

**MEMORANDUM TO:** Article 9 Drafting Committee

**FROM:** Steven L. Harris and Charles W. Mooney, Jr.,  
Reporters

**DATE:** August 7, 1997

**RE:** Interim Draft

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Enclosed is an Interim Draft of Revised UCC Article 9. The Draft reflects our responses to a variety of issues that have been raised by members of the Drafting Committee and other interested persons. It is marked to reflect changes from the draft prepared for the 1997 Annual Meeting of the National Conference of Commissioners on Uniform State Laws.

As we enter the final year of the project, a number of issues remain outstanding. We prepared the enclosed draft to highlight some of these issues and afford you the opportunity to consider and respond to them over the next several weeks. We plan to prepare another draft for the Drafting Committee's next meeting (November 14-16) and would like that draft to reflect the resolution of as many open issues as possible. To this end, we have enclosed a list of questions. (This list is intended to supplement, not supersede, other questions and issues identified in the comments to the 1997 Annual Meeting Draft and this Draft.) We ask that you please send us your responses to as many of them as your time permits. You need not respond to every question, nor need you send us a formal response. Legible handwritten comments or annotations to the enclosure will suffice. The sooner we receive your comments, the better. Comments received after September 30 may not be reflected in the October draft.

In addition, if there are issues that you would like to see addressed in November, please let one of us know.

Finally, as always, we solicit your specific suggestions for improving the text and comments.

Thanks in advance.

S.L.H.

C.W.M.

## Selected Open Issues

1. Should the text of § 9-111 explicitly invalidate "supergeneric" collateral descriptions (e.g., "all debtor's personal property")?

2. Where should filing occur for statutory liens? See the alternate versions of § 9-302.

3. What obligations, if any, should the draft impose upon an enforcing secured party whose security interest is senior to the interest of a true consignor? See § 9-601, comment 6.

4. Should we broaden the general rules in §§ 9-203(e)(5) and 9-308(f) to cover personal property securing a right to payment (i.e., to provide that the holder of a perfected security interest in the account or general intangible automatically has a perfected security interest in the collateral securing the account or general intangible)?

5. Letters of Credit:

a. Several of the revisions relate to security interests in obligations supported by letters of credit and in letters of credit and proceeds of letters of credit. See, in particular, the following provisions and the related comments: §§ 9-110; 9-203(f); 9-208(a)(4), (b); 9-304A; 9-314(d), (e); 9-406A; 5-118 (in the appendix). These provisions reflect points on which we seek your advice, both on policy and drafting. They are very much a work in progress, and we continue to consult with experts in letter of credit law and practice.

b. Should there be a "takes free" provision similar to § 9-329 that would protect recipients of funds paid by an issuer or nominated person under a letter of credit from a security interest in the letter or credit or the underlying obligation it supports?

6. How will the credit or offset against the statutory damage formulation under § 9-624(c) work in practice to take account of the elimination or reduction of a deficiency? Should the secured party seeking a credit or offset have the burden of proof as to the amount of the elimination or reduction? Should the debtor be required to prove that amount?

7. Which alternative for § 9-319(b) is most appropriate? If Alternative A is adopted, should the treatment of proceeds be explicitly addressed in each non-first-to-file-or-perfect priority rule? See comment 3. Is there a need for a complementary rule that ties the priority to continued perfection in the original collateral? What if the latter no longer exists?

8. Draft § 9-328(b) (persons who deal with or acquire financial assets or security entitlements) is essentially a placeholder.

a. Would we do better to list the rights we're not affecting? (E.g. Nothing in this Article imposes liability upon a securities intermediary that is not liable to a person having an adverse claim to a financial asset under § 8-115. Nothing in this Article permits an action to be asserted against a person against whom an action may not be asserted under § 8-502, 8-503(e), 8-510(a), 8-510(b).)

b. How does 8-510(c) come into play? Would we create a renvoi by putting priority rules in 9-328?

c. Does it make sense to move the rules in 8-511 to Article 9? If not, should there be a cross-reference to them, perhaps in 9-324?

9. What should be the proper method of perfecting a security interest in the beneficial interest in a nominee real estate trust (Illinois land trust)? Cf. § 9-308A(9).

10. Should the definition of "account" (§ 9-103(a)) include a right to payment for refraining from doing something (e.g., for not competing with a third party)?

11. Is the notification scheme in new § 9-328(d) a satisfactory and balanced resolution of the issue?

12. Should § 9-610 be modified to make ineffective a disclaimer or modification of a title/quiet enjoyment warranty to the extent that the warranty could not be disclaimed if the property had been sold voluntarily by the debtor? (Consider, in this connection, whether other law limits disclaimer and modification of warranties of the kind arising under § 9-610.)

13. Draft § 9-201(b) carries forward the provision in former (current) § 9-201 to the effect that Article 9 does not "validate" illegal practices under other statutes or regulations. The 1997 Annual Meeting draft of Article 2, § 2-104(a)(2), provides that transactions subject to that article are also subject to "any applicable law which establishes a different rule for consumers." Subsection (b) provides that "in the case of a conflict between this article and a statute or decision referred to in subsection (a), the statute or decision governs." Should Article 9 take a similar approach?

14. Should the Drafting Committee reconsider the (limited) inclusion of all statutory liens? By subordinating unfiled

(unperfected) statutory liens to perfected Article 9 security interests, the draft would permit a debtor's trustee in bankruptcy to avoid the statutory lien under Bankruptcy Code § 545. The ABA group did not focus on this issue when developing their recommendation.

15. Assuming statutory liens remain included, should a statutory landlord's lien be excluded entirely or treated as any other (non-agricultural) statutory lien? See § 9-112(c)(4).

16. Is § 9-314(b) (continued perfection of possessory security interest) necessary?

17. Should the various provisions contained in § 9-332 remain in one section dealing with accessions or should they be moved to various other relevant portions of the article? See § 9-332, comment 6. The same question concerning § 9-333, dealing with commingled goods, is raised in comment 9 to that section.

18. Should the reporters draft an appropriate provision to reflect the approach outlined in § 9-333, comment 7, dealing with multiple security interests in a single input to a commingled mass?

19. Part 5, Filing:

a. Is the revised treatment of collateral derived from the extraction of oil, gas, and other minerals, including the new category of "as-extracted collateral" (defined in § 9-102), satisfactory?

b. Is our understanding correct concerning the effect of financing statements covering "timber to be cut," as explained in § 9-501, comment 2?

c. Which alternative of § 9-502(c)(2) is preferable?

d. Does the qualification added to § 9-503(c) appropriately address a debtor (e.g., a general partnership) that has no name? See also § 9-503, comment 2, second paragraph. Alternatively, should the statute provide a stronger incentive for such debtors to formally adopt a name?

e. Is the problem of a secured party's wrongful failure to terminate a financing statement addressed appropriately by providing for the debtor's authorization and filing of a termination statement, as in set forth in § 9-508(c) & (e)? See § 9-508, Reporters' Comments - June, 1997, Draft. Note that this approach may provide more protection for secured parties than current law. Under current law, if a debtor (or

anyone else) wrongfully files an unauthorized termination statement, the financing statement would be removed from the record (although it would remain effective). Under the "open drawer" system, a debtor-filed termination statement becomes a part of the record, but the financing statement itself is not removed. Moreover, under § 9-508(e), a debtor-filed termination statement is ineffective unless it indicates that it is such. Finally, a secured party can respond to a debtor's wrongful filing of a termination statement by filing an amendment stating that the termination statement is ineffective and that the secured party is not required to terminate the financing statement. See § 9-509. Should the draft provide, instead, explicit authorization for a secured party to file a correction statement under § 9-519 in response to an unauthorized and ineffective termination statement?

f. Is § 9-514, which now appears in square brackets, necessary?

g. Is § 9-520(a)(5) ((a)(6) in the 1997 Annual Meeting Draft), which now appears in square brackets, feasible? Necessary?

20. The agenda for the March, 1997, meeting of the Drafting Committee identified for discussion several sections of the February, 1997, Draft (the section numbers remain accurate). Those that the Drafting Committee did not have time to discuss include the following. We welcome your comments.

Accessions and commingled goods. See §§ 9-332, 9-333. See also paragraphs 17 and 18 above.

Priority rule for filed but unattached security interests and lien creditors See § 9-315.

Choice of law. See §§ 9-102(40), 9-301, 9-307.

New signature requirements. See §§ 9-208, 9-209, 9-311, 9-321, 9-322, 9-331, 9-404, 9-608, 9-610, 9-611, 9-614, 9-617, 9-619.

Assignees and account debtors. See §§ 9-403, 9-404.

Definition of "depository institution." See § 9-102(13).

Definition of "equipment." See § 9-106.

Transfers by governmental entities. See §9-102(22), 9-113.

Release of control over collateral. See § 9-208.

Accountings, lists of collateral, statements of account. See § 9-209.

Automatic perfection. See §§ 9-308A, 9-309.

Future advances. § 9-320.

Assignments of general intangibles. See § 9-406.

Consolidation of statutory damages and remedies. See § 9-624.