

DRAFT  
FOR APPROVAL

**AMENDMENTS TO UNIFORM COMMERCIAL CODE  
ARTICLES 1, 3, 8, AND 9**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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MEETING IN ITS ONE-HUNDRED-AND-TWENTY-SEVENTH YEAR  
LOUISVILLE, KENTUCKY  
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**AMENDMENTS TO UNIFORM COMMERCIAL CODE  
ARTICLES 1, 3, 8, AND 9**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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June 5, 2018

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ARTICLES 1, 3, 8, AND 9**

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1 rules would be needed to accomplish these results. Rather than creating a new legal system for  
2 electronic mortgage notes (modelled on UCC rules for paper notes) in the Repository Act, it was  
3 quickly concluded during the consultations mentioned above that it would be preferable to  
4 amend the UCC to provide the appropriate rules to bring about results for electronic mortgage  
5 notes that parallel the current treatment of paper notes. The amendments to the UCC would  
6 provide those new legal rules.

7  
8 With the approval of the Permanent Editorial Board for the Uniform Commercial Code, a  
9 Drafting Committee was established under the usual procedures of the Uniform Law  
10 Commission (*ULC*) and The American Law Institute (*ALI*).<sup>4</sup> The Drafting Committee has  
11 considered in detail the substance of the rules that would govern rights with respect to electronic  
12 mortgage notes and related mortgage notes. The Drafting Committee worked in a collaborative  
13 manner and no significant disagreement has arisen over the substantive provisions.

14  
15 In addition, the NY Fed and the Drafting Committee have reciprocally coordinated their  
16 drafting of the Repository Act and the UCC amendments. Attorneys for the NY Fed have been  
17 very receptive to suggestions from the Drafting Committee concerning both the substance and  
18 formulation of the new rules, with the view that the Repository Act and amended UCC should  
19 always yield the same results.

#### 20 21 *National uniformity*

22  
23 Because the home-mortgage-note market is a national market, it is critical that the same rules  
24 for electronic mortgage notes apply throughout the country. It is of course possible that not all  
25 states<sup>5</sup> would have adopted the UCC amendments by the time that the repository system created  
26 by the Repository Act goes into effect. Section 20 of the Repository Act would address this  
27 possibility by providing that to the extent a commercial-law issue would be governed by the law  
28 of a state:

- 29 • If that state’s law includes provisions that are substantively identical to the proposed  
30 UCC amendments, the UCC of that state would apply as enacted to the commercial-  
31 law matter.
- 32 • If that state’s law does not include provisions that are substantively identical to the  
33 proposed UCC amendments, the law of that state would govern the commercial-law  
34 matter *as if* that state *had* enacted the UCC amendments. However, if that state’s  
35 enactment of Article 3 of the UCC is based on a pre-1990 Official Text of the UCC,  
36 that state’s law would govern the commercial-law matter *as if* that state had enacted  
37 the full Official Text of UCC Articles 1, 3, 8, and 9.

38 The Repository Act also is expected to allow the Federal Housing Finance Agency to issue  
39 binding orders determining whether the UCC in force in a particular state does or does not

---

<sup>4</sup> Edwin Smith is the chair of the Drafting Committee, Steven Harris is the Reporter. The membership of the drafting Committee, as usual for Uniform Commercial Code projects, is one half ULC members and one half ALI members. Eileen Ewing is the American Bar Association Advisor. Representatives of the NY Fed and other observers and stakeholders attended the meetings as observers.

<sup>5</sup> For this purpose, “state” includes each state of the United States, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.

1 include provisions that are substantively identical to the UCC Amendments.<sup>6</sup>

2

3       Although the sponsors of the UCC amendments are expected to approve the amendments at  
4 their respective 2018 annual meetings, the plan is to seek enactment in the states only if and  
5 when the federal Repository Act is adopted.

---

<sup>6</sup> This type of preemption has been successfully used in similar circumstances to coordinate the United States Treasury Treasury/Reserve Automated Debt Entry System (“TRADES”) Regulations (31 CFR Part 357) for certain Treasury Securities with Uniform Commercial Code Article 8.



1           **AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLES 1, 3, 8, AND 9**

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

3           \*\*\*

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

6                           \*\*\*

7                           (21) “Holder” means, with respect to:

8   (A) a negotiable instrument other than an electronic mortgage note, the  
9 person in possession ~~of a negotiable instrument that~~ if the negotiable instrument is payable either  
10 to bearer or to an identified person that is the person in possession;

11   (B) a negotiable tangible document of title, the person in possession ~~of a~~  
12 ~~negotiable tangible document of title~~ if the goods are deliverable either to bearer or to the order  
13 of the person in possession; or

14   (C) a negotiable electronic document of title, the person in control ~~of a~~  
15 ~~negotiable electronic document of title; or~~

16   (D) an electronic mortgage note, the registrant if, at the time the related  
17 mortgage note was submitted to the repository system, the submitter:

18   (i) was the holder of the mortgage note; or

19   (ii) held a security interest in the mortgage note which was created  
20 in favor of the submitter by a person that was the holder at the time the security interest was  
21 created.

22                           \*\*\*

23           (c) The following terms have the meanings given in the [National Mortgage Note

1 Repository Act of 2018] [, as amended]:

2 (1) “Authorized transferor”.

3 (2) “Electronic mortgage note”.

4 (3) “Mortgage note”.

5 (4) “Registered transfer”.

6 (5) “Registrant”.

7 (6) “Repository operator”.

8 (7) “Repository system”.

9 (8) “System rules”.

10 ***Legislative Note:*** *In states in which the constitution or other law does not permit the phrase “as*  
11 *amended” when federal statutes are incorporated into state law, the phrase should be deleted in*  
12 *subsection (c). However, a change in a federal-law definition would result in a change to a*  
13 *definition enacted by a state as it applies to electronic mortgage notes, even if the state*  
14 *enactment does not include the phrase “as amended.”*

15  
16 *A state that chooses to restate, rather than incorporate by reference, the federal-law*  
17 *definitions should do so carefully. Some of the definitions may use terms that are defined*  
18 *differently in the federal law than in the Uniform Commercial Code.*

19  
20 **Reporter’s Note**

21  
22 1. This draft is specifically designed to implement the National Mortgage Note Repository  
23 Act of 2018 (“RA” or “Repository Act”), which has yet to be enacted. It is essential that the  
24 resulting UCC amendments governing electronic mortgage notes fit seamlessly into the  
25 Repository Act. Accordingly, this draft incorporates by reference the definitions of certain terms  
26 borrowed from the Repository Act. See draft §§ 1-201; 3-103; 9-105. The current definitions of  
27 these Repository Act terms are set forth in the Appendix and will appear in the Official  
28 Comments.

29  
30 Once enacted, the Repository Act may be amended. Accordingly, this draft refers to the  
31 Repository Act “as amended.” Some States may be precluded from including this phrase or its  
32 equivalent in their legislation. Even so, if a definition in the Repository Act is amended, the  
33 supremacy of federal law may result in a change to the applicable definition in such a State.

34  
35 Some of the Repository Act definitions include words that are themselves defined in the  
36 Repository Act. Accordingly, any incorporation of these definitions into the Uniform  
37 Commercial Code *in haec verba* will require great care.

1           2. Draft subsection (b)(21)(D) would provide a new definition of a “holder” of an electronic  
2 mortgage note. To see how this subsection is meant to work, consider first the person that  
3 becomes initial registrant.  
4

5           Draft § 1-201(b)(21)(D)(i) addresses the case in which the person that submits a mortgage  
6 note for conversion becomes the registrant. If the submitter was the holder of the mortgage note,  
7 it follows that the initial registrant of the related electronic mortgage note—who, after all, is the  
8 same person—would be the holder of the electronic mortgage note.  
9

10          The Repository Act also would allow a secured party in possession or control of a negotiable  
11 mortgage note (including a transferable record) to submit the mortgage note to the repository  
12 without itself becoming the initial registrant. See RA § 7(b)(4); § 7(c)(3)(B). In this case, the  
13 secured party would become the authorized transferor, and its debtor would become the initial  
14 registrant. RA § 7(c)(3)(B).  
15

16          If the submitting secured party is the holder of the mortgage note and its debtor becomes the  
17 initial registrant of the related electronic mortgage note, the debtor would become the holder of  
18 the electronic mortgage note under draft § 1-201(b)(21)(D)(i). In addition, the secured party  
19 would become obligated as if it had indorsed the note in blank, unless it disclaims liability in the  
20 repository system. See draft § 3-415(g)(1). Likewise, if a submitting secured party is a  
21 nonholder in possession of a mortgage note of which the secured party’s debtor had been the  
22 holder and the debtor becomes the initial registrant of the related electronic mortgage note, the  
23 debtor would become the holder of the related electronic mortgage note under draft § 1-  
24 201(b)(21)(D)(ii).  
25

26          Under this approach, a secured party that is a holder, or holder in due course, of a mortgage  
27 note may retain its status with respect to the related electronic mortgage note by becoming the  
28 initial registrant. However, a secured party that chooses to utilize the repository system without  
29 itself becoming the registrant would deprive itself of this status. The debtor ordinarily would  
30 acquire the secured party’s right to enforce, including any rights as a holder in due course, and  
31 the secured party ordinarily could reacquire those rights by becoming the transferee of a  
32 registered transfer of the electronic mortgage note. See draft § 3-203(b).  
33

34          If a secured party submits a note as to which neither the secured party nor its debtor is the  
35 holder, there would be no holder of the related electronic mortgage note. The initial registrant  
36 would become the person entitled to enforce the electronic mortgage note under draft § 3-  
37 301(a)(2).  
38

39          3. E-SIGN provides that “a person having control of a transferable record is the holder, as  
40 defined in section 1-201(20) of the Uniform Commercial Code, of the transferable record.” 15  
41 U.S.C. § 7021(d). Accordingly, § 1-201(b)(21)(D) of this draft may apply to a submitted  
42 mortgage note that is intangible.  
43

44          4. Under draft § 1-201(b)(21)(D), if the initial registrant of an electronic mortgage note is the  
45 holder, then all subsequent registrants would be holders.  
46

1 5. In some situations, a secured party with a security interest in a mortgage note may have  
2 more than one debtor. Suppose, for example, that the mortgagee (Bank) creates a security  
3 interest by selling the mortgage note to SP-1. SP-1 takes delivery without Bank's indorsement.  
4 SP-1 then sells and delivers the mortgage note to SP-2 without an indorsement. SP-2 has two  
5 debtors, Bank and SP-1. Bank was a holder; SP-1 was not. SP-2, as the assignee of a security  
6 interest created by Bank in favor of SP-1, should not be able to elevate itself and become a  
7 holder, let alone a holder in due course, by converting the mortgage note to an electronic  
8 mortgage note and becoming the registrant. Draft § 1-201(b)(21)(D) would not allow SP-2 to do  
9 so. SP-2 holds a security interest that Bank created when Bank was the holder of the mortgage  
10 note; however, Bank did not create the security interest "in favor of the submitter [SP-2]."  
11

### 12 SECTION 3-103. DEFINITIONS.

13 (a) In this [article]:

14 \*\*\*

15 (18) "Transferable record" has the meaning given in the [National Mortgage Note  
16 Repository Act of 2018] [, as amended].

17 \*\*\*

18  
19 Legislative Note: In states in which the constitution or other law does not permit the phrase "as  
20 amended" when federal statutes are incorporated into state law, the phrase should be deleted in  
21 subsection (a)(18). However, a change in a federal-law definition would result in a change to a  
22 definition enacted by a state as it applies to electronic mortgage notes, even if the state  
23 enactment does not include the phrase "as amended."

24  
25 A state that chooses to restate, rather than incorporate by reference, the federal-law  
26 definitions should do so carefully. Some of the definitions may use terms that are defined  
27 differently in the federal law than in the Uniform Commercial Code.  
28

### 29 SECTION 3-104. NEGOTIABLE INSTRUMENT.

30 (a) Except as otherwise provided in subsections (c) and (d), "negotiable instrument"  
31 means:

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

34 (1)(A) is payable to bearer or to order at the time it is issued or first comes





1 accept a writing.”); § 1-201 (b)(43) (“Writing” includes printing, typewriting, or any other  
2 intentional reduction to tangible form.”). For these reasons, draft subsections (a) and (b) would  
3 be amended to exclude electronic mortgage notes from their scope.  
4

5 Draft subsection (c) would provide that negotiation of an electronic mortgage note occurs  
6 when there is a registered transfer of the electronic mortgage note to a person that becomes the  
7 holder. A negotiation would occur under this subsection if, and only if, the transferor is a  
8 “holder” as defined in draft § 1-201(b)(21)(D).  
9

10 2. In some instances, a person that would have become a holder had the mortgage note not  
11 been converted would become a nonholder of the related electronic mortgage note. Suppose, for  
12 example, the payee and holder of a negotiable mortgage note (“Payee”) transfers the instrument  
13 to a nonholder (“Transferee”). Sometime later, Transferee transfers the instrument back to  
14 Payee. Payee would become the holder of the mortgage note again. However, if Transferee  
15 submits the mortgage note to the repository, becomes the registrant of the resulting electronic  
16 mortgage note, and then transfers the electronic mortgage note to Payee, Payee would not  
17 become the holder of the electronic mortgage note.  
18

19 3. Draft subsection (d) follows from the definition of “holder” in draft § 1-201(b)(21)(D).  
20 However, the Drafting Committee thinks it advisable to state the rule in the statute rather than  
21 require those who use the statute to deduce it from the definition.  
22

### 23 **SECTION 3-203. TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY**

#### 24 **TRANSFER.**

25 (a) An instrument other than an electronic mortgage note is transferred when it is  
26 delivered by a person other than its issuer for the purpose of giving to the person receiving  
27 delivery the right to enforce the instrument. An instrument that is a mortgage note is also  
28 transferred when the mortgage note is converted to an electronic mortgage note if the person that  
29 submitted the mortgage note to the repository system was the person entitled to enforce the  
30 instrument at the time of submission and does not become the initial registrant of the related  
31 electronic mortgage note. An electronic mortgage note is transferred when a registered transfer  
32 occurs.

33 (b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the  
34 transferee any right of the transferor to enforce the instrument, including any right as a holder in

1 due course, but the transferee cannot acquire rights of a holder in due course by a transfer,  
2 directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality  
3 affecting the instrument. The transferor of an electronic mortgage note is the person that was the  
4 registrant of the electronic mortgage note immediately before the transfer, even if the authorized  
5 transferor effected the transfer.

6 \*\*\*

### 7 **Reporter’s Note**

8 1. *Transfer of an electronic mortgage note.* Under subsection (b), transfer of an instrument,  
9 whether or not it is a negotiation, transfers the right to enforce the instrument. Under existing  
10 law, an instrument is transferred by delivery, which Article 1 defines for this purpose as  
11 “voluntary transfer of possession.” § 1-201(b)(15). An electronic mortgage note cannot be the  
12 subject of possession. Accordingly, the third sentence of draft subsection (a) would provide that  
13 an electronic mortgage note is transferred when a registered transfer occurs under the Repository  
14 Act.

15  
16 Under the Repository Act, the authorized transferor may effect a registered transfer. Draft  
17 subsection (b) would provide that, even in this case, the registrant immediately prior to the  
18 subsection (b) transfer—who by definition is the person entitled to enforce the electronic  
19 mortgage note, see draft § 3-301(a)(2)—is the transferor. As the transferor, the “old” registrant  
20 makes the transfer warranties in draft § 3-416(a) if the transfer is for consideration, and becomes  
21 obligated to pay the electronic mortgage note as if it were an indorser. See draft § 3-415(g)(2).

22  
23 2. *Transfer arising from the conversion of a mortgage note.* The second sentence of draft §  
24 3-203(a) addresses the common situation in which a secured party that is the person entitled to  
25 enforce a negotiable mortgage note (including a transferable record) submits the mortgage note  
26 to the repository without itself becoming the initial registrant. The sentence would provide that,  
27 in these circumstances, a transfer occurs when the mortgage note is converted to an electronic  
28 mortgage note.

29  
30 If, however, the submitting secured party’s debtor, and not the secured party itself, is the  
31 person entitled to enforce the mortgage note, e.g., because the delivery of the instrument to the  
32 secured party was not “for the purpose of giving to the [secured party] the right to enforce the  
33 instrument,” § 3-203(a), then there will be no transfer of the instrument. As the initial registrant,  
34 the debtor would become the person entitled to enforce the related electronic mortgage note  
35 under draft § 3-301(a)(2). Inasmuch as the parties’ obligations under the electronic mortgage  
36 note are identical to those under the related mortgage note, see draft §§ 3-412(b) and 3-415(f),  
37 the debtor’s right to enforce the mortgage note, including any right as a holder in due course,  
38 would carry forward to the electronic mortgage note.



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

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

3                   (1) with respect to an instrument other than an electronic mortgage note:

4                           ~~(i)~~(A) the holder of the instrument;

5                           ~~(ii)~~(B) a nonholder in possession of the instrument ~~who~~ which has the  
6 rights of a holder; or

7                           ~~(iii)~~(C) a person not in possession of the instrument ~~who~~ which is entitled  
8 to enforce the instrument pursuant to Section 3-309 or 3-418(d); and

9                   (2) with respect to an electronic mortgage note, the registrant.

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

12                                   **Reporter’s Note**

13           The maker of a note is obligated to pay the note to a person entitled to enforce the  
14 instrument. See § 3-412. A key principle underlying the Repository Act is that the registrant of  
15 an electronic mortgage note is the person entitled to enforce the electronic mortgage note. Draft  
16 subsection (a)(2) would state this principle.  
17

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

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

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

24                   (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without  
25 notice that the instrument is overdue or has been dishonored or that there is an uncured default

1 with respect to payment of another instrument issued as part of the same series, (iv) without  
2 notice that the instrument contains an unauthorized signature or has been altered, (v) without  
3 notice of any claim to the instrument described in Section 3-306, and (vi) without notice that any  
4 party has a defense or claim in recoupment described in Section 3-305(a).

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

12 \*\*\*

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

15 (h) There is no holder in due course of an electronic mortgage note that the repository  
16 operator creates based on submission of a mortgage note that was not a negotiable instrument or  
17 transferable record at the time of submission.

18 (i) There is no holder in due course of an electronic mortgage note that the repository  
19 operator creates based on submission of a mortgage note that was not submitted by a person that,  
20 at the time of submission:

21 (1) was the holder of the mortgage note; or

22 (2) held a security interest in the mortgage note which was created in favor of the  
23 submitter by a person that was the holder at the time the security interest was created.

1 **Reporter’s Note**

2 1. Section 10 of the Repository Act mandates the issuance of regulations requiring the  
3 registrant to give to the repository operator “notice of *discharge* of a *borrower’s obligation*  
4 evidenced by an *electronic mortgage note*.” RA § 10(b)(1). It also requires the establishment of  
5 “a process by which a *borrower* may . . . give notice to the *repository operator* of the *borrower’s*  
6 belief that its *obligation* or the *obligation* evidenced by the *electronic mortgage note* has been  
7 *discharged*” and may request the *registrant* or a court to confirm the discharge to the registry  
8 operator. RA § 10(b)(2).  
9

10 The amendment to draft § 3-302(b) is premised on the assumption that no reasonable person  
11 would take a transfer of an electronic mortgage note without first examining the records of the  
12 repository system. If these records indicate that the obligation of one or more obligors on the  
13 electronic mortgage note has been discharged, then, under the draft, the discharge would be  
14 effective against the transferee-registrant, even if that person became a holder in due course  
15 thereafter.  
16

17 2. Once the records of the repository system reflect that the obligation evidenced by an  
18 electronic mortgage note is discharged with respect to all borrowers, the electronic mortgage  
19 note will no longer be transferable by the repository system. RA § 10(c). If an electronic  
20 mortgage note is discharged with respect to less than all of the borrowers, however, the  
21 electronic mortgage note would remain transferable and potential transferees would have access  
22 to a record of the discharge. Accordingly, draft § 3-302(b) would have practical effect only in  
23 some cases where there are multiple borrowers.  
24

25 3. Regarding access to records of the repository system, see RA § 15(b).  
26

27 4. One can deduce the rule in subsection (h) from draft § 3-201(d) (providing that there  
28 cannot be a holder of an electronic mortgage note that the repository operator creates based on  
29 submission of a mortgage note that was not a negotiable instrument or transferable record) and  
30 UCC § 3-302(a) (defining “holder in due course”). However, the Drafting Committee thinks it  
31 advisable to state the rule in the statute rather than require those who use the statute to deduce it.  
32

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

35 (a) In an action with respect to an instrument, the authenticity of, and authority to make,  
36 each signature on the instrument is admitted unless specifically denied in the pleadings. If the  
37 validity of a signature is denied in the pleadings, the burden of establishing validity is on the  
38 person claiming validity, but the signature is presumed to be authentic and authorized unless the

1 action is to enforce the liability of the purported signer and the signer is dead or incompetent at  
2 the time of trial of the issue of validity of the signature. If an action to enforce the instrument is  
3 brought against a person as the undisclosed principal of a person ~~who~~ that signed the instrument  
4 as a party to the instrument, the plaintiff has the burden of establishing that the defendant is  
5 liable on the instrument as a represented person under Section 3-402(a).

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

13 (c) The following rules apply to an electronic mortgage note:

14 (1) Except as otherwise provided in paragraph (2), a plaintiff is entitled to payment

15 if:

16 (A) the validity of signatures is admitted or proved;

17 (B) there is compliance with subsection (a); and

18 (C) the plaintiff produces:

19 (i) a record of the electronic mortgage note certified by the

20 repository operator; and

21 (ii) a record of the repository system, certified by the repository

22 operator and identifying the plaintiff as the registrant of the electronic mortgage note.

23 (2) A plaintiff is not entitled to payment under paragraph (1) if the defendant:

1                   (A) produces a record of the repository system, certified by the repository  
2 operator more recently than the record produced by the plaintiff, which identifies a person other  
3 than the plaintiff as the registrant; or

4                   (B) proves that it has a defense or claim in recoupment.

5                   (3) If a defense or claim in recoupment is proved, the right to payment of the  
6 plaintiff is subject to the defense or claim, except to the extent the plaintiff proves that the  
7 plaintiff has rights of a holder in due course which are not subject to the defense or claim.

8                   **Reporter’s Note**

9                   The draft provisions should be read in conjunction with RA § 17(a)(1)(C) (“all *records* of the  
10 *repository system* that are certified by the *repository operator* shall be self-authenticating”) and  
11 any applicable local rules of evidence.  
12

13                   **SECTION 3-309. ENFORCEMENT OF LOST, DESTROYED, OR STOLEN**  
14 **INSTRUMENT.**

15                   (a) ~~A~~ Subject to subsection (c), a person not in possession of an instrument is entitled to  
16 enforce the instrument if:

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

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

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

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

24                   (3) the person cannot reasonably obtain possession of the instrument because the  
25 instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful

1 possession of an unknown person or a person that cannot be found or is not amenable to service  
2 of process.

3 \*\*\*

4 (c) Subsection (a) does not apply to an instrument converted to an electronic mortgage  
5 note.

### Reporter's Note

6 1. Subsection (c) follows from the fact that the registrant is the person entitled to enforce an  
7 electronic mortgage note, which manifests the same obligation as the related mortgage note.

8

9 2. Under some circumstances, more than one person may be entitled to enforce a written  
10 instrument. For example, if a written note payable to bearer is stolen, the thief becomes the  
11 holder and is entitled to enforce under draft § 3-301(a)(1)(A), and the person from whom the  
12 instrument was stolen may qualify as a person entitled to enforce under draft § 3-301(A)(1)(C)  
13 and this section. Electronic mortgage notes are different. At any given moment, there can be  
14 only one registrant of, and thus only one person entitled to enforce, an electronic mortgage note.  
15

### 16 SECTION 3-412. OBLIGATION OF ISSUER OF NOTE OR CASHIER'S 17 CHECK.

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

24 (b) If the repository system converts a mortgage note to an electronic mortgage note,  
25 the obligation of a maker of, or equivalent obligor on, the mortgage note becomes an obligation  
26 under subsection (a) on the related electronic mortgage note.

1 **Reporter’s Note**

2 1. Upon conversion to an electronic mortgage note, a mortgage note loses its significance as  
3 the embodiment of the maker’s obligation (and the obligation of any indorser) to pay. See RA §  
4 8(a)(2). Accordingly, no person has the right to enforce a mortgage note that has been converted  
5 to an electronic mortgage note, to obtain possession of such a written mortgage note, or to obtain  
6 control of such a mortgage note that was in electronic form (e.g., a transferable record).  
7

8 Under draft subsection (b) and draft § 3-415(f), the obligation to pay a converted mortgage  
9 note would become an obligation to pay the related electronic mortgage note. Conversion of a  
10 mortgage note to an electronic mortgage note would not impose a new obligation upon a person  
11 that is obligated on the mortgage note. The Official Comments would explain that conversion  
12 would not affect related issues, such as when a party incurred its obligation.  
13

14 2. Article 3 defines the terms “maker” and “indorser” with respect to an Article 3 negotiable  
15 instrument. See § 3-103(a)(7) (“maker”); § 3-204(b) (“indorser”). Not every mortgage note that  
16 is submitted for conversion will be negotiable. Accordingly, draft § 3-412(b) and draft § 3-  
17 415(f) would apply as well to “equivalent obligor[s],” a phrase that appears in E-SIGN, 15  
18 U.S.C. § 7021(e).  
19

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

21 (a) Subject to subsections (b), (c), (d), and (e) and to Section 3-419(d), if an instrument is  
22 dishonored, an indorser is obliged to pay the amount due on the instrument (i) according to the  
23 terms of the instrument at the time it was indorsed, or (ii) if the indorser indorsed an incomplete  
24 instrument, according to its terms when completed, to the extent stated in Sections 3-115 and 3-  
25 407. The obligation of the indorser is owed to a person entitled to enforce the instrument or to a  
26 subsequent indorser ~~who~~ or transferor that paid the instrument under this section.

27 (b) ~~If~~ Subject to subsection (f), if an indorsement states that it is made “without  
28 recourse” or otherwise disclaims liability of the indorser, the indorser is not liable under  
29 subsection (a) to pay the instrument.

30 (c) If notice of dishonor of an instrument is required by Section 3-503 and notice of  
31 dishonor complying with that section is not given to an indorser, the liability of the indorser  
32 under subsection (a) is discharged.

1 (d) If a draft is accepted by a bank after an indorsement is made, the liability of the  
2 indorser under subsection (a) is discharged.

3 (e) If an indorser of a check is liable under subsection (a) and the check is not presented  
4 for payment, or given to a depository bank for collection, within 30 days after the day the  
5 indorsement was made, the liability of the indorser under subsection (a) is discharged.

6 (f) If the repository system converts a mortgage note to an electronic mortgage note, the  
7 obligation of an indorser of, or equivalent obligor on, the mortgage note becomes an obligation  
8 under subsection (a) on the related electronic mortgage note.

9 (g) Except as otherwise provided in subsection (h):

10 (1) if a mortgage note is transferred when it is converted to an electronic mortgage  
11 note and the person that submitted the mortgage note to the repository system was the holder of  
12 the mortgage note at the time of submission, the transferor incurs the obligation of an indorser  
13 under subsection (a); and

14 (2) a transferor of an electronic mortgage note incurs the obligation of an indorser  
15 under subsection (a).

16 (h) Subsection (g) does not apply if the records of the repository system indicate that  
17 liability has been disclaimed.

### **Reporter's Note**

18 1. Regarding draft subsection (f), see the Reporter's Note to draft § 3-412.

19  
20 2. Inasmuch as an electronic mortgage note is intangible, it cannot be indorsed. However,  
21 draft § 3-415(g) imposes indorser liability in two circumstances where an indorsement ordinarily  
22 would be made on a tangible mortgage note.

23  
24 *Transfer of an electronic mortgage note.* Draft § 3-203 would provide that a registered  
25 transfer under the Repository Act is a transfer of an electronic mortgage note for purposes of this  
26 article, and that the transferor is the transferring registrant, regardless of whether the registered  
27 transfer was initiated by the registrant or the authorized transferor. Draft subsection (g)(2) would



1 impose indorsement liability on the transferor. To be effective, a disclaimer of this liability must  
2 appear in the records of the repository system. See draft subsection (h). 3. Regarding access to  
3 records of the repository system, see RA § 15(b).

4  
5 An indorser that pays a note is entitled to recover the amount paid from a prior indorser  
6 under subsection (a) or the maker under § 3-412(a). As amended, these two subsections would  
7 afford the same right to a transferor that pays an electronic mortgage note.

8  
9 *Transfer arising from the conversion of a mortgage note.* Draft § 3-203(a) would provide  
10 that a transfer occurs if a secured party that submits a mortgage note does not become the initial  
11 registrant of the related electronic mortgage note. If the submitting secured party was the holder  
12 of the mortgage note, the transfer constitutes a negotiation, by which the initial registrant would  
13 become the holder, see draft § 3-201(a), and draft § 3-415(g)(1) would impose indorsement  
14 liability on the submitting secured party (unless disclaimed in accordance with draft subsection  
15 (h)).  
16

### 17 **SECTION 3-416. TRANSFER WARRANTIES.**

18 (a) A person ~~who~~ that transfers an instrument for consideration warrants to the transferee  
19 and, if the transfer is by indorsement or the instrument is an electronic mortgage note, to any  
20 subsequent transferee that:

21 (1) the warrantor is a person entitled to enforce the instrument;

22 (2) all signatures on the instrument are authentic and authorized;

23 (3) the instrument has not been altered;

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

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

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

31 \*\*\*

1 (c) The warranties ~~stated~~ in subsection (a) cannot be disclaimed with respect to checks.  
2 With respect to an electronic mortgage note, a disclaimer of the warranties in subsection (a) is  
3 effective against a subsequent transferee only to the extent the records of the repository system  
4 indicate the existence and nature of the disclaimer. Unless notice of a claim for breach of  
5 warranty is given to the warrantor within 30 days after the claimant has reason to know of the  
6 breach and the identity of the warrantor, the liability of the warrantor under subsection (b) is  
7 discharged to the extent of any loss caused by the delay in giving notice of the claim.

8 \*\*\*

9 (e) A transfer of a mortgage note which occurs when the mortgage note is converted to  
10 an electronic mortgage note is not of itself a transfer for consideration under subsection (a).

### 11 **Reporter's Note**

12 1. Under draft subsection (a) a registrant that effects, or whose authorized transferor effects,  
13 a transfer of an electronic mortgage note would make transfer warranties. See draft § 3-203(b)  
14 (providing that the transferor of an electronic mortgage note is the person that was the registrant  
15 of the electronic mortgage note immediately before the transfer).  
16

17 2. The warranties under subsection (a) run in favor of an immediate transferee in all transfers  
18 for consideration. They also run in favor of subsequent transferees if the transfer is made by  
19 indorsement. An electronic mortgage note cannot be indorsed. Rather, a person that transfers an  
20 electronic mortgage note incurs liability under § 3-415 as if the person were an indorser. Draft §  
21 3-416(a) takes the same approach with respect to warranties. Like an indorser, a transferring  
22 registrant would make warranties to subsequent transferees as well as to the immediate  
23 transferees.  
24

25 This parallel treatment may result in different outcomes, depending on whether a written note  
26 or an electronic mortgage note is transferred. This is because every transferring registrant is  
27 treated like an indorser, whereas not every transfer of a written note is accompanied by the  
28 transferor's indorsement. Consider a written mortgage note that has been indorsed in blank to *A*.  
29 If *A* sells and delivers the note to *B*, then *A* makes transfer warranties to *B*, but not to subsequent  
30 transferees. Suppose, however, that before *A* sells the mortgage note to *B*, the mortgage note is  
31 converted to an electronic mortgage note with respect to which *A* is the registrant. If *A* transfers  
32 the electronic mortgage note to *B*, then *A* makes transfer warranties not only to *B*, but also to  
33 subsequent transferees.  
34

35 3. By submitting a mortgage note for conversion and not becoming the initial registrant of

1 the related electronic mortgage note, a secured party may transfer the instrument. See draft § 3-  
2 203(a). Draft subsection (e) would make clear that such a transfer would not necessarily be “for  
3 consideration” and that the secured party would not necessarily make transfer warranties.  
4

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

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

15 \*\*\*

16 **Reporter’s Note**

17  
18 The Article 3 default rule is that failure to give a required notice of dishonor discharges  
19 the obligation of an indorser to pay. UCC § 3-415(c). See also UCC § 3-503(a) (specifying  
20 when notice of dishonor is required). Presentment is a condition of dishonor. UCC § 3-502.  
21 The 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 terms are sufficiently common in residential  
24 mortgage notes that it would make sense to amend UCC § 3-504 to excuse presentment of all  
25 electronic mortgage notes.  
26

27 **SECTION 3-602. PAYMENT.**

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

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 [National Mortgage Note Repository Act of 2018] is consistent with the  
10 2002 amendments to this section. A state that has not enacted the 2002 amendments should  
11 enact the 2002 amendments in conjunction with enactment of this amendment.

12  
13

#### **Reporter’s Note**

14 Under the amendment, the obligation on an electronic mortgage note can be discharged even  
15 if payment is made with knowledge of an adverse claim to the electronic mortgage note by  
16 another person.  
17

#### **SECTION 3-604. DISCHARGE BY CANCELLATION OR RENUNCIATION.**

18 (a) A person entitled to enforce an instrument, with or without consideration, may  
19 discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such  
20 as surrender of the instrument to the party, destruction, mutilation, or cancellation of the  
21 instrument, cancellation or striking out of the party’s signature, or the addition of words to the  
22 instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights  
23 against the party by a signed record. The obligation of a party to pay is not discharged by  
24 destruction of a mortgage note in connection with or as a consequence of submission of the  
25 mortgage note to the repository system and conversion of the mortgage note to an electronic  
26 mortgage note.  
27

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

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

### 6 **Reporter’s Note**

7 It is safe to conclude as a matter of law that by intentionally destroying a written instrument,  
8 the person entitled to enforce the instrument intends to discharge persons that are obligated on  
9 the instrument. No such conclusion is justified by the intentional destruction of a written  
10 mortgage note in conjunction with the conversion of the mortgage note to an electronic mortgage  
11 note. The draft amendment so provides.  
12

## 13 **SECTION 8-103. RULES FOR DETERMINING WHETHER CERTAIN** 14 **OBLIGATIONS AND INTERESTS ARE SECURITIES OR FINANCIAL ASSETS.**

15 \*\*\*

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

### 18 **Reporter’s Note**

19 Some “writings” may meet the definition of both “negotiable instrument” in Article 3 and  
20 “security certificate” in Article 8. These writings ordinarily would be governed by Article 8,  
21 UCC § 8-103(d), and would constitute “investment property” and not “instruments” under  
22 Article 9. UCC § 9-102(a)(49) (defining “investment property” to include certificated  
23 securities); UCC § 9-102(a)(47) (defining “instrument” to exclude investment property).  
24

25 Draft subsection (h) would change this rule by providing that an electronic mortgage note is  
26 not an Article 8 security. However, an electronic mortgage note that is credited to a securities  
27 account would be a “financial asset” under subsection (h), as is a tangible Article 3 instrument  
28 that is not a security. UCC § 8-103(d) (“A writing that is a security certificate is governed by  
29 this Article and not by Article 3, even though it also meets the requirements of that Article.  
30 However, a negotiable instrument governed by Article 3 is a financial asset if it is held in a  
31 securities account.”). An electronic mortgage note that is credited to a securities account would  
32 remain in the repository system and the broker or other securities intermediary would be the  
33 registrant. The mortgagee’s (or assignee’s) rights with respect to the electronic mortgage note

1 would be a security entitlement, which is a kind of “investment property” under Article 9.  
2

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

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

5 \*\*\*

6 (2) “Account”, except as used in “account for”, means a right to payment of a  
7 monetary obligation, whether or not earned by performance, (i) for property that has been or is to  
8 be sold, leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be  
9 rendered, (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation  
10 incurred or to be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a  
11 vessel under a charter or other contract, (vii) arising out of the use of a credit or charge card or  
12 information contained on or for use with the card, or (viii) as winnings in a lottery or other game  
13 of chance operated or sponsored by a ~~State~~ state, governmental unit of a ~~State~~ state, or person  
14 licensed or authorized to operate the game by a ~~State~~ state or governmental unit of a ~~State~~ state.  
15 The term includes health-care-insurance receivables. The term does not include (i) rights to  
16 payment evidenced by chattel paper, an electronic mortgage note, or an instrument, (ii)  
17 commercial tort claims, (iii) deposit accounts, (iv) investment property, (v) letter-of-credit rights  
18 or letters of credit, or (vi) rights to payment for money or funds advanced or sold, other than  
19 rights arising out of the use of a credit or charge card or information contained on or for use with  
20 the card.

21 (3) “Account debtor” means a person obligated on an account, chattel paper, or  
22 general intangible. The term does not include persons obligated to pay a negotiable instrument,  
23 even if the instrument constitutes part of chattel paper.

24 \*\*\*

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

12                   \*\*\*

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

20                   \*\*\*

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



1 \*\*\*

2 (61) “Payment intangible” means a general intangible under which the account  
3 debtor’s principal obligation is a monetary obligation. The term includes an electronic mortgage  
4 note.

5 **Reporter’s Note**

6  
7 1. An electronic mortgage note is a “negotiable instrument” within the meaning of Articles 3  
8 and 9. UCC § 3-104(a); § 9-102(b). Unlike other negotiable instruments, which are writings, an  
9 electronic mortgage note is intangible. Accordingly, this draft classifies an electronic mortgage  
10 note as an intangible for purposes of Article 9.

11  
12 2. Under existing law, one cannot classify a right to payment evidenced by an intangible  
13 note without first ascertaining the basis of the obligation. If the intangible note evidences the  
14 right to payment of a loan, Article 9 would classify it as a “payment intangible.” However, an  
15 intangible note that evidences the right to payment for the sale of property would be an  
16 “account.”

17  
18 The draft does not follow this approach, which would create unnecessary complexity as  
19 applied to electronic mortgage notes. Under the draft, the same Article 9 provisions would  
20 govern an electronic mortgage note regardless of the source of the maker’s obligation. Given  
21 that the vast proportion of electronic mortgage notes is expected to arise from loans, the draft  
22 would classify all electronic mortgage notes as “payment intangibles.” The definitions of  
23 “account,” “chattel paper,” “instrument,” and “payment intangible” would be amended to  
24 effectuate this result.

25  
26 3. The obligor on a payment intangible typically is an “account debtor.” However, because  
27 term excludes “persons obligated to pay a negotiable instrument, even if the instrument  
28 constitutes part of chattel paper,” the maker or other obligor on an electronic mortgage note  
29 would not fall within the definition.

30  
31 4. If a mortgagee (or its assignee) credits an electronic mortgage note to a securities account,  
32 the mortgagee would hold a security entitlement with respect to the electronic mortgage note.  
33 The security entitlement would be “investment property” as defined in Article 9.

34  
35 **SECTION 9-105. CONTROL OF ELECTRONIC CHATTEL PAPER; CONTROL**  
36 **OF ELECTRONIC MORTGAGE NOTE.**

37 (a) [General rule: control of electronic chattel paper.] A secured party has control of  
38 electronic chattel paper if a system employed for evidencing the transfer of interests in the

1 chattel paper reliably establishes the secured party as the person to which the chattel paper was  
2 assigned.

3 (b) [**Specific facts giving control of electronic chattel paper.**] A system satisfies  
4 subsection (a) if the record or records comprising the chattel paper are created, stored, and  
5 assigned in such a manner that:

6 (1) a single authoritative copy of the record or records exists which is unique,  
7 identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

8 (2) the authoritative copy identifies the secured party as the assignee of the record  
9 or records;

10 (3) the authoritative copy is communicated to and maintained by the secured party  
11 or its designated custodian;

12 (4) copies or amendments that add or change an identified assignee of the  
13 authoritative copy can be made only with the consent of the secured party;

14 (5) each copy of the authoritative copy and any copy of a copy is readily  
15 identifiable as a copy that is not the authoritative copy; and

16 (6) any amendment of the authoritative copy is readily identifiable as authorized  
17 or unauthorized.

18 (c) [**Control of electronic mortgage note.**] A secured party has control of an electronic  
19 mortgage note if the secured party is:

20 (1) the authorized transferor of the electronic mortgage note; or

21 (2) the registrant of the electronic mortgage note and there is no authorized

22 transferor of the electronic mortgage note.

1  
2  
3 **Reporter’s Note**

4 Under § 9-330(d), a purchaser of an instrument has priority over a security interest in the  
5 instrument perfected by a method other than possession if the purchaser gives value and takes  
6 possession of the instrument in good faith and without knowledge that the purchase violates the  
7 rights of the secured party. This draft contains an analogous provision, draft § 9-330(d), that  
8 would allow for a superpriority in an electronic mortgage note. Inasmuch as an electronic  
9 mortgage note is intangible, this new superpriority would not depend on possession. Rather, it  
10 would depend on *control*, as defined in draft § 9-105(c).

11 Like control of a deposit account or security entitlement, control of an electronic mortgage  
12 note depends on the secured party having the power to “get its hands on” the collateral. By  
13 becoming the registrant of an electronic mortgage note, a secured party becomes entitled under  
14 the Repository Act and draft § 3-301 to enforce the borrower’s obligation for the mortgage debt.  
15 By becoming the authorized transferor, a secured party acquires the power under the Repository  
16 Act to effect a registered transfer to itself and thereafter, as the new registrant, to enforce the  
17 borrower’s obligation. See RA § 12(a).

18  
19 As is the case with possession under Section 9-313, in determining whether a particular  
20 person has control under subsection (a), the principles of agency apply. See Section 1-103 and  
21 Restatement (3d), Agency § 8.12, Comment b. See also RA § 17(b) (providing that, with certain  
22 exceptions, “the extent to which a person may act through an agent or other representative is  
23 determined by other law”).  
24

25 **SECTION 9-108. SUFFICIENCY OF DESCRIPTION.**

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

29 \* \* \*

30 **(f) [Electronic mortgage note.]** A description of an electronic mortgage note is  
31 sufficient if it describes the electronic mortgage note or the mortgage note from which the  
32 electronic mortgage note was converted.

33 **Reporter’s Note**  
34

35 Draft subsection (f) is one of several amendments that reflect the fact that an electronic  
36 mortgage note evidences the same obligation as the related mortgage note. It is designed to  
37 ensure that transaction parties would not be penalized for their failure to use the new

1 terminology.

2  
3 Example 1: Debtor authenticates a security agreement covering “all Debtor’s mortgage  
4 notes, existing and after-acquired.” The description would be sufficient under subsection  
5 (f) to cover not only all Debtor’s existing and after-acquired mortgage notes but also all  
6 Debtor’s existing and after-acquired electronic mortgage notes. The same result would  
7 obtain if the security agreement covered “all Debtor’s instruments, existing and after-  
8 acquired.”  
9

10 Because a description of collateral pursuant to this Section is sufficient as an indication of  
11 collateral in a financing statement, see UCC § 9-504(1), a financing statement indicating the  
12 collateral as a mortgage note would be sufficient to perfect a security interest in the related  
13 electronic mortgage note.  
14

15 Example 2: Debtor authenticates a security agreement covering six mortgage notes, each  
16 of which is reasonably identified. Before value is given and the security interest attaches,  
17 two of the mortgage notes are converted to electronic mortgage notes. Thereafter, with  
18 Debtor’s authorization, Secured Party files a financing statement covering “six mortgage  
19 notes.” As in Example 1, under subsection (f) the description in the security agreement  
20 would be sufficient to describe the electronic mortgage notes to which the security  
21 interest attached. In addition, the indication of the collateral in the financing statement  
22 would be sufficient.  
23

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

26 \*\*\*

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

30 (1) value has been given;

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

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

34 (A) the debtor has authenticated a security agreement that provides a

1 description of the collateral and, if the security interest covers timber to be cut, a description of  
2 the land concerned;

3 (B) the collateral is not a certificated security and is in the possession of  
4 the secured party under Section 9-313 pursuant to the debtor's security agreement;

5 (C) the collateral is a certificated security in registered form and the  
6 security certificate has been delivered to the secured party under Section 8-301 pursuant to the  
7 debtor's security agreement; or

8 (D) the collateral is deposit accounts, electronic chattel paper, investment  
9 property, letter-of-credit rights, electronic mortgage notes, or electronic documents and the  
10 secured party has control under Section 7-106, 9-104, 9-105, 9-106, or 9-107 pursuant to the  
11 debtor's security agreement.

12 \*\*\*

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

### 15 Reporter's Note

16  
17 An electronic mortgage note evidences the same obligation as the related mortgage note.  
18 Accordingly, new subsection (j) would provide that a security interest in a mortgage note  
19 continues in the related electronic mortgage note.  
20

## 21 SECTION 9-208. ADDITIONAL DUTIES OF SECURED PARTY HAVING 22 CONTROL OF COLLATERAL.

23 (a) [**Applicability of section.**] This section applies to cases in which there is no  
24 outstanding secured obligation and the secured party is not committed to make advances, incur  
25 obligations, or otherwise give value.

26 (b) [**Duties of secured party after receiving demand from debtor.**] Within 10 days

1 after receiving an authenticated demand by the debtor:

2 (1) a secured party having control of a deposit account under Section 9-104(a)(2)  
3 shall send to the bank with which the deposit account is maintained an authenticated statement  
4 that releases the bank from any further obligation to comply with instructions originated by the  
5 secured party;

6 (2) a secured party having control of a deposit account under Section 9-104(a)(3)  
7 shall:

8 (A) pay the debtor the balance on deposit in the deposit account; or

9 (B) transfer the balance on deposit into a deposit account in the debtor's  
10 name;

11 (3) a secured party, other than a buyer, having control of electronic chattel paper  
12 under Section 9-105 shall:

13 (A) communicate the authoritative copy of the electronic chattel paper to  
14 the debtor or its designated custodian;

15 (B) if the debtor designates a custodian that is the designated custodian  
16 with which the authoritative copy of the electronic chattel paper is maintained for the secured  
17 party, communicate to the custodian an authenticated record releasing the designated custodian  
18 from any further obligation to comply with instructions originated by the secured party and  
19 instructing the custodian to comply with instructions originated by the debtor; and

20 (C) take appropriate action to enable the debtor or its designated custodian  
21 to make copies of or revisions to the authoritative copy which add or change an identified  
22 assignee of the authoritative copy without the consent of the secured party;

23 (4) a secured party having control of investment property under Section 8-

1 106(d)(2) or 9-106(b) shall send to the securities intermediary or commodity intermediary with  
2 which the security entitlement or commodity contract is maintained an authenticated record that  
3 releases the securities intermediary or commodity intermediary from any further obligation to  
4 comply with entitlement orders or directions originated by the secured party; ~~and~~

5 (5) a secured party having control of a letter-of-credit right under Section 9-107  
6 shall send to each person having an unfulfilled obligation to pay or deliver proceeds of the letter  
7 of credit to the secured party an authenticated release from any further obligation to pay or  
8 deliver proceeds of the letter of credit to the secured party;

9 (6) a secured party, other than a buyer, having control of an electronic mortgage  
10 note under Section 9-105(c)(1) shall send to the repository operator an instruction directing the  
11 repository operator to revoke the secured party's status as authorized transferor; and

12 (7) a secured party, other than a buyer, having control of an electronic mortgage  
13 note under Section 9-105(c)(2) shall send to the repository operator an instruction directing the  
14 repository operator to make a registered transfer of the electronic mortgage note to the debtor.

#### 15 **Reporter's Note**

16  
17 Draft subsections (b)(6) and (b)(7) would require a secured party that has been paid in full  
18 and has not committed to make future advances to relinquish control over an electronic mortgage  
19 note. The term "secured party" includes not only a creditor holding a security interest that  
20 secures an obligation but also the buyer of an account, chattel paper, payment intangible, or  
21 promissory note. UCC § 9-102(a)(73)(D). As with subsection (b)(3), concerning security  
22 interests in electronic chattel paper, the new subsections would apply only to a secured party  
23 whose security interest secures an obligation and not to a buyer, whether of the electronic  
24 mortgage note or of the related mortgage note.  
25

26 **SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF**  
27 **SECURITY INTERESTS.** Except as otherwise provided in Sections 9-303 through 9-306, the  
28 following rules determine the law governing perfection, the effect of perfection or nonperfection,

1 and the priority of a security interest in collateral:

2 (1) Except as otherwise provided in this section, while a debtor is located in a  
3 jurisdiction, the local law of that jurisdiction governs perfection, the effect of perfection or  
4 nonperfection, and the priority of a security interest in collateral.

5 (2) While collateral is located in a jurisdiction, the local law of that jurisdiction governs  
6 perfection, the effect of perfection or nonperfection, and the priority of a possessory security  
7 interest in that collateral.

8 (3) Except as otherwise provided in paragraph (4), while negotiable documents, goods,  
9 instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that  
10 jurisdiction governs:

11 (A) perfection of a security interest in the goods by filing a fixture filing;

12 (B) perfection of a security interest in timber to be cut; and

13 (C) the effect of perfection or nonperfection and the priority of a nonpossessory  
14 security interest in the collateral.

15 (4) The local law of the jurisdiction in which the wellhead or minehead is located  
16 governs perfection, the effect of perfection or nonperfection, and the priority of a security  
17 interest in as-extracted collateral.

18 (5) While a debtor is located in a jurisdiction that is not a state, the local law of the  
19 District of Columbia governs:

20 (A) perfection of a security interest in an electronic mortgage note by control; and

21 (B) the effect of perfection or nonperfection and the priority of a security interest in  
22 an electronic mortgage note perfected by control.



## Reporter's Note

1  
2  
3 1. Under the draft, a security interest in an electronic mortgage note may be perfected by  
4 filing or control. Under the existing choice-of-law provisions, the law governing perfection, the  
5 effect of perfection or nonperfection, and the priority of a security interest in an electronic  
6 mortgage note (“choice-of-law issues”) is the local law of the jurisdiction in which a debtor is  
7 located. UCC § 9-301(1). Although draft § 9-301(5) changes the choice-of-law rule in some  
8 circumstances, paragraph (1) would continue to apply if the debtor is located in a state, as  
9 defined in UCC § 1-201.

10  
11 Example 1: Debtor is an Illinois corporation and so is located in Illinois under UCC § 9-  
12 307(e). Because Illinois is a state, draft paragraph (5) would not apply. Paragraph (1)  
13 would apply to all security interests in Debtor’s electronic mortgage notes and Illinois  
14 law would govern all the choice-of-law issues, regardless of the method by which the  
15 security interests are perfected.

16  
17 Example 2: Debtor is organized under the law of the Cayman Islands, where its chief  
18 executive office is located. Because the Cayman Islands does not have a filing system for  
19 perfection of nonpossessory security interests, Debtor would be located in the District of  
20 Columbia under UCC § 9-307(c). Because the definition of “state” includes the District  
21 of Columbia, paragraph (1) would apply to all security interests in Debtor’s electronic  
22 mortgage notes and the local law of the District would govern all the choice-of-law  
23 issues, regardless of the method by which the security interests are perfected.

24  
25 2. A debtor may be located in a non-UCC jurisdiction. (UCC § 9-307(c) reduces the  
26 likelihood that this will occur.) For example, a debtor that is a Canadian corporation with its  
27 chief executive office in Toronto would be located in Ontario, and Ontario law would govern the  
28 perfection of a security interest. Ontario law, however, does not contemplate the creation of  
29 superpriority, perfected-by-control security interests in an electronic mortgage note. A secured  
30 party that has control but does not file would be unperfected.

31  
32 Draft paragraph (5) would prevent this troubling outcome. Inasmuch as a Canadian  
33 debtor is located in a jurisdiction that is not a state, the local law of the District of Columbia  
34 would govern perfection of the security interest, as well as the effect of perfection or  
35 nonperfection and the priority of the security interest. Even if the District of Columbia does not  
36 enact the draft amendments, they will apply by operation of the choice-of-law provisions of the  
37 Repository Act.

38  
39 Example 3: Debtor is organized under the law of Ontario, Canada, and its chief  
40 executive office is in Toronto. Under UCC § 9-307(b), Debtor would be located in  
41 Ontario. (Section 9-307(c) would not apply because Ontario has a filing system for  
42 perfection of nonpossessory security interests.) The local law of Ontario would govern  
43 commercial-law matters. UCC § 9-301(1). However, because Ontario is not a state, the  
44 local law of the District of Columbia would govern commercial-law matters with respect  
45 to a security interest perfected by control. Draft § 9-301(5).

1           3. By its terms, draft paragraph (5) does not apply to perfection of a security interest in  
2 an electronic mortgage note by filing. Such a security interest remains subject to the local law of  
3 the debtor's location. UCC § 9-301(1). Paragraph (1) also applies to determine the law  
4 governing the priority of conflicting perfected-by-filing security interests.  
5

6           Example 4: Under the facts of Example 3, *SP-1* and *SP-2* each hold a security interest in  
7 Debtor's electronic mortgage note. Each has perfected by filing. Paragraph (1) applies,  
8 and the local law of Ontario governs not only the perfection but also the priority of the  
9 conflicting security interests.  
10

11           4. Under a literal reading, the priority of a perfected-by-filing security interest in an  
12 electronic mortgage note would be governed by the local law of Ontario, UCC § 9-301(1),  
13 whereas the priority of a conflicting, perfected-by-control security interest in the same electronic  
14 mortgage note would be governed by the local law of the District of Columbia. Draft § 9-301(5).  
15 In resolving a priority dispute of this kind, a court should construe Section 9-301 to promote its  
16 underlying purposes and policies, UCC § 1-103(a), and determine priority under the local law of  
17 the District of Columbia under draft § 9-103(5).  
18

19           Example 5: Under the facts of Example 3, *SP-1* and *SP-2* each hold a security interest in  
20 Debtor's electronic mortgage note. *SP-1* has perfected by filing; *SP-2* has perfected by  
21 control. The local law of Ontario governs perfection of *SP-1*'s security interest. UCC §  
22 9-301(1). But because Debtor is not located in a state and *SP-2* is perfected by control,  
23 draft paragraph (5) applies. The local law of the District of Columbia governs the  
24 priority of the conflicting security interests.  
25

26           Where there are three conflicting security interests, two of which are perfected by filing  
27 and one of which is perfected by control, a court should apply the local law of Ontario to  
28 determine the priority between the two perfected-by-filing security interests and should apply the  
29 local law of the District of Columbia to determine the priority between the secured party having  
30 control and the filers. Because the secured party with control would have priority over the  
31 secured parties that perfected by filing, no circular priority would result.  
32

33           Example 6: Under the facts of Example 5, *SP-3* also holds a perfected-by-filing security  
34 interest in Debtor's electronic mortgage note. Because Debtor is not located in a state  
35 and *SP-2* is perfected by control, draft paragraph (5) applies. The local law of the District  
36 of Columbia governs the priority between *SP-2* and each of *SP-1* and *SP-3*. The local  
37 law of Ontario governs the priority between *SP-1* and *SP-3*.  
38

39           **SECTION 9-308. WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS**  
40 **PERFECTED; CONTINUITY OF PERFECTION.**

41           \*\*\*

42           (h) [Continuous perfection upon conversion to electronic mortgage note.] If a

1 secured party holds a perfected security interest in a mortgage note that is converted to an  
2 electronic mortgage note and the security interest in the electronic mortgage note is perfected on  
3 conversion, the security interest continues as a perfected security interest in the electronic  
4 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. See draft § 9-322(b).  
14

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

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

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

23 (1) that is perfected under Section 9-308(d), (e), (f), or (g);

24 (2) that is perfected under Section 9-309 when it attaches;

25 (3) in property subject to a statute, regulation, or treaty described in Section 9-  
26 311(a);

27 (4) in goods in possession of a bailee which is perfected under Section 9-  
28 312(d)(1) or (2);

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

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

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

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

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

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

11 \*\*\*

12 **SECTION 9-312. PERFECTION OF SECURITY INTERESTS IN CHATTEL**  
13 **PAPER, DEPOSIT ACCOUNTS, DOCUMENTS, GOODS COVERED BY**  
14 **DOCUMENTS, INSTRUMENTS, INVESTMENT PROPERTY, LETTER-OF-CREDIT**  
15 **RIGHTS, AND MONEY; PERFECTION BY PERMISSIVE FILING; TEMPORARY**  
16 **PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION.**

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

19 \*\*\*

20 (e) [**Temporary perfection: new value.**] A security interest in certificated securities,  
21 negotiable documents, or instruments is perfected without filing or the taking of possession or  
22 control for a period of 20 days from the time it attaches to the extent that it arises for new value  
23 given under an authenticated security agreement.



1 (including mortgage notes) and certificated securities to the debtor for one of the specified  
2 purposes.

3  
4 Draft subsection (h) would expand upon the rule in subsection (g) by providing for temporary  
5 perfection of a security interest in a mortgage note without filing or possession if the secured  
6 party delivers the mortgage note to the debtor for the purpose of submission to the repository  
7 system. Although the secured party would remain perfected during this 20-day period, it would  
8 risk losing priority to a competing secured party that takes possession and qualifies under UCC §  
9 9-330(d) [draft § 9-330(e)] or 9-331.

10  
11 If the mortgage note is converted to an electronic mortgage note within the 20-day period,  
12 perfection will continue in the electronic mortgage note if the secured party has control of the  
13 electronic mortgage on conversion (see draft § 9-314(a)) or if a filed financing statement covers  
14 the mortgage note or the electronic mortgage note.  
15

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

18 (a) [**Perfection by possession or delivery.**] Except as otherwise provided in subsection  
19 (b), a secured party may perfect a security interest in tangible negotiable documents, goods,  
20 instruments other than mortgage notes that have been converted to electronic mortgage notes,  
21 money, or tangible chattel paper by taking possession of the collateral. A secured party may  
22 perfect a security interest in certificated securities by taking delivery of the certificated securities  
23 under Section 8-301.

24 \*\*\*

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

29 (1) a secured party that has possession of a mortgage note and delivers the  
30 mortgage note to the repository system for conversion retains possession until the repository

1 system converts the mortgage note to an electronic mortgage note;

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 until:

5 (A) the mortgage note is converted to an electronic mortgage note if the  
6 mortgage note is converted not later than 20 days after the delivery; or

7 (B) the debtor redelivers the mortgage note to the secured party if the  
8 mortgage note is redelivered not later than 20 days after the delivery without having been  
9 converted; and

10 (3) a secured party does not retain possession of a mortgage note that has been  
11 converted to an electronic mortgage note.

12 \*\*\*

### 13 **Reporter's Note**

14  
15 1. The amendment to draft § 9-313(d) would address situations in which a mortgage note  
16 that is subject to a possessory security interest is converted to an electronic mortgage note. In the  
17 first situation (subsection (d)(1)), a secured party that itself delivers a mortgage note to the  
18 repository system retains possession until the mortgage note is converted to an electronic  
19 mortgage note. (Subsection (d)(1) applies equally to a secured party that submits a mortgage  
20 note for conversion through an agent. See UCC § 1-103(b) (providing, *inter alia*, that, unless  
21 displaced by the particular provisions of the UCC, the law of agency supplements its  
22 provisions).) For perfection to continue after conversion, the security interest in the electronic  
23 mortgage note must be perfected by filing, including by filing against the mortgage note (see  
24 draft § 9-308(h)), or by control (see draft § 9-314(a)).

25  
26 2. Subsection (d)(2) would cover the case where the secured party delivers the mortgage  
27 note to the debtor for the purpose of submission to the repository system. Under draft § 9-  
28 312(h), a secured party that delivers the mortgage note to the debtor for this purpose would  
29 remain perfected but would risk losing priority to a competing secured party that takes  
30 possession and qualifies under UCC § 9-330(d) [draft § 9-330(e)] or 9-331. Subsection (d)(2) of  
31 this section is designed to enable a secured party that enjoys the superpriority afforded by UCC §  
32 9-330(d) [draft § 9-330(e)] or 9-331 to retain that priority notwithstanding delivery of the  
33 mortgage note to the debtor.

1 Subsection (d)(2)(A) would cover the case where the contemplated conversion actually  
2 occurs. If the mortgage note is converted to an electronic mortgage note within 20 days after  
3 delivery to the debtor and the secured party has control of the electronic mortgage note (draft §  
4 9-105(c)) on conversion, the secured party would be deemed to have retained possession of the  
5 mortgage note (and thus priority under draft § 9-330(e)) until the mortgage note is converted, at  
6 which time the secured party would achieve priority with respect to the related electronic  
7 mortgage note under draft § 9-330(d). If the mortgage note is converted within the 20-day  
8 period but the secured party does not have control of the related electronic mortgage note, then  
9 the security interest in the electronic mortgage note would be unperfected, unless it is perfected  
10 by filing.

11  
12 Subsection (d)(2)(B) would deal with the unusual situation where the debtor returns the  
13 unconverted mortgage note to the secured party. The secured party would be deemed to have  
14 retained possession if the mortgage note is redelivered within 20 days after the delivery to the  
15 debtor.

16  
17 3. Subsection (d)(3) would deal with situations in which the secured party submits a  
18 mortgage note for conversion without delivering it to the repository system, e.g., electronically.  
19 Once the mortgage note is converted, the secured party does not retain possession of it for  
20 purposes of perfection by possession. However, the secured party could protect itself by  
21 submitting the mortgage note in such a manner that it has control of the related electronic  
22 mortgage note when it is created. See draft §§ 9-105(c) and 9-314(a).

23  
24 4. The amendment to subsection (a) would address a related issue. A mortgage note that is  
25 converted to an electronic mortgage note no longer embodies a right to payment. Accordingly,  
26 once a mortgage note has been converted to an electronic mortgage note, a secured party would  
27 be unable to perfect a security interest in the mortgage note by taking possession of it. However,  
28 a filing against the converted mortgage note would be effective to perfect against the related  
29 electronic mortgage note. See draft § 9-108(f) and the Reporter's Note thereto.

30  
31 **SECTION 9-314. PERFECTION BY CONTROL.**

32 (a) **[Perfection by control.]** A security interest in investment property, deposit accounts,  
33 letter-of-credit rights, electronic chattel paper, ~~or~~ electronic documents, or electronic mortgage  
34 notes may be perfected by control of the collateral under Section 7-106, 9-104, 9-105, 9-106, or  
35 9-107.

36 (b) **[Specified collateral: time of perfection by control; continuation of perfection.]**  
37 A security interest in deposit accounts, electronic chattel paper, letter-of-credit rights, ~~or~~  
38 electronic documents, or electronic mortgage notes is perfected by control under Section 7-106,



1 9-104, 9-105, or 9-107 when the secured party obtains control and remains perfected by control  
2 only while the secured party retains control.

3 \*\*\*

4 **SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY**  
5 **INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.**

6 \*\*\*

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

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

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

14 (3) the time of filing or perfection as to a security interest in a mortgage note that  
15 is converted to an electronic mortgage note is also the time of filing or perfection as to the  
16 security interest in the related electronic mortgage note if there is no period after the earliest time  
17 of filing or perfection when there is neither filing nor perfection.

18 \*\*\*

19 **Reporter's Note**

20  
21 Together with draft § 9-504(b), subsection (b)(3) would allow for priority of a security  
22 interest in an electronic mortgage note to date from the time a financing statement was filed  
23 against the related mortgage note.



1 on whether the purchaser obtains control, whereas the later turns on whether the purchaser takes  
2 possession.

3  
4 2. A secured party that has priority under draft § 9-330(e) with respect to a mortgage note  
5 that is converted to an electronic mortgage note may achieve priority under draft § 9-330(d) with  
6 respect to the related electronic mortgage note. If, as typically will be the case, there is no gap  
7 between perfection by possession and perfection by control, the secured party's superpriority  
8 would be continuous.

9  
10 3. It is possible that, after taking possession of a mortgage note, a secured party having  
11 priority under draft § 9-330(e) might learn that its purchase violated the rights of a third party.  
12 This subsequent knowledge would not deprive the secured party of its priority. Likewise, if  
13 thereafter the mortgage note is converted and the secured party has control over the related  
14 electronic mortgage note, this knowledge would not disqualify the secured party for priority  
15 under draft § 9-330(d).  
16

17 **SECTION 9-406. DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF**  
18 **ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS**  
19 **ON ASSIGNMENT OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES,**  
20 **AND PROMISSORY NOTES INEFFECTIVE.**

21 \*\*\*

22 (d) [Term restricting assignment generally ineffective.] Except as otherwise provided  
23 in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term in an  
24 agreement between an account debtor and an assignor or in an electronic mortgage note or a  
25 promissory note is ineffective to the extent that it:

26 (1) prohibits, restricts, or requires the consent of the account debtor or person  
27 obligated on the electronic mortgage note or promissory note to the assignment or transfer of, or  
28 the creation, attachment, perfection, or enforcement of a security interest in, the account, chattel  
29 paper, payment intangible, or promissory note; or

30 (2) provides that the assignment or transfer or the creation, attachment, perfection,  
31 or enforcement of the security interest may give rise to a default, breach, right of recoupment,

1 claim, defense, termination, right of termination, or remedy under the account, chattel paper,  
2 payment intangible, or promissory note.

3 (e) **[Inapplicability of subsection (d) to certain sales.]** Subsection (d) does not apply  
4 to the sale of a payment intangible or promissory note, other than a sale pursuant to a disposition  
5 under Section 9-610 or an acceptance of collateral under Section 9-620.

6 \*\*\*

7 **Reporter’s Note**

8 The amendments to this section extend to electronic mortgage notes the rules applicable to  
9 tangible promissory notes. Inasmuch as an electronic mortgage note is a payment intangible, the  
10 expansion is needed only where the persons obligated are set forth and not where the types of  
11 collateral appear.

12  
13 By definition, an electronic mortgage note is an Article 3 “negotiable instrument” as well as a  
14 “payment intangible,” which is a type of “general intangible.” See draft § 9-102(a); UCC § 9-  
15 102(b). But unlike other notes that are Article 3 negotiable instruments, an electronic mortgage  
16 note is neither an Article 9 “instrument” nor a “promissory note,” which is a type of  
17 “instrument.” See draft § 9-102(a).

18  
19 Ordinarily, the obligor on a payment intangible is an “account debtor.” UCC § 9-102(a)(3).  
20 However, the definition of “account debtor” excludes an obligor on an Article 3 negotiable  
21 instrument. Accordingly, the obligor on an electronic mortgage note is neither an “account  
22 debtor” nor an obligor on a promissory note.

23  
24 **SECTION 9-408. RESTRICTIONS ON ASSIGNMENT OF PROMISSORY**  
25 **NOTES, HEALTH-CARE-INSURANCE RECEIVABLES, AND CERTAIN GENERAL**  
26 **INTANGIBLES INEFFECTIVE.**

27 (a) **[Term restricting assignment generally ineffective.]** Except as otherwise provided  
28 in subsection (b), a term in an electronic mortgage note or a promissory note or in an agreement  
29 between an account debtor and a debtor which relates to a health-care-insurance receivable or a  
30 general intangible, including a contract, permit, license, or franchise, and which term prohibits,  
31 restricts, or requires the consent of the person obligated on the electronic mortgage note or

1 promissory note or the account debtor to, the assignment or transfer of, or creation, attachment,  
2 or perfection of a security interest in, the promissory note, health-care-insurance receivable, or  
3 electronic mortgage note or other general intangible, is ineffective to the extent that the term:

4 (1) would impair the creation, attachment, or perfection of a security interest; or

5 (2) provides that the assignment or transfer or the creation, attachment, or  
6 perfection of the security interest may give rise to a default, breach, right of recoupment, claim,  
7 defense, termination, right of termination, or remedy under the promissory note, health-care-  
8 insurance receivable, electronic mortgage note or other general intangible.

9 (b) [**Applicability of subsection (a) to sales of certain rights to payment.**] Subsection  
10 (a) applies to a security interest in a payment intangible or promissory note only if the security  
11 interest arises out of a sale of the payment intangible or promissory note, other than a sale  
12 pursuant to a disposition under Section 9-610 or an acceptance of collateral under Section 9-620.

13 (c) [**Legal restrictions on assignment generally ineffective.**] A rule of law, statute, or  
14 regulation that prohibits, restricts, or requires the consent of a government, governmental body or  
15 official, person obligated on an electronic mortgage note or a promissory note, or account debtor  
16 to the assignment or transfer of, or creation of a security interest in, a promissory note, health-  
17 care-insurance receivable, electronic mortgage note or other general intangible, including a  
18 contract, permit, license, or franchise between an account debtor and a debtor, is ineffective to  
19 the extent that the rule of law, statute, or regulation:

20 (1) would impair the creation, attachment, or perfection of a security interest; or

21 (2) provides that the assignment or transfer or the creation, attachment, or  
22 perfection of the security interest may give rise to a default, breach, right of recoupment, claim,  
23 defense, termination, right of termination, or remedy under the promissory note, health-care-

1 insurance receivable, electronic mortgage note or other general intangible.

2 (d) [**Limitation on ineffectiveness under subsections (a) and (c).**] To the extent that a  
3 term in an electronic mortgage note or a promissory note or in an agreement between an account  
4 debtor and a debtor which relates to a health-care-insurance receivable or general intangible or a  
5 rule of law, statute, or regulation described in subsection (c) would be effective under law other  
6 than this article but is ineffective under subsection (a) or (c), the creation, attachment, or  
7 perfection of a security interest in the promissory note, health-care-insurance receivable,  
8 electronic mortgage note or other general intangible:

9 (1) is not enforceable against the person obligated on the electronic mortgage note  
10 or promissory note or against the account debtor;

11 (2) does not impose a duty or obligation on the person obligated on the electronic  
12 mortgage note or promissory note or a duty or obligation on the account debtor;

13 (3) does not require the person obligated on the electronic mortgage note or  
14 promissory note or require the account debtor to recognize the security interest, pay or render  
15 performance to the secured party, or accept payment or performance from the secured party;

16 (4) does not entitle the secured party to use or assign the debtor's rights under the  
17 promissory note, health-care-insurance receivable, electronic mortgage note or other general  
18 intangible, including any related information or materials furnished to the debtor in the  
19 transaction giving rise to the promissory note, health-care-insurance receivable, electronic  
20 mortgage note or other general intangible;

21 (5) does not entitle the secured party to use, assign, possess, or have access to any  
22 trade secrets or confidential information of the person obligated on the electronic mortgage note  
23 or promissory note or the account debtor; and

1 (6) does not entitle the secured party to enforce the security interest in the  
2 promissory note, health-care-insurance receivable, electronic mortgage note or other general  
3 intangible.

4 (e) **[Section prevails over specified inconsistent law.]** This section prevails over any  
5 inconsistent provisions of the following statutes, rules, and regulations:

6 [List here any statutes, rules, and regulations containing provisions inconsistent  
7 with this section.]

8 *Legislative Note: States that amend statutes, rules, and regulations to remove provisions*  
9 *inconsistent with this section need not enact subsection (e).*

#### 10 **Reporter's Note**

11  
12 The amendments to this section extend to electronic mortgage notes the rules applicable to  
13 tangible promissory notes. The amendments to this section extend to electronic mortgage notes  
14 the rules applicable to tangible promissory notes. Inasmuch as an electronic mortgage note is a  
15 payment intangible, which is a type of general intangibles, the expansion is needed only where  
16 the persons obligated are set forth and not where the types of collateral appear.  
17

#### 18 **SECTION 9-619. TRANSFER OF RECORD OR LEGAL TITLE.**

19 \*\*\*

20 **(d) [Registered transfer not disposition of collateral; secured party not relieved of**  
21 **duties.]** A registered transfer of an electronic mortgage note effected by a secured party to itself  
22 is not of itself a disposition of collateral under this [article] and does not of itself relieve the  
23 secured party of its duties under this [article].

#### 24 **Reporter's Note**

25  
26 The registrant of an electronic mortgage note is the only person entitled to enforce the  
27 maker's obligation. See draft § 3-301. A secured party that wishes to collect on an electronic  
28 mortgage note as to which it is the authorized transferor must first effect a registered transfer of  
29 the electronic mortgage note to itself as registrant. Subsection (d) would make clear that, of  
30 itself, such a registered transfer does not constitute a disposition of collateral under part 6.

Appendix

Definitions from the National Electronic Mortgage Repository Act of 2018  
(draft of March 30, 2018)

**AUTHORIZED TRANSFEROR.**—means, with respect to an electronic mortgage note, the person identified on the records of the repository system as the authorized transferor of such electronic mortgage note.

**ELECTRONIC MORTGAGE NOTE.**—means a record of the repository system created by the repository operator pursuant to paragraph 7(c)(3) that has the effect given in subsection 8(a).

**MORTGAGE NOTE.**—means an instrument, a transferable record, or a controlled record secured by a residential mortgage. The term does not include:

- (i) lost, missing, or destroyed negotiable instruments;
- (ii) a mortgage note secured by real property situated within the lands of a federally recognized Indian tribe, as defined by the Secretary of the Interior pursuant to 25 U.S.C. § 5131, if such tribe has not consented to be deemed to be a state for purposes of the Act; or
- (iii) electronic mortgage notes.

**REGISTERED TRANSFER.**—means a change in the identity of the registrant in the repository system that is the effect of an instruction by the registrant or the authorized transferor of the relevant electronic mortgage note received by the repository operator. An instruction of a registrant to reflect a change of its name on the repository system is not a registered transfer.

**REGISTRANT.**—means, with respect to an electronic mortgage note, the person identified on the records of the repository system as the registrant of such electronic mortgage note.

**REPOSITORY OPERATOR.**—means the entity [**AltA**: organized under] [**AltB**: licensed by] by this Act to operate the repository system.

**REPOSITORY SYSTEM.**—means the electronic database and registered transfer service established by the repository operator.

**SYSTEM RULES.**—means the rules the repository operator adopts concerning the operations, security, and rights or obligations of persons who may use the repository system.

**TRANSFERABLE RECORD.**—has the meaning assigned to such term in 15 U.S.C. § 7021, except that no recording of an oral communication may be the basis of a transferable record.