 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY.	24
SECTION 9-313. WHEN POSSESSION BY OR DELIVERY TO SECURED PARTY PERFECTS SECURITY INTEREST WITHOUT FILING.	27
SECTION 9-313A. POSSESSION OF ELECTRONIC MORTGAGE NOTE.....	29
SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.	30

1 **AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLES 1, 3, AND 9**

2 **Reporter’s Prefatory Note**

3 The Federal Reserve Bank of New York, in conjunction with the other Federal Reserve
4 banks, has prepared draft federal legislation that would establish a repository for residential
5 mortgage notes. The draft federal legislation, currently titled the National Mortgage Note
6 Repository Act of 2017 (the *Repository Act* or *RA*), would allow for both tangible and intangible
7 notes (referred to as *mortgage notes*) to be submitted to a federal repository, converted into
8 *electronic mortgage notes*, and transferred on the records of the repository system.
9

10 These draft amendments to the UCC were designed to provide the commercial-law rules
11 governing electronic mortgage notes that would be created by, and maintained in, the proposed
12 federal repository. A memorandum from Edwin Smith and Steven Harris, explains more about
13 the background of the draft amendments and their relation to the proposed federal legislation.
14

15 The Reporter’s Notes refer to the January 27, 2017, draft of the Repository Act, which is
16 separately available.
17
18

19 **SECTION 1-201. GENERAL DEFINITIONS.**

20 ***

21 (b) Subject to definitions contained in other articles of [the Uniform Commercial Code]
22 that apply to particular articles or parts thereof:

23 ***

24 (16A) “Electronic mortgage note” means an electronic mortgage note as defined
25 in the [National Mortgage Note Repository Act of 2017].

26 ***

27 (21) “Holder” means:

28 (A) subject to Section 3-103A, the person in possession of a negotiable
29 instrument that is payable either to bearer or to an identified person that is the person in

30 possession; or

31 (B) the person in possession of a document of title if the goods are

1 deliverable either to bearer or to the order of the person in possession.

2 ***

3 (24A) “Mortgage note” means a mortgage note as defined in the [National
4 Mortgage Note Repository Act of 2017].

5 ***

6 (31A) “Registered transfer” means a registered transfer as defined in the [National
7 Mortgage Note Repository Act of 2017].

8 (31B) “Registrant” means a registrant as defined in the [National Mortgage Note
9 Repository Act of 2017].

10 ***

11 (32A) “Repository operator” means the repository operator as defined in the
12 [National Mortgage Note Repository Act of 2017].

13 (32B) “Repository system” means the repository system as defined in the
14 [National Mortgage Note Repository Act of 2017].

15 ***

16 (39A) “System rules” means system rules as defined in the [National Mortgage
17 Note Repository Act of 2017].

18 ***

19 **Reporter’s Notes**

20 1. At least for the time being, this draft retains references to the National Mortgage Note
21 Repository Act of 2017, the draft federal law with which it is designed to be applied.

22
23 2. The Repository Act defines the term *mortgage note* to mean an instrument (as defined in
24 UCC Article 9), transferable record (as defined in E-SIGN), and controlled record (roughly
25 speaking, an electronic record that evidences a mortgage debt and is in a system that evidences
26 the transfer of interests in the record and can reliably establish the identity of the person to whom
27 the record or was issued or transferred). The Repository Act contemplates that a mortgage note

1 may (but need not) be submitted to a new repository system for conversion to an electronic
2 mortgage note.

3
4 **SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES' POWER TO**
5 **CHOOSE APPLICABLE LAW.**

6 ***

7 (c) If one of the following provisions of [the Uniform Commercial Code] specifies the
8 applicable law, that provision governs and a contrary agreement is effective only to the extent
9 permitted by the law so specified:

- 10 (1) Section 2-402;
- 11 (2) Sections 2A-105 and 2A-106;
- 12 (3) Section 4-102;
- 13 (4) Section 4A-507;
- 14 (5) Section 5-116;
- 15 [(6) Section 6-103;]
- 16 (7) Section 8-110;
- 17 (8) Sections 9-301 through ~~9-307~~ 9-307A.

18 **Reporter's Note**

19
20 RA § 9(b)(1) provides that an electronic mortgage note is a negotiable instrument. A
21 negotiable instrument is an Article 9 "instrument" in which a security interest can be perfected
22 by taking possession. Draft § 9-313A provides special rules with respect to perfection by
23 possession of an electronic mortgage note, and draft § 9-307A provides a rule for determining
24 where an electronic mortgage note is located for purposes of Article 9's choice-of-law rules.
25 Like Article 9's other choice-of-law rules, the rule in draft § 9-307A would be mandatory.
26

27 **SECTION 3-102. SUBJECT MATTER.**

28 (a) This Article applies to negotiable instruments. It does not apply to money, to
29 payment orders governed by Article 4A, or to securities governed by Article 8.

1 (b) If Except as otherwise provided in Section 3-103A, if there is conflict between this
2 Article and Article 4 or 9, Articles 4 and 9 govern.

3 (c) Regulations of the Board of Governors of the Federal Reserve System and operating
4 circulars of the Federal Reserve Banks supersede any inconsistent provision of this Article to the
5 extent of the inconsistency.

6
7 **SECTION 3-103. DEFINITIONS.**

8 (a) In this article:

9 ***

10 (18) “Transferable record” means a transferable record as defined in the
11 Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.

12 (b) Other definitions applying to this Article and the sections in which they appear are:

13 ***

14 “Holder”..... Section 3-103A

15
16 ***

17
18 **SECTION 3-103A. POSSESSION AND HOLDER OF ELECTRONIC**
19 **MORTGAGE NOTE.**

20 (a) For purposes of this Article and Section 1-201(b)(21)(A), the registrant of an
21 electronic mortgage note is in possession of it.

22 (b) If a person having control of a mortgage note under the Electronic Signatures in
23 Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., submits the mortgage note
24 to the repository system, the initial registrant of the related electronic mortgage note becomes the
25 holder of the electronic mortgage note.

26 (c) There cannot be a holder of an electronic mortgage note that the repository operator

1 creates based on submission of a mortgage note that was not a negotiable instrument or
2 transferable record.

3 **Reporter's Notes**

4 1. Possession of an electronic record is an oxymoron, but it appears to be necessary, given
5 that the Repository Act takes this approach.

6
7 2. The initial clause of subsection (a) and the draft amendment to § 3-102(b) reflect the fact
8 that, with respect to an electronic mortgage note, the meaning of *possession* in this Article would
9 differ from its meaning under the amendments to Article 9. See draft § 9-313A.

10
11 **SECTION 3-104. NEGOTIABLE INSTRUMENT.**

12 (a) Except as provided in subsections (c) and (d), “negotiable instrument” means:

13 (1) an unconditional promise or order to pay a fixed amount of money, with or
14 without interest or other charges described in the promise or order, if it:

15 ~~(1)(A)~~ is payable to bearer or to order at the time it is issued or first comes
16 into possession of a holder;

17 ~~(2)(B)~~ is payable on demand or at a definite time; and

18 ~~(3)(C)~~ does not state any other undertaking or instruction by the person
19 promising or ordering payment to do any act in addition to the payment of money, but the
20 promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral
21 to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on
22 or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or
23 protection of an obligor; and

24 (2) an electronic mortgage note.

25 ***

1 **Reporter’s Note**

2 This change accords with RA § 9(b)(1)(A) and (1)(B). It would bring electronic mortgage
3 notes within the scope of UCC Article 3, which applies to negotiable instruments. UCC § 3-102.
4 As a negotiable instrument, an electronic mortgage note would be classified as an “instrument”
5 within the definition in UCC § 9-102. The Reporter’s Notes to that section summarize the
6 consequences of the classification.

7 **SECTION 3-104A. CONVERSION OF MORTGAGE NOTE TO ELECTRONIC**

8 **MORTGAGE NOTE.** If the repository system converts a mortgage note that is a negotiable
9 instrument or transferable record to an electronic mortgage note:

10 (1) the obligation of a maker of the mortgage note becomes an obligation on the
11 electronic mortgage note under Section 3-412; and

12 (2) the obligation of an indorser of the mortgage note becomes an obligation on the
13 electronic mortgage note under Section 3-415.

14 **Reporter’s Note**

15
16 Under this section, the conversion of a mortgage note to an electronic mortgage note would
17 not impose a new obligation upon a person who is obligated on the mortgage note. The Official
18 Comments would explain that conversion would not affect related issues, such as when a maker
19 or indorser incurred its obligation.
20

21 **SECTION 3-201. NEGOTIATION.**

22
23 (a) “Negotiation” means a transfer of possession, whether voluntary or involuntary, of an
24 instrument by a person other than the issuer to a person who thereby becomes its holder.

25 (b) Except for negotiation by a remitter, if an instrument is payable to an identified
26 person, negotiation requires transfer of possession of the instrument and its indorsement by the
27 holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession
28 alone.

29 (c) In this section, a transfer of possession of an electronic mortgage note occurs when

1 the electronic mortgage note is transferred under Section 3-203(a).

2 **Reporter's Notes**

3 1. Article 3 distinguishes between a *transfer of an instrument* (UCC § 3-203) and a *transfer*
4 *of possession* of an instrument (UCC § 3-201). Negotiation of a negotiable instrument to a
5 person who becomes its holder requires a transfer of possession.

6
7 Draft § 3-203(a) provides that, upon the occurrence of a registered transfer under the
8 Repository Act, an electronic mortgage note is transferred and the transferee becomes a person
9 entitled to enforce the electronic mortgage note. RA § 3 defines “registered transfer” to mean “a
10 change in the identity of the registrant in the repository system that is the effect of an instruction
11 by the registrant or the authorized transferor of the relevant electronic mortgage note” (italics
12 removed).

13
14 Draft § 3-201(c) provides that when a registered transfer of an electronic mortgage note
15 occurs, a *transfer of possession* of the electronic mortgage note also occurs. This is consistent
16 with RA § 9(d)(2).

17
18 2. Regarding indorsements of an electronic mortgage note, see draft § 3-204.
19

20 **SECTION 3-203. TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY**
21 **TRANSFER.**

22 (a) An instrument, other than an electronic mortgage note, is transferred when it is
23 delivered by a person other than its issuer for the purpose of giving to the person receiving
24 delivery the right to enforce the instrument. An electronic mortgage note is transferred when a
25 registered transfer occurs.

26 (b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the
27 transferee any right of the transferor to enforce the instrument, including any right as a holder in
28 due course, but the transferee cannot acquire rights of a holder in due course by a transfer,
29 directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality
30 affecting the instrument.

31 ***

1 **SECTION 3-204. INDORSEMENT.**

2 (a) ~~“Indorsement”~~ Subject to subsections (b) and (c), “indorsement” means a signature,
3 other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other
4 words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting
5 payment of the instrument, or (iii) incurring indorser’s liability on the instrument, but regardless
6 of the intent of the signer, a signature and its accompanying words is an indorsement unless the
7 accompanying words, terms of the instrument, place of the signature, or other circumstances
8 unambiguously indicate that the signature was made for a purpose other than indorsement. For
9 the purpose of determining whether a signature is made on an instrument, a paper affixed to the
10 instrument is a part of the instrument.

11 **(b) This subsection applies if the holder of a mortgage note that is a negotiable**
12 **instrument or transferable record submits the mortgage note to the repository system and is not**
13 **the initial registrant of the related electronic mortgage note. Subject to Section 3-415(b), the**
14 **conversion of the mortgage note to the electronic mortgage note is a blank indorsement of the**
15 **mortgage note by the submitter if, at the time of submission, the submitter is the holder of the**
16 **mortgage note and the mortgage note is payable to an identified person who is the submitter.**

17 **(c) Subject to Section 3-415(b), a transfer of an electronic mortgage note under Section**
18 **3-203(a) is a blank indorsement of the electronic mortgage note by the person who was the**
19 **registrant immediately before the transfer.**

20 ***

21
22

Reporter’s Notes

23 1. Subsection (b) would address mortgage notes that are submitted to the repository system
24 for conversion. It deals with the case where the person submitting a mortgage note that is a
25 negotiable instrument or transferable record is the holder thereof but does not become the initial
26 registrant of the related electronic mortgage note. If the submitted mortgage note runs to bearer,

1 then the initial registrant would become the holder of the electronic mortgage note without an
2 indorsement. See draft § 3-201. However, if the submitted mortgage note runs to the order of
3 the submitter, an indorsement would be necessary to make the initial registrant a holder. Draft
4 subsection (b) would provide such an indorsement.
5

6 2. Subsection (c) would address the transfer of electronic mortgage notes within the
7 repository system. Together with draft § 3-201(c), this subsection would bring about the result
8 that when an electronic mortgage note is the subject of a registered transfer from the holder, the
9 transferee registrant becomes the holder.
10

11 **SECTION 3-301. PERSON ENTITLED TO ENFORCE INSTRUMENT.**

12 (a) “Person entitled to enforce” an instrument means:

13 (1) in the case of an instrument other than an electronic mortgage note, (i) the
14 holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a
15 holder, or (iii) a person not in possession of the instrument who is entitled to enforce the
16 instrument pursuant to Section 3–309 or 3–418(d); and

17 (2) in the case of an electronic mortgage note, the registrant of the electronic
18 mortgage note.
19

20 (b) A person may be a person entitled to enforce the instrument even though the person
21 is not the owner of the instrument or is in wrongful possession of the instrument.
22

23 **Reporter’s Note**

24 The maker of a note is obligated to pay the note to a person entitled to enforce the
25 instrument. See § 3-412. A key principle underlying the Repository Act is that the registrant of
26 an electronic mortgage note is the person who is entitled to enforce. See RA § 8(c)(4)(A)(ii) (“to
27 the extent that the *obligation* evidenced by an *electronic mortgage* note is enforceable, the
28 *registrant* is the holder or other *person* entitled to enforce”). Draft paragraph (a)(2) would state
29 this principle.

30 **SECTION 3-302. HOLDER IN DUE COURSE.**

31 (a) Subject to subsection (c) and Section 3–106(d), “holder in due course” means the
32 holder of an instrument if:

1 (1) the instrument when issued or negotiated to the holder does not bear such
2 apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call
3 into question its authenticity; and

4 (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without
5 notice that the instrument is overdue or has been dishonored or that there is an uncured default
6 with respect to payment of another instrument issued as part of the same series, (iv) without
7 notice that the instrument contains an unauthorized signature or has been altered, (v) without
8 notice of any claim to the instrument described in Section 3–306, and (vi) without notice that any
9 party has a defense or claim in recoupment described in Section 3–305(a).

10 (b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is
11 not notice of a defense under subsection (a), but discharge is effective against a person who
12 became a holder in due course with notice of the discharge. Public filing or recording of a
13 document does not of itself constitute notice of a defense, claim in recoupment, or claim to the
14 instrument, except that a record of the repository system that indicates that the obligation of a
15 person on an electronic mortgage note under Section 3–412 or 3–415 has been discharged
16 constitutes notice of the discharge.

17 ***

18 (g) This section is subject to any law limiting status as a holder in due course in
19 particular classes of transactions.

20 (h) There cannot be a holder in due course of an electronic mortgage note that the
21 repository operator creates based on submission of a mortgage note that was not a negotiable
22 instrument or transferable record.

1 **Reporter’s Notes**

2 1. RA § 11(b) mandates the issuance of regulations requiring the registrant to give to the
3 repository operator “notice of *discharge* of a *borrower’s obligation* evidenced by an *electronic*
4 *mortgage note*.” It also requires the establishment of “a process by which a *borrower* may
5 provide notice to the *repository operator* of the *borrower’s* belief that its *obligation* or the
6 *obligation* evidenced by the *electronic mortgage note* has been *discharged*” and may request the
7 *registrant* or a court to confirm the discharge to the registry operator. RA § 11(b)(2).
8

9 The amendment to draft subsection (b) is premised on the assumption that no reasonable
10 person would take a transfer of an electronic mortgage note without first examining the records
11 of the repository system. If these records indicate that the obligation of one or more obligors on
12 the electronic mortgage note has been discharged, then, under the draft, the discharge would be
13 effective against the transferee-registrant, even if that person became a holder in due course
14 thereafter.
15

16 Once the records of the repository system reflect that the obligation evidenced by an
17 electronic mortgage note is discharged with respect to all borrowers, the electronic mortgage
18 note will no longer be transferable by the repository system. RA § 11(c). If an electronic
19 mortgage note is discharged with respect to less than all of the borrowers, however, the
20 electronic mortgage note would remain transferable and potential transferees would have access
21 to a record of the discharge. Accordingly, the draft addition would have practical effect only in
22 some cases where there are multiple borrowers.
23

24 2. Draft subsection (h) would incorporate the rule in RA § 9(b)(1)(B). Although one can
25 deduce this rule from draft § 3-103A(c) (providing that there cannot be a holder of an electronic
26 mortgage note that the repository operator creates based on submission of a mortgage note that
27 was not a negotiable instrument or transferable record) and UCC § 3-302(a) (defining “holder in
28 due course”), the Drafting Committee thinks it useful to set forth the rule in the statute.
29
30

31 **SECTION 3-308. PROOF OF SIGNATURES AND STATUS AS HOLDER IN**
32 **DUE COURSE.**

33 (a) In an action with respect to an instrument, the authenticity of, and authority to make,
34 each signature on the instrument is admitted unless specifically denied in the pleadings. If the
35 validity of a signature is denied in the pleadings, the burden of establishing validity is on the
36 person claiming validity, but the signature is presumed to be authentic and authorized unless the
37 action is to enforce the liability of the purported signer and the signer is dead or incompetent at
38 the time of trial of the issue of validity of the signature. If an action to enforce the instrument is

1 brought against a person as the undisclosed principal of a person who signed the instrument as a
2 party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on
3 the instrument as a represented person under Section 3–402(a).

4 (b) If the validity of signatures is admitted or proved and there is compliance with
5 subsection (a), a plaintiff producing the instrument is entitled to payment if the plaintiff proves
6 entitlement to enforce the instrument under Section 3–301, unless the defendant proves a defense
7 or claim in recoupment. If a defense or claim in recoupment is proved, the right to payment of
8 the plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the
9 plaintiff has rights of a holder in due course which are not subject to the defense or claim.

10 (c) Under subsection (b), a plaintiff:

11 (1) produces an electronic mortgage note by producing a record of the electronic
12 mortgage note which is certified by the repository operator; and

13 (2) proves entitlement to enforce an electronic mortgage note by producing a
14 record of the repository system which:

15 (A) is certified by the repository operator; and

16 (B) identifies the plaintiff as the registrant of the electronic mortgage note.

17 **Reporter’s Note**

18 Draft subsection (c)(1) is based upon RA § 18(a)(1)(A). Draft subsection (c)(2) is based
19 upon RA § 18(a)(1)(B).

20

21 **SECTION 3-309. ENFORCEMENT OF LOST, DESTROYED, OR STOLEN**
22 **INSTRUMENT.**

23 (a) ~~A~~ Except as otherwise provided in subsection (c), a person not in possession of an
24 instrument is entitled to enforce the instrument if:

1 (1) the person seeking to enforce the instrument:

2 (A) was entitled to enforce the instrument when loss of possession
3 occurred; or

4 (B) has directly or indirectly acquired ownership of the instrument from a
5 person who was entitled to enforce the instrument when loss of possession occurred;

6 (2) the loss of possession was not the result of a transfer by the person or a lawful
7 seizure; and

8 (3) the person cannot reasonably obtain possession of the instrument because the
9 instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful
10 possession of an unknown person or a person that cannot be found or is not amenable to service
11 of process.

12 ***

13 (c) Subsection (a) does not apply to an instrument that is converted to an electronic
14 mortgage note in the repository system.

Reporter's Note

15 Subsection (c) comports with RA § 9(b)(2).

16 SECTION 3-412. OBLIGATION OF ISSUER OF NOTE OR CASHIER'S CHECK.

17 The issuer of a note or cashier's check or other draft drawn on the drawer is obliged to pay the
18 instrument (i) according to its terms at the time it was issued or, if not issued, at the time it first
19 came into possession of a holder, or (ii) if the issuer signed an incomplete instrument, according
20 to its terms when completed, to the extent stated in Sections 3-115 and 3-407. The obligation is
21 owed to a person entitled to enforce the instrument or to an indorser who paid the instrument
22 under Section 3-415.

1 **SECTION 3-415. OBLIGATION OF INDORSER.**

2 (a) Subject to subsections (b), (c), (d), (e) and to Section 3–419(d), if an instrument is
3 dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the
4 terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete
5 instrument, according to its terms when completed, to the extent stated in Sections 3–115 and 3–
6 407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a
7 subsequent indorser who paid the instrument under this section.

8 (b) If an indorsement states that it is made “without recourse” or otherwise disclaims
9 liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument.
10 However, the indorser of an electronic mortgage note under Section 3-204(b) or (c) is liable
11 under subsection (a) unless the records of the repository system indicate that liability has been
12 disclaimed.

13 ***

14 **Reporter’s Note**

15 The amendment to this section comports with RA § 12(a)(3) and (a)(4), under which a
16 registered transfer is deemed to be accompanied by the registrant’s unqualified indorsement of
17 the electronic mortgage note, unless the transferring registrant instructs the repository operator
18 that the electronic mortgage note is accompanied by another type of indorsement.

19 **SECTION 3-416. TRANSFER WARRANTIES.**

20 (a) A person who transfers an instrument for consideration warrants to the transferee
21 and, if the transfer is by indorsement, to any subsequent transferee that:

- 22 (1) the warrantor is a person entitled to enforce the instrument;
- 23 (2) all signatures on the instrument are authentic and authorized;
- 24 (3) the instrument has not been altered;

1 (4) the instrument is not subject to a defense or claim in recoupment of any party
2 which can be asserted against the warrantor;

3 (5) the warrantor has no knowledge of any insolvency proceeding commenced
4 with respect to the maker or acceptor or, in the case of an unaccepted draft, the drawer; and

5 (6) with respect to a remotely-created consumer item, that the person on whose
6 account the item is drawn authorized the issuance of the item in the amount for which the item is
7 drawn.

8 ***

9 (c) The warranties stated in subsection (a) cannot be disclaimed with respect to checks.
10 A disclaimer of the warranties stated in subsection (a) is effective with respect to the transfer of
11 an electronic mortgage note only to the extent the records of the repository system indicate the
12 existence and nature of the disclaimer. Unless notice of a claim for breach of warranty is given
13 to the warrantor within 30 days after the claimant has reason to know of the breach and the
14 identity of the warrantor, the liability of the warrantor under subsection (b) is discharged to the
15 extent of any loss caused by the delay in giving notice of the claim.

16 ***

17 **Reporter's Note**

18 The amendment to this section comports with RA § 12(a)(3) and (a)(4).

19 **SECTION 3-421. RECOVERY OF POSSESSION OF MORTGAGE NOTE.** A
20 person may not recover possession of a mortgage note that has been converted to an electronic
21 mortgage note.

1 **Reporter’s Note**

2 Draft § 3-421 reflects RA § 9(c)(3): “if a *mortgage note* is subsequently *converted* into
3 an *electronic mortgage note*, the remedies shall not include recovery of the relevant *mortgage*
4 *note*.”
5
6

7 **SECTION 3-504. EXCUSED PRESENTMENT AND NOTICE OF DISHONOR.**

8 (a) Presentment for payment or acceptance of an instrument is excused if (i) the person
9 entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the
10 maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency
11 proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the
12 obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being
13 enforced has waived presentment or otherwise has no reason to expect or right to require that the
14 instrument be paid or accepted, ~~or~~ (v) the drawer instructed the drawee not to pay or accept the
15 draft or the drawee was not obligated to the drawer to pay the draft, or (vi) the instrument is an
16 electronic mortgage note.

17 **Reporter’s Note**

18 The Article 3 default rule is that failure to give a required notice of dishonor discharges the
19 obligation of an indorser to pay. UCC § 3-415(c). *See also* UCC § 3-503(a) (specifying when
20 notice of dishonor is required). Presentment is a condition of dishonor. UCC § 3-502. The
21 requirements of presentment and notice of dishonor are excused if, by the terms of the
22 instrument, they are not necessary to enforce the indorser’s obligation. UCC § 3-504(a)
23 (presentment), (b) (notice of dishonor). These provisions are sufficiently common in mortgage
24 notes that it would make sense to amend UCC § 3-504 to excuse presentment of all electronic
25 mortgage notes.

26 **SECTION 3-602. PAYMENT.**

27 (a) Subject to subsection (e), an instrument is paid to the extent payment is made by or
28 on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the
29 instrument.

1 (b) Subject to subsection (e), a note is paid to the extent payment is made by or on behalf
2 of a party obliged to pay the note to a person that formerly was entitled to enforce the note only
3 if at the time of the payment the party obliged to pay has not received adequate notification that
4 the note has been transferred and that payment is to be made to the transferee. A notification is
5 adequate only if it is signed by the transferor or the transferee; reasonably identifies the
6 transferred note; and provides an address at which payments subsequently are to be made. Upon
7 request, a transferee shall seasonably furnish reasonable proof that the note has been transferred.
8 Unless the transferee complies with the request, a payment to the person that formerly was
9 entitled to enforce the note is effective for purposes of subsection (c) even if the party obliged to
10 pay the note has received a notification under this paragraph.

11 (c) Subject to subsection (e), to the extent of a payment under subsections (a) and (b), the
12 obligation of the party obliged to pay the instrument is discharged even though payment is made
13 with knowledge of a claim to the instrument under Section 3-306 by another person.

14 (d) Subject to subsection (e), a transferee, or any party that has acquired rights in the
15 instrument directly or indirectly from a transferee, including any such party that has rights as a
16 holder in due course, is deemed to have notice of any payment that is made under subsection (b)
17 after the date that the note is transferred to the transferee but before the party obliged to pay the
18 note receives adequate notification of the transfer.

19 (e) The obligation of a party to pay the instrument is not discharged under subsections
20 (a) through (d) if:

21 (1) a claim to the instrument under Section 3-306 is enforceable against the party
22 receiving payment and (i) payment is made with knowledge by the payor that payment is
23 prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case

1 of an instrument other than a cashier's check, teller's check, ~~or~~ certified check, or electronic
2 mortgage note, the party making payment accepted, from the person having a claim to the
3 instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the
4 instrument; or

5 (2) the person making payment knows that the instrument, other than an
6 electronic mortgage note, is a stolen instrument and pays a person it knows is in wrongful
7 possession of the instrument.

8 ***

9 *Legislative Note: The relevant provisions of the [National Mortgage Note Repository Act of*
10 *2017] are consistent with the 2002 amendments to this section. A jurisdiction that has not*
11 *enacted those amendments should do so in conjunction with enactment of the amendment shown*
12 *here.*

13
14

Reporter's Note

15 The suggested amendment is meant to conform this section with RA § 9(b)(3).

16 SECTION 3-604. DISCHARGE BY CANCELLATION OR RENUNCIATION.

17 (a) A person entitled to enforce an instrument, with or without consideration, may
18 discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such
19 as surrender of the instrument to the party, destruction, mutilation, or cancellation of the
20 instrument, cancellation or striking out of the party's signature, or the addition of words to the
21 instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights
22 against the party by a signed record. Submission of a mortgage note to the repository operator
23 does not discharge the obligation of a party to pay the instrument.

24 (b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not
25 affect the status and rights of a party derived from the indorsement.

1 (c) In this section, “signed,” with respect to a record that is not a writing, includes the
2 attachment to or logical association with the record of an electronic symbol, sound, or process
3 with the present intent to adopt or accept the record.

4 **Reporter’s Note**

5 The amendment to subsection (a) comports with RA § 9(b)(2).
6
7

8 **SECTION 8-103. RULES FOR DETERMINING WHETHER CERTAIN**
9 **OBLIGATIONS AND INTERESTS ARE SECURITIES OR FINANCIAL ASSETS.**

10 ***

11 (h) An electronic mortgage note is not a security, but is a financial asset if it is held in a
12 securities account.

13 **Reporter’s Note**

14 Some “writings” meet the definition of both “negotiable instrument” in Article 3 and
15 “security certificate” in Article 8. These writings ordinarily would be governed by Article 8,
16 UCC § 8-103(d), and would constitute “investment property” and not “instruments” under
17 Article 9. UCC § 9-102(a)(49) (defining “investment property” to include certificated
18 securities); UCC § 9-102(a)(47) (defining “instrument” to exclude investment property).
19

20 Draft subsection (h) would change this rule by providing that an electronic mortgage note is
21 not an Article 8 security. A mortgagee or its assignee may, however, cause the electronic
22 mortgage note to be credited to a securities account as a financial asset. In this case, the
23 electronic mortgage note would remain in the repository system and the broker or other securities
24 intermediary would be the registrant. The mortgagee’s (or assignee’s) rights with respect to the
25 electronic mortgage note would be a security entitlement, which is a kind of “investment
26 property” under Article 9.
27
28

29 **SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.**

30 (a) [Article 9 definitions.] In this article:

31 ***

32 (11) “Chattel paper” means a record or records that evidence both a monetary

1 obligation and a security interest in specific goods, a security interest in specific goods and
2 software used in the goods, a security interest in specific goods and license of software used in
3 the goods, a lease of specific goods, or a lease of specific goods and license of software used in
4 the goods. In this paragraph, “monetary obligation” means a monetary obligation secured by the
5 goods or owed under a lease of the goods and includes a monetary obligation with respect to
6 software used in the goods. The term does not include (i) charters or other contracts involving
7 the use or hire of a vessel, ~~or~~ (ii) records that evidence a right to payment arising out of the use of
8 a credit or charge card or information contained on or for use with the card, or (iii) an electronic
9 mortgage note. If a transaction is evidenced by records that include an instrument or series of
10 instruments, other than an electronic mortgage note or series of electronic mortgage notes, the
11 group of records taken together constitutes chattel paper.

12 ***

13 (47) “Instrument” means a negotiable instrument or any other writing that
14 evidences a right to the payment of a monetary obligation, is not itself a security agreement or
15 lease, and is of a type that in ordinary course of business is transferred by delivery with any
16 necessary indorsement or assignment. The term does not include (i) investment property, (ii)
17 letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit
18 or charge card or information contained on or for use with the card.

19 ***

20 (49) “Investment property” means a security, whether certificated or
21 uncertificated, security entitlement, securities account, commodity contract, or commodity
22 account.

23 ***

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Reporter's Notes

1. Because an electronic mortgage note would fall within the definition of “negotiable instrument” in UCC § 3-104, it would be classified as an Article 9 “instrument.” Classifying an electronic mortgage note as an Article 9 “instrument” would mean that an electronic mortgage note is also a “promissory note.” UCC §9-102(a)(65). Several consequences would follow:

a. Sales of an electronic mortgage note would be perfected automatically under UCC § 9-309.

b. For an electronic mortgage note that is sold, contractual and legal restrictions on assignment would be ineffective to the extent provided in UCC § 9-408.

c. For an electronic mortgage note that secures an obligation, contractual restrictions on assignment would be ineffective to the extent provided in UCC § 9-406(d).

2. The definition of “chattel paper” would be amended to address the unlikely case in which an electronic mortgage note also “evidence[s] a security interest in specific goods.”

3. If a mortgagee (or its assignee) credits an electronic mortgage note to a securities account, the mortgagee would hold a security entitlement with respect to the electronic mortgage note. The security entitlement would be “investment property” as defined in Article 9.

SECTION 9-108. SUFFICIENCY OF DESCRIPTION.

(a) **[Sufficiency of description.]** Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

* * *

(f) **[Electronic mortgage note.]** A description of a mortgage note reasonably identifies a related electronic mortgage note.

32
33
34
35
36
37
38
39

Reporter's Note

Draft subsection (f) is one of several amendments that reflect the fact that an electronic mortgage note evidences the same obligation as the related mortgage note. It would have two important effects.

The first would be in cases where a security agreement describing the collateral as a mortgage note is authenticated before the mortgage note is converted to an electronic mortgage

1 note and value is given after conversion. The second would be that a financing statement
2 indicating the collateral as a mortgage note would be sufficient to perfect a security interest in a
3 related electronic mortgage note. See § UCC 9-504 (“A financing statement sufficiently
4 indicates the collateral that it covers if the financing statement provides: (1) a description of the
5 collateral pursuant to Section 9-108 . . .”).
6

7 **SECTION 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY**
8 **INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUISITES.**

9 ***

10 (b) [**Enforceability.**] Except as otherwise provided in subsections (c) through (i), a
11 security interest is enforceable against the debtor and third parties with respect to the collateral
12 only if:

13 (1) value has been given;

14 (2) the debtor has rights in the collateral or the power to transfer rights in the
15 collateral to a secured party; and

16 (3) one of the following conditions is met:

17 (A) the debtor has authenticated a security agreement that provides a
18 description of the collateral and, if the security interest covers timber to be cut, a description of
19 the land concerned;

20 (B) the collateral is not a certificated security and is in the possession of
21 the secured party under Section 9-313 or 9-313A pursuant to the debtor’s security agreement;

22 (C) the collateral is a certificated security in registered form and the
23 security certificate has been delivered to the secured party under Section 8-301 pursuant to the
24 debtor’s security agreement; or

25 (D) the collateral is deposit accounts, electronic chattel paper, investment
26 property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105,

1 9-106, or 9-107 pursuant to the debtor’s security agreement.

2 ***

3 (j) A security interest that is attached to a mortgage note at the time the mortgage note is
4 converted to an electronic mortgage note continues in the electronic mortgage note

5 **Reporter’s Note**

6
7 An electronic mortgage note evidences the same obligation as the related mortgage note.
8 Accordingly, new subsection (j) would provide that a security interest in a mortgage note
9 continues in the related electronic mortgage note.

10
11
12 **SECTION 9-307A. LOCATION OF ELECTRONIC MORTGAGE NOTE.** For

13 purposes of this part, an electronic mortgage note is located in the District of Columbia.

14 **Reporter’s Notes**

15
16 1. RA § 9(b)(1) requires that an electronic mortgage note be treated as an Article 9
17 instrument. Accordingly, the draft contemplates that a secured party can perfect a security
18 interest in an electronic mortgage note by taking possession of the electronic mortgage note. See
19 draft §§ 9-310; 9-313; 9-313A.

20
21 Under UCC § 9-301(2) and (3), the law of the location of the collateral governs perfection of
22 a possessory security interest in an instrument, as well as the effect of perfection or
23 nonperfection and the priority of all security interests in instruments. Under draft § 9-307A, the
24 local law of the District of Columbia would govern these issues with respect to security interests
25 in all electronic mortgage notes in the repository. The draft’s approach would foreclose the
26 possibility (short of a subsequent amendment to Article 9 or overriding federal law) that the
27 relevant jurisdiction would change.

28
29 2. Like the “location” rules in UCC § 9-307, the rule in this section applies solely for
30 purposes of Article 9’s choice-of-law provisions. *Compare* UCC § 9-307(k).

31
32 3. Like the other choice-of-law rules in Article 9, this rule would be mandatory. *See* draft §
33 1-301.

34
35
36 **SECTION 9-308. WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS**
37 **PERFECTED; CONTINUITY OF PERFECTION.**

38 ***

1 (h) If a secured party holds a perfected security interest in a mortgage note that is
2 converted to an electronic mortgage note and the security interest in the electronic mortgage note
3 is perfected on conversion, the security interest continues as a perfected security interest in the
4 electronic mortgage note.

5 **Reporter’s Note**

6
7 Draft § 9-308(h) would make clear that perfection of a security interest is continuous if the
8 security interest in a mortgage note was perfected when the conversion process began and the
9 security interest in the related electronic mortgage note was perfected on conversion. As a
10 consequence, in cases where draft subsection (h) applies and the first-to-file-or-perfect rule of
11 UCC § 9-322(a) determines the priority of conflicting security interests in an electronic mortgage
12 note, the secured party’s priority with respect to an electronic mortgage note would date from the
13 earlier of perfection or filing with respect to the related mortgage note.

14
15
16 **SECTION 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY**
17 **INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND**
18 **AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY.**

19 (a) [**General rule: perfection by filing.**] Except as otherwise provided in subsection
20 (b) and Section 9-312(b), a financing statement must be filed to perfect all security interests and
21 agricultural liens.

22 (b) [**Exceptions: filing not necessary.**] The filing of a financing statement is not
23 necessary to perfect a security interest:

- 24 (1) that is perfected under Section 9-308(d), (e), (f), or (g);
- 25 (2) that is perfected under Section 9-309 when it attaches;
- 26 (3) in property subject to a statute, regulation, or treaty described in Section 9-
27 311(a);
- 28 (4) in goods in possession of a bailee which is perfected under Section 9-
29 312(d)(1) or (2);

1 (5) in certificated securities, documents, goods, or instruments which is perfected
2 without filing or possession under Section 9-312(e), (f), or (g);

3 (5A) in a mortgage note which is perfected without filing or possession under
4 Section 9-312(h);

5 (6) in collateral in the secured party's possession under Section 9-313 or 9-313A;

6 (7) in a certificated security which is perfected by delivery of the security
7 certificate to the secured party under Section 9-313;

8 (8) in deposit accounts, electronic chattel paper, investment property, or letter-of-
9 credit rights which is perfected by control under Section 9-314;

10 (9) in proceeds which is perfected under Section 9-315; or

11 (10) that is perfected under Section 9-316.

12 ***

13 **Reporter's Note**

14 See the Reporter's Notes to draft §§ 9-312 and 9-313A.
15
16

17 **SECTION 9-312. PERFECTION OF SECURITY INTERESTS IN CHATTEL**
18 **PAPER, DEPOSIT ACCOUNTS, DOCUMENTS, GOODS COVERED BY**
19 **DOCUMENTS, INSTRUMENTS, INVESTMENT PROPERTY, LETTER-OF-CREDIT**
20 **RIGHTS, AND MONEY; PERFECTION BY PERMISSIVE FILING; TEMPORARY**
21 **PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION.**

22 (a) [**Perfection by filing permitted.**] A security interest in chattel paper, negotiable
23 documents, instruments, or investment property may be perfected by filing.

24 ***

25 (e) [**Temporary perfection: new value.**] A security interest in certificated securities,

1 negotiable documents, or instruments is perfected without filing or the taking of possession for a
2 period of 20 days from the time it attaches to the extent that it arises for new value given under
3 an authenticated security agreement.

4 (f) **[Temporary perfection: goods or documents made available to debtor.]** A
5 perfected security interest in a negotiable document or goods in possession of a bailee, other than
6 one that has issued a negotiable document for the goods, remains perfected for 20 days without
7 filing if the secured party makes available to the debtor the goods or documents representing the
8 goods for the purpose of:

- 9 (1) ultimate sale or exchange; or
10 (2) loading, unloading, storing, shipping, transshipping, manufacturing,
11 processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

12 (g) **[Temporary perfection: delivery of security certificate or instrument to debtor.]**
13 A perfected security interest in a certificated security or instrument remains perfected for 20 days
14 without filing if the secured party delivers the security certificate or instrument to the debtor for
15 the purpose of:

- 16 (1) ultimate sale or exchange; or
17 (2) presentation, collection, enforcement, renewal, or registration of transfer.

18 **(h) [Temporary perfection: delivery of mortgage note to debtor.]** A security interest
19 in a mortgage note is perfected for a period of 20 days without filing if the secured party delivers
20 the mortgage note to the debtor for the purpose of submission to the repository system.

21 ~~(h)~~**(i) [Expiration of temporary perfection.]** After the 20-day period specified in
22 subsection (e), (f), ~~or~~ (g), or (h) expires, perfection depends upon compliance with this article.

23 Reporter's Note

24
25 When a secured party perfects a security interest by taking possession of the collateral, the

1 security interest ordinarily becomes unperfected if secured party relinquishes possession of the
2 collateral to the debtor. UCC § 9-312(f) contains an exception to this rule, which provides for
3 temporary perfection without filing or possession if a secured party delivers instruments and
4 certificated securities to the debtor for one of the specified purposes.

5
6 Draft subsection (h) would expand upon the rule in subsection (f) by providing for temporary
7 perfection of a security interest in a mortgage note without filing or possession if the secured
8 party delivers the mortgage note to the debtor for the purpose of submission to the repository
9 system. Although the secured party would remain perfected during this 20-day period, it would
10 risk losing priority to a competing secured party who takes possession and qualifies under UCC
11 § 9-330(d) or 9-331.

12
13 If the mortgage note is converted to an electronic mortgage note within the 20-day period,
14 perfection will continue in the electronic mortgage note if the secured party has possession of the
15 electronic mortgage on conversion (see draft § 9-313(d)(2)) or if a filed financing statement
16 covers the electronic mortgage note.

17
18
19 **SECTION 9-313. WHEN POSSESSION BY OR DELIVERY TO SECURED**
20 **PARTY PERFECTS SECURITY INTEREST WITHOUT FILING.**

21 (a) **[Perfection by possession or delivery.]** ~~Except~~ Subject to Section 9-313A and
22 except as otherwise provided in subsection (b), a secured party may perfect a security interest in
23 negotiable documents, goods, instruments, money, or tangible chattel paper by taking possession
24 of the collateral. A secured party may perfect a security interest in certificated securities by
25 taking delivery of the certificated securities under Section 8-301.

26 ***

27 (d) **[Time of perfection by possession; continuation of perfection.]** If perfection of a
28 security interest depends upon possession of the collateral by a secured party, perfection occurs
29 no earlier than the time the secured party takes possession and continues only while the secured
30 party retains possession. In this subsection:

31 (1) a secured party that has possession of a mortgage note and submits the
32 mortgage note to the repository system retains possession until the mortgage note is converted to

1 an electronic mortgage note; and
2 (2) a secured party that has possession of a mortgage note and delivers the
3 mortgage note to the debtor for the purpose of submission to the repository system retains
4 possession notwithstanding the delivery if:
5 (A) the mortgage note is converted to an electronic mortgage note or
6 redelivered to the secured party not later than 20 days after the delivery; and
7 (B) on conversion, the secured party has possession of the electronic
8 mortgage note under Section 9-313A.

9 ***

10 **Reporter's Notes**

- 11
12 1. The Repository Act contemplates that a person can have possession of an electronic
13 mortgage note. Accordingly draft § 9-102 would amend the definition of “instrument” to include
14 an electronic mortgage note. UCC § 9-313(a) provides that a secured party may perfect a
15 security interest in an instrument by taking possession of the collateral. Inasmuch as an
16 electronic mortgage note is not susceptible of physical possession, the steps that must be taken to
17 take possession of an electronic mortgage note differ from those with respect to a tangible
18 mortgage note. Draft § 9-313A would address possession of an electronic mortgage note.
19
20 2. The amendment to draft § 9-313(d) would address two situations in which a mortgage
21 note that is subject to a possessory security interest is converted to an electronic mortgage note.
22 In the first (subsection (d)(1)), a secured party that itself submits a mortgage note to the
23 repository system retains possession until the mortgage note is converted to an electronic
24 mortgage note. (Subsection (d)(1) applies equally to a secured party that submits a mortgage
25 note for conversion through an agent. See UCC § 1-103(b) (providing, *inter alia*, that, unless
26 displaced by the particular provisions of the UCC, the law of agency supplements its provisions).
27 For perfection to continue after submission, the security interest in the electronic mortgage note
28 must be perfected by filing, including by filing against the mortgage note (see draft § 9-308(b),
29 or by taking possession (see draft § 9-313A).
30
31 3. Subsection (d)(2) covers the case where the secured party delivers the mortgage note to
32 the debtor for the purpose of submission to the repository system. Although delivery to the
33 debtor ordinarily would result in loss of possession, subsection (d)(2) would provide that the
34 secured party retains possession of the mortgage note (and thus the security interest in the
35 mortgage note remains perfected) if the two specified conditions are satisfied. (As noted in
36 connection with draft § 9-312(h), a secured party who delivers the mortgage note to the debtor
37 for the purpose of submission to the repository system would risk losing priority to a competing

1 secured party who takes possession and qualifies under UCC § 9-330(d) or 9-331.)

2
3 If the first condition is satisfied, but the second is not—i.e., if the mortgage note is submitted
4 within the 20-day period but the secured party does not take possession of the related electronic
5 mortgage note—then the security interest in the mortgage note nevertheless would remain
6 perfected, albeit temporarily under draft § 9-312(h). The security interest in the electronic
7 mortgage note would be unperfected thereafter, unless it is perfected by filing.

8
9
10 **SECTION 9-313A. POSSESSION OF ELECTRONIC MORTGAGE NOTE.**

11 **(a) [Authorized transferor.]** In this section, “authorized transferor” means an
12 authorized transferor as defined in the [National Mortgage Note Repository Act of 2017].

13 **(b) [Perfection by possession: general rule.]** Except as otherwise provided in
14 subsection (c), for purposes of this Article, a secured party:

15 (1) takes possession of an electronic mortgage note when the secured party
16 becomes the registrant or authorized transferor of the electronic mortgage note; and

17 (2) retains possession of the electronic mortgage note until the secured party is
18 neither the registrant nor authorized transferor of the electronic mortgage note.

19 **(c) [Perfection by possession: exception.]** A secured party that is the registrant of an
20 electronic mortgage note does not have possession of the electronic mortgage note while there is
21 an authorized transferor of the electronic mortgage note.

22 **(d) [Conversion of mortgage note to electronic mortgage note.]** If a secured party has
23 possession of a mortgage note when it is converted to an electronic mortgage note and the
24 secured party takes possession of the related electronic mortgage note on conversion, possession
25 is continuous.

26 **Reporter’s Notes**

27
28 1. Article 9 currently provides several methods for perfecting a security interest in an
29 instrument. A secured party who perfects by taking possession may achieve priority over a
30 secured party who perfected earlier by another method. UCC § 9-330(d) (purchaser who gives

1 value and takes possession of an instrument in good faith and without knowledge that the
2 purchase violates the rights of a competing secured party); UCC § 9-331(a) (holder in due
3 course).

4
5 Draft § 9-313A(b) explains how a secured party takes possession of an electronic mortgage
6 note for purposes of Article 9: it becomes the person identified by the records of the repository
7 system as the registrant or authorized transferor of the electronic mortgage note. (Regarding
8 possession of an electronic mortgage note for purposes of Article 3, see draft § 3-103A(a).) By
9 becoming the registrant, a secured party becomes entitled under the Repository Act and draft § 3-
10 301 to enforce the borrower's obligation for the mortgage debt. By becoming the authorized
11 transferor, a secured party acquires the power under the Repository Act to effect a registered
12 transfer to itself and thereafter, as the new registrant, to enforce the borrower's obligation.
13

14 An authorized transferor who becomes the registrant by transferring an electronic mortgage
15 note to itself ordinarily would be continuously perfected by possession. The instant that the
16 secured party lost possession as the authorized transferor it would obtain possession as the
17 registrant. However, under subsection (c), a registrant is not in possession if there is an
18 authorized transferor. This subsection would eliminate the possibility that two secured parties
19 would have possession of the same electronic mortgage note.
20

21 2. Subsection (d) would make clear that conversion of a mortgage note would not prevent a
22 secured party from having continuous perfection by possession of the mortgage note under draft
23 § 9-313 and the related electronic mortgage note under draft § 9-313A.
24
25

26 SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY

27 INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.

28 ***

29 (b) [**Time of perfection: proceeds, ~~and~~ supporting obligations, and electronic**
30 **mortgage notes.**] For the purposes of subsection (a)(1):

31 (1) the time of filing or perfection as to a security interest in collateral is also the
32 time of filing or perfection as to a security interest in proceeds; ~~and~~

33 (2) the time of filing or perfection as to a security interest in collateral supported
34 by a supporting obligation is also the time of filing or perfection as to a security interest in the
35 supporting obligation; and

36 (3) the time of filing or perfection as to a security interest in a mortgage note

1 which is described in Section 9-203(j) is also the time of filing or perfection as to the security
2 interest in the related electronic mortgage note if there is no period thereafter when there is
3 neither filing nor perfection.

4 ***

5 **Reporter's Note**

6
7 Together with draft § 9-504(b), subsection (b)(3) would allow for priority of a security
8 interest in an electronic mortgage note to date from the time a financing statement was filed
9 against the related mortgage note.