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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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AMENDMENTS SHOWN IN STRIKE AND SCORE

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ARTICLES 1, 3, AND 9
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SECTION 1-201. GENERAL DEFINITIONS.

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

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

(21) “Holder” means:

(A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or

(B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession.

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

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

(31B) “Registrant” means a registrant as defined in the [National Mortgage Note Repository Act of 2017].
(32A) “Repository operator” means the repository operator as defined in the [National Mortgage Note Repository Act of 2017].

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

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

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Reporter’s Notes

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

2. Revisions to the definition of “holder” have been relocated to Article 3. See draft § 3-301.

SECTION 1-301. TERRITORIAL APPLICABILITY; PARTIES’ POWER TO CHOOSE APPLICABLE LAW.

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

(1) Section 2-402;

(2) Sections 2A-105 and 2A-106;

(3) Section 4-102;

(4) Section 4A-507;

(5) Section 5-116;
RA § 9(b)(1)(A) and (B) provide that an electronic mortgage note (EMN) is a negotiable instrument as defined in Article 3. A negotiable instrument is an Article 9 “instrument,” in which a security interest can be perfected by taking possession. Draft § 9-313A provides special rules with respect to perfection by possession of an EMN, and draft § 9-307A provides a rule for determining where an EMN is located for purposes of Article 9’s choice-of-law rules. Like Article 9’s other choice-of-law rules, the rule in draft § 9-307A would be mandatory.

SECTION 3-103. DEFINITIONS.

(a) In this article:

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(6A) “Holder” includes the person identified by the repository system as the initial registrant of an electronic mortgage note if, at the time the related mortgage note is submitted to the repository system:

(i) the mortgage note is a negotiable instrument and the person is the holder of it; or

(ii) the mortgage note is a transferable record and the person has control of it under 15 U.S.C. Section 7021.

***

Under RA § 8(c)(B), the person submitting a mortgage note for conversion to an EMN becomes the initial registrant of the EMN. Draft § 3-103 would expand the Article 3 definition of “holder,” so that the holder of a submitted mortgage note that is a negotiable instrument under Article 3 or a transferable record under E-SIGN would become the holder of (and, under § 3-301, a person entitled to enforce) the related EMN.

Draft provisions on negotiation (§ 3-201) are meant to allow the initial registrant to transfer its status as holder to a subsequent holder. (The initial registrant would be able to transfer its rights, including any rights it may have as a holder in due course, under § 3-203.)

A person who submits a mortgage note that is not a negotiable instrument or transferable record (and so is not a “holder” as defined in Article 1 or draft § 3-104) would not become a holder of the related EMN. However, the person would become the person entitled to enforce the EMN and would be able to transfer its right to enforce under § 3-203.

**SECTION 3-104. NEGOTIABLE INSTRUMENT.** Except as provided in subsections (c) and (d), “negotiable instrument” means:

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

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

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

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

(2) an electronic mortgage note.
This change, which accords with RA § 9(b)(1)(A) and (B), would bring EMNs within the scope of UCC Article 3 (negotiable instruments). UCC § 3-102. As a negotiable instrument, an EMN would be an “instrument” within the definition in UCC § 9-102.

SECTION 3-201. NEGOTIATION.

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

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

(c) A transfer of possession of an electronic mortgage note occurs under subsection (a) when the electronic mortgage note is transferred under Section 3-203(a).

Reporters Notes

1. Article 3 distinguishes between a transfer of an instrument (§ 3-203) and a transfer of possession of an instrument (§ 3-201).

Draft § 3-203(a) provides that, upon the occurrence of a registered transfer under the RA, an EMN is transferred, and the transferee becomes a person entitled to enforce the EMN. RA § 3 defines “registered transfer” to mean “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” (italics removed).

Draft § 3-201(c) provides that when a registered transfer of an EMN occurs, a transfer of possession of the EMN also occurs. This is consistent with the RA, which provides that “[t]he person identified by the repository system as the registrant shall be treated for all purposes of law to have had continuous possession of the electronic mortgage note associated by the repository system with such registrant from the time the registrant is so identified until another person becomes the registrant of such electronic mortgage note” RA § 9(d)(2) (italics removed).

2. Regarding indorsements of an EMN, see draft § 3-204.
SECTION 3-203. TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY TRANSFER.

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

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

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Reporter’s Note

As noted above in connection with draft § 3-201, a registered transfer of an EMN under the Repository Act results in a transfer of possession of the EMN. See also RA § 9(b) (providing that, with certain exceptions, “the person identified by the repository system as the registrant of an electronic mortgage note has the rights that a holder would have if the electronic mortgage note were a negotiable instrument”).

SECTION 3-204. INDOREMENT.

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

(b) A transfer of an electronic mortgage note under Section 3-203(a) is an indorsement
of the electronic mortgage note by the transferring registrant.

(b)(c) …

(e)(d) …

(4)(e) …

Reporter’s Notes

1. Under the Repository Act’s default rule, “a registered transfer is deemed to be
accompanied by an unqualified indorsement by the registrant . . . of the electronic mortgage note
in the name of the registrant with the transfer warranties set forth in UCC Article 3.” RA §
12(a)(3). However, “[a] registrant may instruct the repository operator that the electronic
mortgage note is accompanied by an indorsement other than the type described in paragraph (3)
so long as such instruction comports with system rules.” RA § 12(a)(4). Presumably this means
that the deemed indorsement might be a blank indorsement, a special indorsement, or a
restrictive indorsement.

One can become the holder of an EMN only by being identified by the repository system as
the registrant. See draft § 3-104. If, as seems likely, system rules will not permit a registered
transfer to X to be accompanied by a deemed special indorsement to Y, then a deemed blank
indorsement and a deemed special indorsement would have the same practical effect.
Accordingly, this draft does not specify whether a transferor’s deemed indorsement of an EMN
is a special indorsement or a blank indorsement, and instead would leave that question to the RA
and system rules.

If a transferring registrant is not the holder of the EMN, the deemed indorsement will not
enable the transferee registrant to become a holder. Nevertheless, unless the indorsement
provides otherwise, the transferor will become obligated to pay the EMN if the borrower
defaults. See UCC § 3-415.

2. Unless the registrant waives its power, both the registrant and authorized transferor have
the power to effectuate a registered transfer. RA § 13(a), (e)(1). Regardless of which party
initiates a registered transfer, the accompanying indorsement is that of the registrant. RA §
12(a)(3); draft § 3-204(b).
SECTION 3-301. PERSON ENTITLED TO ENFORCE INSTRUMENT.

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

(i) (1) the holder of the instrument;

(ii) (2) a nonholder in possession of the instrument who has the rights of a holder;

or

(iii) (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3–309 or 3–418(d); or

(4) a nonholder who is the registrant of an electronic mortgage note who does not have the rights of a holder.

(b) For purposes of subsection (a), the registrant of an electronic mortgage note is in possession of the instrument.

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

Reporter’s Note

1. The draft reflects RA § 8(c)(4)(A)(ii) (“to the extent that the obligation evidenced by an electronic mortgage note is enforceable, the registrant is the holder or other person entitled to enforce”) and RA § 9(d)(2) (“The person identified by the repository system as the registrant shall be treated for all purposes of law to have had continuous possession of the electronic mortgage note associated by the repository system with such registrant from the time the registrant is so identified until another person becomes the registrant of such electronic mortgage note.”).

Current UCC § 3-301(i) (draft § 3-301(a)(1)) already includes the holder of an EMN, whether the person was the initial registrant or an immediate or mediate transferee of such an initial registrant. Draft §§ 3-104 and 3-201 explain when a person becomes the holder of an EMN. These sections apply only to mortgage notes that were submitted by the holder thereof, as defined by Article 1 and E-SIGN.

In particular, draft § 3-201(c), which provides that a registered transfer of an EMN constitutes a transfer of possession of the EMN, applies only with respect to negotiation (i.e., the transfer of possession to a person who becomes the holder). It does not address possession of an instrument in other contexts. Accordingly, to ensure that a registrant of an EMN is a person
entitled to enforce the instrument, the draft makes two amendments to § 3-301.

First, draft § 3-301(b) would provide that a nonholder of an EMN has possession of the EMN for these purposes. With this amendment, draft § 3-301(a)(2), which covers a nonholder in possession of an instrument who has the rights of a holder, would include an initial registrant who was a nonholder who was entitled to enforce the relevant mortgage note.

Second, draft § 3-301(a)(4) would cover cases in which the registrant is not the holder and has not acquired the rights of a holder by transfer under § 3-203(a). These registrants include the registrant of an EMN that was created based on a mortgage note that either (i) was not negotiable instrument or transferable record or (ii) was a negotiable instrument or transferable record but was submitted by a person who was not the holder, e.g., the thief of a negotiable mortgage note that was payable to an identified person other than the thief.

2. RA § 9(d)(1) provides, “[T]he person identified by the repository system as the initial registrant shall be treated for all purposes of law as having had continuous possession or control of the mortgage note throughout the submission and conversion process.” The Drafting Committee may wish to consider whether this rule should be added to Article 3 and, if so, where. The Reporter’s Note to draft § 9-313 discusses the relevant considerations.

SECTION 3-302. HOLDER IN DUE COURSE.

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(b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument, except that a record of the repository system that reflects that the obligation of a person obligated on an electronic mortgage note has been discharged constitutes notice of the discharge.

***

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

(h) An electronic mortgage note that the repository operator created based on submission
of a mortgage note that was not a negotiable instrument or a transferable record cannot have a
holder in due course.

**Reporter’s Notes**

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

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

Once the records of the repository system reflect that the obligation evidenced by an EMN is
discharged with respect to all borrowers, the EMN will no longer be transferable by the
repository system. RA § 11(c). If an EMN is only partially discharged, e.g., discharged with
respect to only one of the two borrowers, the EMN would remain transferable and potential
transferees would have access to a record of the discharge. Accordingly, the draft addition
would have practical effect only in cases of partial discharge.

2. Draft subsection (h) would incorporate the rule in RA § 9(b)(1)(B). It may be useful to
state this rule, even if one can deduce it from other provisions of the draft.

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

(a) In an action with respect to an instrument, the authenticity of, and authority to make,
each signature on the instrument is admitted unless specifically denied in the pleadings. If the
validity of a signature is denied in the pleadings, the burden of establishing validity is on the
person claiming validity, but the signature is presumed to be authentic and authorized unless the
action is to enforce the liability of the purported signer and the signer is dead or incompetent at
the time of trial of the issue of validity of the signature. If an action to enforce the instrument is
brought against a person as the undisclosed principal of a person who signed the instrument as a
party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on the instrument as a represented person under Section 3–402(a).

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

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

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

(2) proves entitlement to enforce an electronic mortgage note by producing a record of the repository system which is certified by the repository operator and identifies the plaintiff as the registrant of the electronic mortgage note.

Reporter’s Notes

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

2. The Drafting Committee may wish to consider whether any special provisions are needed to address situations in which the registrant is the agent of a secured party.

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

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

(1) the person seeking to enforce the instrument:
(A) was entitled to enforce the instrument when loss of possession occurred; or

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

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

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

***

(c) Subsection (a) does not apply to an instrument that is converted to an electronic mortgage note in the repository system and is destroyed during or after submission to the repository operator, if the destruction was required or permitted by system rules or regulations promulgated by the Federal Housing Finance Agency.

Reporter’s Note

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

SECTION 3–415. OBLIGATION OF INDORSER.

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

(b) If an indorsement states that it is made “without recourse” or otherwise disclaims liability of the indorser, the indorser is not liable under subsection (a) to pay the instrument. However, the indorser of an electronic mortgage note is liable under subsection (a) unless the records of the repository operator indicate that liability has been disclaimed.

***

Reporter’s Note

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

SECTION 3-416. TRANSFER WARRANTIES.

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

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

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

(3) the instrument has not been altered;

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

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

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

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

***

Reporter’s Note

The change to this section comports with RA § 12(a)(3) and (a)(4), under which a registered transfer is deemed to be accompanied by an unqualified indorsement “with the transfer warranties set forth in UCC Article 3,” unless the transferring registrant instructs the repository operator that the EMN is accompanied by another type of indorsement.

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

Reporter’s Note

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

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

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

Reporter’s Note

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

SECTION 3-602. PAYMENT.

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

(b) Subject to subsection (e), a note is paid to the extent payment is made by or on behalf
of a party obliged to pay the note to a person that formerly was entitled to enforce the note only
if at the time of the payment the party obliged to pay has not received adequate notification that
the note has been transferred and that payment is to be made to the transferee. A notification is
adequate only if it is signed by the transferor or the transferee; reasonably identifies the
transferred note; and provides an address at which payments subsequently are to be made. Upon
request, a transferee shall seasonably furnish reasonable proof that the note has been transferred.
Unless the transferee complies with the request, a payment to the person that formerly was
entitled to enforce the note is effective for purposes of subsection (c) even if the party obliged to
pay the note has received a notification under this paragraph.
(c) Subject to subsection (e), to the extent of a payment under subsections (a) and (b), the obligation of the party obliged to pay the instrument is discharged even though payment is made with knowledge of a claim to the instrument under Section 3-306 by another person.

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

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

(1) a claim to the instrument under Section 3-306 is enforceable against the party receiving payment and (i) payment is made with knowledge by the payor that payment is prohibited by injunction or similar process of a court of competent jurisdiction, or (ii) in the case of an instrument other than a cashier’s check, teller’s check, or certified check, or electronic mortgage note, the party making payment accepted, from the person having a claim to the instrument, indemnity against loss resulting from refusal to pay the person entitled to enforce the instrument; or

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

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Legislative Note: The relevant provisions of the National Mortgage Note Repository Act of 2017 are consistent with the 2002 amendments to this section. A State that has not enacted those amendments should do so in conjunction with enactment of the amendment shown here.
The suggested amendment is meant to conform this section with RA § 9(b)(3).

SECTION 3-604. DISCHARGE BY CANCELLATION OR RENUNCIATION.

(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction, mutilation, or cancellation of the instrument, cancellation or striking out of the party’s signature, or the addition of words to the instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights against the party by a signed record.

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

(c) The obligation of a party to pay an instrument is not discharged if:

(1) the instrument is converted to an electronic mortgage note in the repository system and is destroyed during or after submission to the repository operator, and

(2) the destruction was required or permitted by system rules or regulations promulgated by the Federal Housing Finance Agency.

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

Subsection (c) comports with RA § 9(b)(2).
SECTION 8-103. RULES FOR DETERMINING WHETHER CERTAIN
OBLIGATIONS AND INTERESTS ARE SECURITIES OR FINANCIAL ASSETS.

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

Reporter’s Note

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

It is not completely clear whether the Repository Act allows for submission of a writing that
satisfies both Article 3 and Article 8 or a transferable record that would satisfy both articles if it
were in writing. But even if these records are eligible for submission, RA § 9(e)(1)(ii) says that
an EMN is “not a security for purposes of . . . UCC § 8-102(a)(15)(iii)(A)” (which refers to
“dealt in or traded on securities exchanges or securities markets”). Section 8-103 would be
amended accordingly.

SECTION 8-501. SECURITIES ACCOUNT; ACQUISITION OF SECURITY
ENTITLEMENTS FROM SECURITIES INTERMEDIARY.

(d) If a securities intermediary holds a financial asset for another person, and the
financial asset is registered in the name of, payable to the order of, or specially indorsed to the
other person, and has not been indorsed to the securities intermediary or in blank, the other
person is treated as holding the financial asset directly rather than as having a security
entitlement with respect to the financial asset.

Reporter’s Note

A mortgagee (or its assignee) may credit an EMN to a securities account. In that case, the
securities intermediary normally would become the registrant under the RA and UCC § 8-501(d) clearly would not apply. The Drafting Committee may wish to consider whether an EMN could possibly be credited to a securities account without the securities intermediary becoming the registrant and, if it could, whether UCC § 8-501 or its official comments should be amended to address the situation.

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

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

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

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

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

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Reporter’s Notes

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

Several consequences would follow:

a. Sales of an EMN would be perfected automatically under UCC § 9-309.

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

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

2. The definition of “chattel paper” would be amended to address the unlikely case in which an EMN also “evidence[s] a security interest in specific goods.” The Drafting Committee may wish to consider whether the bracketed language in the amended definition is desirable.

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

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

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

(1) value has been given;

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

(3) one of the following conditions is met:

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

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

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

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

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SECTION 9-307A. LOCATION OF ELECTRONIC MORTGAGE NOTE. An electronic mortgage note is located in the District of Columbia.

Reporter’s Notes

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

Under UCC § 9-301(2) and (3), the law of the location of the collateral governs perfection of a possessory security interest in an instrument, as well as the effect of perfection or
nonperfection and the priority of all security interests in instruments. Under the draft, the local
law of the District of Columbia would govern these issues with respect to security interests in all
EMNs in the repository. This approach would foreclose the possibility (short of a subsequent
amendment to Article 9 or overriding federal law) that the relevant jurisdiction would change.

2. Like the other choice-of-law rules in Article 9, this rule would be mandatory. See draft §
1-301.

SECTION 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY

INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND

AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY.

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

(1) that is perfected under Section 9-308(d), (e), (f), or (g);
(2) that is perfected under Section 9-309 when it attaches;
(3) in property subject to a statute, regulation, or treaty described in Section 9-
311(a);
(4) in goods in possession of a bailee which is perfected under Section 9-
312(d)(1) or (2);
(5) in certificated securities, documents, goods, or instruments which is perfected
without filing or possession under Section 9-312(e), (f), or (g);
(6) in collateral in the secured party’s possession under Section 9-313 or 9-313A;
(7) in a certificated security which is perfected by delivery of the security
certificate to the secured party under Section 9-313;
(8) in deposit accounts, electronic chattel paper, investment property, or letter-of-
credit rights which is perfected by control under Section 9-314;
(9) in proceeds which is perfected under Section 9-315; or

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

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

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

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(d) [Time of perfection by possession; continuation of perfection.] If perfection of a security interest depends upon possession of the collateral by a secured party, perfection occurs no earlier than the time the secured party takes possession and continues only while the secured party retains possession.

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Reporter’s Note

RA § 9(d)(1) provides that “[t]he person identified by the repository system as the initial registrant shall be treated for all purposes of law as having had continuous possession or control of the mortgage note throughout the submission and conversion process.” The Drafting Committee may wish to consider whether that rule should be added to Article 9 or stated in the official comments. Among the relevant considerations are:

a. Tangible mortgage notes. If the rule were not expressed in Article 9, would anyone conclude that the initial registrant of an electronic mortgage note lost possession of the related mortgage note by submitting it to the registry system? If not, then a statutory statement to that effect might open the door to arguments that the same result would not obtain in analogous situations. On the other hand, Article 9 does contain provisions providing for temporary, continuous perfection by possession. See UCC § 9-312(f) (secured party makes available to the
debtor a negotiable document of title or goods held by a bailee who has not issued a negotiable
title for them), (g) (secured party delivers a security certificate or instrument to the debtor for a
limited purpose).

b. Intangible mortgage notes. RA § 9(d)(1) applies also to intangible mortgage notes.
The reference to “control” in RA § 9(d)(1) apparently is meant to address mortgage notes that,
when submitted to the repository system, are “transferable records” under E-SIGN. If Article 9
is amended to address possession of tangible mortgage notes during the submission and
conversion process, should the amendment also cover intangible mortgage notes? These
mortgage notes are payment intangibles under Article 9, with respect to which a security interest
cannot be perfected by taking possession. Some of these mortgage notes are transferable records
under E-SIGN and UETA; others are not. E-SIGN and UETA address the rights and status of a
person who has control of a transferable record. But inasmuch as neither statute suggests that
such a person has possession for purposes of other law, it may be inappropriate for Article 9 or
its comments to do so.

Following is an indicative formulation of an Article 9 provision that tracks RA § 9(d)(1):

When the repository system identifies a secured party as the initial registrant of an
electronic mortgage note, any security interest held by the secured party in the
related mortgage note is deemed to have been perfected by taking possession of
the mortgage note from the time the mortgage note is submitted to the repository
system until the repository system converts the mortgage note into an electronic
mortgage note.

SECTION 9-313A. PERFECTION OF SECURITY INTEREST IN ELECTRONIC
MORTGAGE NOTE AND MORTGAGE NOTE.

(a) [“Authorized transferor.”] In this section, “authorized transferor” means a person
who is authorized by a registrant to effect a registered transfer.

(b) [Possession by registrant.] A secured party takes possession of an electronic
mortgage note when the repository system identifies the secured party as the registrant of the
electronic mortgage note. The secured party retains possession until the earlier of the time the
repository operator receives a notification from the secured party that the secured party waives
its right to make a registered transfer or the time the repository system identifies another person
as the registrant of the electronic mortgage note.

(c) [Possession by authorized transferor.] A secured party who is the authorized
transferor of an electronic mortgage note takes possession of the electronic mortgage note when
the repository operator receives a notification from the registrant that the registrant waives its
right to make a registered transfer. The secured party retains possession until the time the
secured party ceases to be the authorized transferor.

Reporter’s Notes

1. Article 9 currently provides four methods for perfecting a security interest in an
instrument: (i) by filing (UCC § 9-310(a)); (ii) by taking possession (UCC § 9-313(a)); (iii)
temporarily, when the security interest is given for new value (UCC § 9-312(e)); and (iv)
temporarily, when the secured party relinquishes possession of the instrument to the debtor for a
temporary and limited purpose (UCC § 9-312(g)). Sales of promissory notes are perfected
automatically. UCC § 9-309(b)(4).

A secured party who perfects by taking possession may achieve priority over a secured party
who perfected earlier. UCC § 9-330(d) (purchaser who gives value and takes possession of an
instrument in good faith and without knowledge that the purchase violates the rights of a
competing secured party); UCC § 9-331(a) (holder in due course).

2. The Repository Act contemplates that a person can have possession of an EMN. RA §
9(d)(2) provides that the person identified by the repository system as the registrant shall be
treated as having had continuous possession of an EMN from the time the person is so identified
until another person becomes the registrant. Draft § 9-313A(b) would provide for this result.

RA § 13(f) provides a method whereby possession of an EMN can be divested from the
registrant and given to the authorized transferor: “if a registrant waives its right to make a
registered transfer in accordance with subsection 13(e)(1), upon the repository
operator’s receipt of a waiver instruction from the registrant, the authorized transferor
(and not the registrant) shall be deemed to be in possession of the electronic mortgage
note for purposes of UCC Article 9.” Draft § 9-313A(c) is meant to provide for this result.

An authorized transferor who becomes the registrant by transferring an EMN to itself would
be continuously perfected by possession. The instant that it lost possession under draft
subsection (b) it would obtain possession under subsection (c).