

DRAFT
FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

March 24-25, 2017 Drafting Committee Meeting

AMENDMENTS SHOWN IN STRIKE AND SCORE

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ON UNIFORM STATE LAWS

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ARTICLES 1, 3, AND 9**

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

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1 **AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLES 1, 3, 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 (16A) “Electronic mortgage note” means an electronic mortgage note as defined
8 in the [National Mortgage Note Repository Act of 2017].

9 ***

10 (21) “Holder” means:

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

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

15 ***

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

18 ***

19 (31A) “Registered transfer” means a registered transfer as defined in the [National
20 Mortgage Note Repository Act of 2017].

21 (31B) “Registrant” means a registrant as defined in the [National Mortgage Note
22 Repository Act of 2017].

23 ***

1 [(6) Section 6-103;]

2 (7) Section 8-110;

3 (8) Sections 9-301 through ~~9-307~~ 9-307A.

4 **Reporter's Note**

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

12 **SECTION 3-103. DEFINITIONS.**

13 (a) In this article:

14 ***

15 (6A) "Holder" includes the person identified by the repository system as the
16 initial registrant of an electronic mortgage note if, at the time the related mortgage note is
17 submitted to the repository system:

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

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

22 ***

23 (18) "Transferable record" has the meaning ascribed to the term in 15 U.S.C. §
24 7021.

1 **Reporter’s Note**

2
3 Under RA § 8(c)(B), the person submitting a mortgage note for conversion to an EMN
4 becomes the initial registrant of the EMN. Draft § 3-103 would expand the Article 3 definition
5 of “holder,” so that the holder of a submitted mortgage note that is a negotiable instrument under
6 Article 3 or a transferable record under E-SIGN would become the holder of (and, under § 3-301,
7 a person entitled to enforce) the related EMN.
8

9 Draft provisions on negotiation (§ 3-201) are meant to allow the initial registrant to transfer
10 its status as holder to a subsequent holder. (The initial registrant would be able to transfer its
11 rights, including any rights it may have as a holder in due course, under § 3-203.)
12

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

17 **SECTION 3-104. NEGOTIABLE INSTRUMENT.** Except as provided in subsections

18 (c) and (d), “negotiable instrument” means:

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

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

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

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

30 (2) an electronic mortgage note.

1 **Reporter’s Note**

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

5 **SECTION 3-201. NEGOTIATION.**

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

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

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

14 **Reporter’s Notes**

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

17
18 Draft § 3-203(a) provides that, upon the occurrence of a registered transfer under the RA, an
19 *EMN is transferred*, and the transferee becomes a person entitled to enforce the EMN. RA § 3
20 defines “registered transfer” to mean “a change in the identity of the registrant in the repository
21 system that is the effect of an instruction by the registrant or the authorized transferor of the
22 relevant electronic mortgage note” (italics removed).

23
24 Draft § 3-201(c) provides that when a registered transfer of an EMN occurs, a *transfer of*
25 *possession* of the EMN also occurs. This is consistent with the RA, which provides that “[t]he
26 person identified by the repository system as the registrant shall be treated for all purposes of law
27 to have had continuous possession of the electronic mortgage note associated by the repository
28 system with such registrant from the time the registrant is so identified until another person
29 becomes the registrant of such electronic mortgage note” RA § 9(d)(2) (italics removed).

30
31 2. Regarding indorsements of an EMN, see draft § 3-204.

1 indicate that the signature was made for a purpose other than indorsement. For the purpose of
2 determining whether a signature is made on an instrument, a paper affixed to the instrument is a
3 part of the instrument.

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

6 ~~(b)~~(c) ...

7 ~~(e)~~(d) ...

8 ~~(d)~~(e) ...

9 **Reporter's Notes**

10 1. Under the Repository Act's default rule, "a *registered transfer* is deemed to be
11 accompanied by an unqualified indorsement by the *registrant* . . . of the *electronic mortgage note*
12 in the name of the *registrant* with the transfer warranties set forth in *UCC Article 3*." RA §
13 12(a)(3). However, "[a] *registrant* may instruct the *repository operator* that the *electronic*
14 *mortgage note* is accompanied by an indorsement other than the type described in paragraph (3)
15 so long as such instruction comports with *system rules*." RA § 12(a)(4). Presumably this means
16 that the deemed indorsement might be a blank indorsement, a special indorsement, or a
17 restrictive indorsement.

18
19 One can become the holder of an EMN only by being identified by the repository system as
20 the registrant. *See* draft § 3-104. If, as seems likely, system rules will not permit a registered
21 transfer to *X* to be accompanied by a deemed special indorsement to *Y*, then a deemed blank
22 indorsement and a deemed special indorsement would have the same practical effect.
23 Accordingly, this draft does not specify whether a transferor's deemed indorsement of an EMN
24 is a special indorsement or a blank indorsement, and instead would leave that question to the RA
25 and system rules.

26
27 If a transferring registrant is not the holder of the EMN, the deemed indorsement will not
28 enable the transferee registrant to become a holder. Nevertheless, unless the indorsement
29 provides otherwise, the transferor will become obligated to pay the EMN if the borrower
30 defaults. *See* UCC § 3-415.

31
32 2. Unless the registrant waives its power, both the registrant and authorized transferor have
33 the power to effectuate a registered transfer. RA § 13(a), (e)(1). Regardless of which party
34 initiates a registered transfer, the accompanying indorsement is that of the registrant. RA §
35 12(a)(3); draft § 3-204(b).

1 entitled to enforce the instrument, the draft makes two amendments to § 3-301.

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

7
8 Second, draft § 3-301(a)(4) would cover cases in which the registrant is not the holder and
9 has not acquired the rights of a holder by transfer under § 3-203(a). These registrants include the
10 registrant of an EMN that was created based on a mortgage note that either (i) was not negotiable
11 instrument or transferable record or (ii) was a negotiable instrument or transferable record but
12 was submitted by a person who was not the holder, e.g., the thief of a negotiable mortgage note
13 that was payable to an identified person other than the thief.

14
15 2. RA § 9(d)(1) provides, “[T]he *person* identified by the *repository system* as the initial
16 *registrant* shall be treated for all purposes of law as having had continuous possession or control
17 of the *mortgage note* throughout the submission and *conversion* process.” The Drafting
18 Committee may wish to consider whether this rule should be added to Article 3 and, if so, where.
19 The Reporter’s Note to draft § 9-313 discusses the relevant considerations.

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

21 ***

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

29 ***

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

32 (h) An electronic mortgage note that the repository operator created based on submission

1 of a mortgage note that was not a negotiable instrument or a transferable record cannot have a
2 holder in due course.

3 **Reporter's Notes**

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

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

16
17 Once the records of the repository system reflect that the obligation evidenced by an EMN is
18 discharged with respect to all borrowers, the EMN will no longer be transferable by the
19 repository system. RA § 11(c). If an EMN is only partially discharged, e.g., discharged with
20 respect to only one of the two borrowers, the EMN would remain transferable and potential
21 transferees would have access to a record of the discharge. Accordingly, the draft addition
22 would have practical effect only in cases of partial discharge.

23
24 2. Draft subsection (h) would incorporate the rule in RA § 9(b)(1)(B). It may be useful to
25 state this rule, even if one can deduce it from other provisions of the draft.

26 **SECTION 3-308. PROOF OF SIGNATURES AND STATUS AS HOLDER IN DUE** 27 **COURSE.**

28 (a) In an action with respect to an instrument, the authenticity of, and authority to make,
29 each signature on the instrument is admitted unless specifically denied in the pleadings. If the
30 validity of a signature is denied in the pleadings, the burden of establishing validity is on the
31 person claiming validity, but the signature is presumed to be authentic and authorized unless the
32 action is to enforce the liability of the purported signer and the signer is dead or incompetent at
33 the time of trial of the issue of validity of the signature. If an action to enforce the instrument is
34 brought against a person as the undisclosed principal of a person who signed the instrument as a

1 party to the instrument, the plaintiff has the burden of establishing that the defendant is liable on
2 the instrument as a represented person under Section 3-402(a).

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

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

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

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

15 **Reporter's Notes**

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

18
19 2. The Drafting Committee may wish to consider whether any special provisions are needed
20 to address situations in which the registrant is the agent of a secured party.

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

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

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

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

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

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

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

11 ***

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

Reporter's Note

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

SECTION 3-415. OBLIGATION OF INDORSER.

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

1 subsequent indorser who paid the instrument under this section.

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

6 ***

7 **Reporter’s Note**

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

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

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

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

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

17 (3) the instrument has not been altered;

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

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

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

25 ***

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

8 ***

9 **Reporter’s Note**

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

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

17 **Reporter’s Note**

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

21
22 **SECTION 3-504. EXCUSED PRESENTMENT AND NOTICE OF DISHONOR.**

23 (a) Presentment for payment or acceptance of an instrument is excused if (i) the person
24 entitled to present the instrument cannot with reasonable diligence make presentment, (ii) the
25 maker or acceptor has repudiated an obligation to pay the instrument or is dead or in insolvency
26 proceedings, (iii) by the terms of the instrument presentment is not necessary to enforce the
27 obligation of indorsers or the drawer, (iv) the drawer or indorser whose obligation is being

1 enforced has waived presentment or otherwise has no reason to expect or right to require that the
2 instrument be paid or accepted, ~~or~~ (v) the drawer instructed the drawee not to pay or accept the
3 draft or the drawee was not obligated to the drawer to pay the draft, or (vi) the instrument is an
4 electronic mortgage note.

5 **Reporter's Note**

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

13 **SECTION 3-602. PAYMENT.**

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

17 (b) Subject to subsection (e), a note is paid to the extent payment is made by or on behalf
18 of a party obliged to pay the note to a person that formerly was entitled to enforce the note only
19 if at the time of the payment the party obliged to pay has not received adequate notification that
20 the note has been transferred and that payment is to be made to the transferee. A notification is
21 adequate only if it is signed by the transferor or the transferee; reasonably identifies the
22 transferred note; and provides an address at which payments subsequently are to be made. Upon
23 request, a transferee shall seasonably furnish reasonable proof that the note has been transferred.
24 Unless the transferee complies with the request, a payment to the person that formerly was
25 entitled to enforce the note is effective for purposes of subsection (c) even if the party obliged to
26 pay the note has received a notification under this paragraph.

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

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

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

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

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

21 ***

22 **Legislative Note: The relevant provisions of the [National Mortgage Note Repository Act of**
23 **2017] are consistent with the 2002 amendments to this section. A State that has not enacted**
24 **those amendments should do so in conjunction with enactment of the amendment shown here.**
25

1 **Reporter’s Note**

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

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

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

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

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

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

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

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

20 **Reporter’s Note**

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

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

6
7 **SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.**

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

9 ***

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

22 ***

23 (47) “Instrument” means a negotiable instrument or any other writing that
24 evidences a right to the payment of a monetary obligation, is not itself a security agreement or
25 lease, and is of a type that in ordinary course of business is transferred by delivery with any
26 necessary indorsement or assignment. The term does not include (i) investment property, (ii)

1 letters of credit, or (iii) writings that evidence a right to payment arising out of the use of a credit
2 or charge card or information contained on or for use with the card.

3 ***

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

7 ***

8 **Reporter’s Notes**

9
10 1. Because an EMN would fall within the definition of “negotiable instrument” in UCC § 3-
11 104, it would be classified as an Article 9 “instrument.” Classifying an EMN as an Article 9
12 “instrument” would mean that an EMN is also a “promissory note.” UCC §9-102(a)(65).
13 Several consequences would follow:

14
15 a. Sales of an EMN would be perfected automatically under UCC § 9-309.

16
17 b. For an EMN that is sold, contractual and legal restrictions on assignment would be
18 ineffective to the extent provided in UCC § 9-408.

19
20 c. For an EMN that secures an obligation, contractual restrictions on assignment would
21 be ineffective to the extent provided in UCC § 9-406(d).

22
23 2. The definition of “chattel paper” would be amended to address the unlikely case in which
24 an EMN also “evidence[s] a security interest in specific goods.” The Drafting Committee may
25 wish to consider whether the bracketed language in the amended definition is desirable.

26
27 3. If a mortgagee (or its assignee) credits an EMN to a securities account, the mortgagee
28 would hold a security entitlement with respect to the EMN. The security entitlement would be
29 “investment property” as defined in Article 9.

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

32 ***

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

1 only if:

2 (1) value has been given;

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

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

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

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

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

14 (D) the collateral is deposit accounts, electronic chattel paper, investment
15 property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105,
16 9-106, or 9-107 pursuant to the debtor's security agreement.

17 ***

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

20 **Reporter's Notes**

21
22 1. RA § 9(b)(1) requires that an EMN be treated as an Article 9 instrument. Accordingly,
23 the draft contemplates that a secured party can perfect a security interest in an EMN by taking
24 possession of the EMN. See draft §§ 9-310; 9-313; 9-313A.

25
26 Under UCC § 9-301(2) and (3), the law of the location of the collateral governs perfection of
27 a possessory security interest in an instrument, as well as the effect of perfection or

1 nonperfection and the priority of all security interests in instruments. Under the draft, the local
2 law of the District of Columbia would govern these issues with respect to security interests in all
3 EMNs in the repository. This approach would foreclose the possibility (short of a subsequent
4 amendment to Article 9 or overriding federal law) that the relevant jurisdiction would change.
5

6 2. Like the other choice-of-law rules in Article 9, this rule would be mandatory. *See* draft §
7 1-301.

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

11 ***

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

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

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

16 (3) in property subject to a statute, regulation, or treaty described in Section 9-
17 311(a);

18 (4) in goods in possession of a bailee which is perfected under Section 9-
19 312(d)(1) or (2);

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

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

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

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

1 (9) in proceeds which is perfected under Section 9-315; or
2 (10) that is perfected under Section 9-316.

3 ***

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

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

11 ***

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

16 ***

17 **Reporter's Note**

18
19 RA § 9(d)(1) provides that “[t]he *person* identified by the *repository system* as the initial
20 *registrant* shall be treated for all purposes of law as having had continuous possession or control
21 of the *mortgage note* throughout the submission and *conversion* process.” The Drafting
22 Committee may wish to consider whether that rule should be added to Article 9 or stated in the
23 official comments. Among the relevant considerations are:

24
25 a. *Tangible mortgage notes.* If the rule were not expressed in Article 9, would anyone
26 conclude that the initial registrant of an electronic mortgage note lost possession of the related
27 mortgage note by submitting it to the registry system? If not, then a statutory statement to that
28 effect might open the door to arguments that the same result would not obtain in analogous
29 situations. On the other hand, Article 9 does contain provisions providing for temporary,
30 continuous perfection by possession. See UCC § 9-312(f) (secured party makes available to the

1 debtor a negotiable document of title or goods held by a bailee who has not issued a negotiable
2 title for them), (g) (secured party delivers a security certificate or instrument to the debtor for a
3 limited purpose).
4

5 b. *Intangible mortgage notes.* RA § 9(d)(1) applies also to intangible mortgage notes.
6 The reference to “control” in RA § 9(d)(1) apparently is meant to address mortgage notes that,
7 when submitted to the repository system, are “transferable records” under E-SIGN. If Article 9
8 is amended to address possession of tangible mortgage notes during the submission and
9 conversion process, should the amendment also cover intangible mortgage notes? These
10 mortgage notes are payment intangibles under Article 9, with respect to which a security interest
11 cannot be perfected by taking possession. Some of these mortgage notes are transferable records
12 under E-SIGN and UETA; others are not. E-SIGN and UETA address the rights and status of a
13 person who has control of a transferable record. But inasmuch as neither statute suggests that
14 such a person has possession for purposes of other law, it may be inappropriate for Article 9 or
15 its comments to do so.
16

17 Following is an indicative formulation of an Article 9 provision that tracks RA § 9(d)(1):
18

19 When the repository system identifies a secured party as the initial registrant of an
20 electronic mortgage note, any security interest held by the secured party in the
21 related mortgage note is deemed to have been perfected by taking possession of
22 the mortgage note from the time the mortgage note is submitted to the repository
23 system until the repository system converts the mortgage note into an electronic
24 mortgage note.
25

26 **SECTION 9-313A. PERFECTION OF SECURITY INTEREST IN ELECTRONIC**

27 **MORTGAGE NOTE AND MORTGAGE NOTE.**

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

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

36 (c) **[Possession by authorized transferor.]** A secured party who is the authorized

1 transferor of an electronic mortgage note takes possession of the electronic mortgage note when
2 the repository operator receives a notification from the registrant that the registrant waives its
3 right to make a registered transfer. The secured party retains possession until the time the
4 secured party ceases to be the authorized transferor.

5 **Reporter's Notes**

6
7 1. Article 9 currently provides four methods for perfecting a security interest in an
8 instrument: (i) by filing (UCC § 9-310(a)); (ii) by taking possession (UCC § 9-313(a)); (iii)
9 temporarily, when the security interest is given for new value (UCC § 9-312(e)); and (iv)
10 temporarily, when the secured party relinquishes possession of the instrument to the debtor for a
11 temporary and limited purpose (UCC § 9-312(g)). Sales of promissory notes are perfected
12 automatically. UCC § 9-309(b)(4).
13

14 A secured party who perfects by taking possession may achieve priority over a secured party
15 who perfected earlier. UCC § 9-330(d) (purchaser who gives value and takes possession of an
16 instrument in good faith and without knowledge that the purchase violates the rights of a
17 competing secured party); UCC § 9-331(a) (holder in due course).
18

19 2. The Repository Act contemplates that a person can have possession of an EMN. RA §
20 9(d)(2) provides that the person identified by the repository system as the registrant shall be
21 treated as having had continuous possession of an EMN from the time the person is so identified
22 until another person becomes the registrant. Draft § 9-313A(b) would provide for this result.
23

24 RA § 13(f) provides a method whereby possession of an EMN can be divested from the
25 registrant and given to the authorized transferor: “if a *registrant* waives its right to make a
26 *registered transfer* in accordance with subsection 13(e)(1), upon the *repository*
27 *operator's* receipt of a waiver instruction from the *registrant*, the *authorized transferor*
28 (and not the *registrant*) shall be deemed to be in possession of the *electronic mortgage*
29 *note* for purposes of *UCC* Article 9.” Draft § 9-313A(c) is meant to provide for this result.
30

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