1. Introduction. This draft contains proposed statutory text and Reporters’ Comments.

The draft has been revised to take account of the Drafting Committee’s deliberations during its March, 1998, meeting as well as comments received informally and at the 1998 American Law Institute (“ALI”) Annual Meeting on May 13, 1998. At the ALI Annual Meeting the draft was approved by the membership of the American Law Institute (“ALI”), subject to approval of further changes by a special committee and the ALI Council. The draft is submitted to the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) for a final reading and approval during its 1998 Annual Meeting.

The accompanying Reporters’ Comments were prepared with a view towards assisting the Commissioners in evaluating the draft. They focus on the changes from former Article 9 and explain the considerations that entered into many of the Drafting Committee’s decisions. They do not purport to be a complete set of Official Comments. We expect the final version of the text and Official Comments to be ready for submission to state legislatures early in 1999.

During the process of completing the Official Comments, we will incorporate subsection captions. The subsection captions will not be a part of the uniform statutory text approved by NCCUSL and the ALI. However, like the Official Comments and cross-reference tables, they will be a part of the published “Official Text.”

2. Background and History of Article 9 Revisions.

In 1990, the Permanent Editorial Board for the Uniform Commercial Code (“PEB”), with the support of its sponsors, the ALI and NCCUSL, established a committee (“Study Committee”) to study Article 9 of the UCC. The PEB charged the Study Committee to consider whether Article 9 and related provisions of the UCC are in need of revision. The PEB also requested the Study Committee to recommend the nature and the substance of any revisions that it thought desirable. The Study Committee issued its report as of December 1, 1992 (“Report”).

The principal recommendation of the Report called for the creation of a drafting committee (“Drafting Committee”) for the revision of Article 9. The Report also recommended numerous specific changes to Article 9. The ALI and
NCCUSL acted favorably upon the Report’s principal recommendation. The Drafting Committee was organized in 1993.


3. Reorganization and Renumbering; Style.

The draft reflects a substantial reorganization of Article 9 and renumbering of many sections. It also has been conformed to NCCUSL’s current style conventions, with a few exceptions that have been approved by the Committee on Style.

4. Summary of Revisions.

Following is a brief summary of some of the more significant proposed revisions of Article 9 that are included in the draft. The summary focuses on substantive revisions that would change current law. No effort is made to summarize all of the proposed revisions of Article 9.

a. Scope of Article 9.

The draft expands the scope of Article 9 in several respects.

Deposit accounts. Section 9-109 includes within Article 9’s scope deposit accounts as original collateral, except in consumer transactions. Former Article 9 deals with deposit accounts only as proceeds of other collateral.

Sales of payment intangibles and promissory notes. Section 9-109 also includes within the scope of Article 9 most sales of “payment intangibles,” defined in Section 9-102 as general intangibles under which an account debtor’s principal obligation is a monetary obligation. Former Article 9 includes sales of accounts and chattel paper, but not sales of payment intangibles. In its inclusion of sales of
payment intangibles, the draft continues the drafting convention found in former Article 9; it provides that the sale of accounts, chattel paper, payment intangibles, or promissory notes creates a “security interest.” The definition of “account” in Section 9-102 has been expanded to include various rights to payment that would be general intangibles under former Article 9.

Under the draft the scope of Article 9 also includes sales of promissory notes. See Sections 9-102 (defining “promissory note”), 9-109. The Drafting Committee, as well as a task force organized to advise it, concluded that sales of these rights to payment should not be distinguished from sales of payment intangibles.

**Health-care-insurance receivables.** Section 9-109 narrows Article 9’s exclusion of transfers of interests in insurance policies by carving out “health-care-insurance receivables” (defined in Section 9-102) assigned to a health-care provider. See Section 9-109. A health-care-insurance receivable is included within the definition of “account” in Section 9-102.

**Nonpossessory statutory agricultural liens.** Section 9-109 also brings nonpossessory statutory agricultural liens within the scope of Article 9. In doing so, it relies heavily upon the report and recommendations of the Article 9 Task Force of the Subcommittee on Agricultural and Agri-Business Financing, Committee on Commercial Financial Services, Section of Business Law, American Bar Association. However, unlike some earlier drafts, this draft does not extend the scope of Article 9 to statutory liens other than agricultural liens.

**Consignments.** Section 9-109 provides that “true consignments—bailments for the purpose of sale by the bailee—are security interests covered by Article 9, with certain exceptions. See Sections 9-102 (defining “consignment”), 9-109. Currently, many consignments are subject to Article 9’s filing requirements by operation of Section 2-326.

**Supporting obligations and property securing rights to payment.** The draft also addresses explicitly (i) obligations, such as guaranties and letters of credit, that support payment or performance of collateral such as accounts, chattel paper, and payment intangibles, and (ii) and property (including real property) that secures a right to payment that is subject to an Article 9 security interest. See Sections 9-203, 9-308.

**Commercial tort claims.** Section 9-109 expands the scope of Article 9 to include the assignment of commercial tort claims by narrowing the exclusion of tort claims generally. However, the draft continues to exclude tort claims for bodily injury and other non-business tort claims of a natural person. See Section 9-102 (defining “commercial tort claim”).
Transfers by States and governmental units of States. Section 9-109 narrows the exclusion of transfers by States and their governmental units. It excludes only transfers covered by another statute (other than a statute generally applicable to security interests), to the extent the statute governs the creation, perfection, priority, or enforcement of security interests.

Nonassignable general intangibles, promissory notes, health-care-insurance receivables, and letter-of-credit rights. Finally, the draft enables a security interest to attach to letter-of-credit rights, health-care-insurance receivables, promissory notes, and general intangibles, including contracts, permits, licenses, and franchises, notwithstanding a contractual or statutory prohibition against or limitation on assignment. The draft explicitly protects third parties against any adverse effect of the creation or attempted enforcement of the security interest. See Sections 9-408, 9-409.

Subject to these exceptions and two others (Sections 9-406, concerning accounts, chattel paper, and payment intangibles, and 9-407, concerning interests in leased goods), Section 9-401 establishes a baseline rule that the inclusion of transactions and collateral within the scope of Article 9 has no effect on non-Article 9 law dealing with the alienability or inalienability of property. For example, if the assignment of a commercial tort claim is invalid under other applicable law, the fact that a security interest in the claim is within the scope of Article 9 does not override the other applicable law.

b. Duties of Secured Party.

The draft provides for expanded duties of secured parties.

Release of control. Section 9-208 of the draft imposes upon a secured party with control of a deposit account, investment property, or a letter-of-credit right the duty to release control when there is no secured obligation and no commitment to give value. Section 9-209 contains analogous provisions when an account debtor has been notified to pay a secured party.

Information. Section 9-210 of the draft expands a secured party’s duties to provide the debtor with information concerning collateral and the obligations that it secures.

c. Choice of Law.

The choice-of-law rules for the law governing perfection, the effect of perfection or nonperfection, and priority are found in Part 3, Subpart 1, of the draft (Sections 9-301 through 9-307).

Where to file: Location of debtor. The draft changes the choice-of-law rule governing perfection (i.e., where to file) for most collateral to the law of the
jurisdiction where the debtor is located. See Section 9-301. Under current law, the
jurisdiction of the debtor’s location governs only perfection and priority of a
security interest in accounts, general intangibles, mobile goods, and, for purposes of
perfection by filing, chattel paper and investment property.

Determining debtor’s location. As a general matter, Section 9-307 of the
draft follows current law, under which the location of the debtor is the debtor’s
place of business (or chief executive office, if the debtor has more than one place of
business). Section 9-307 contains three major exceptions. First, a “registered
organization,” such as a corporation or limited liability company, is located in the
State under whose law the debtor is organized, e.g., a corporate debtor’s State of
incorporation. Second, an individual debtor (i.e., human being) is located at his or
her principal residence. Third, the draft contains special rules for determining the
location of the United States and registered organizations organized under the law
of the United States.

Location of non-U.S. debtors. If, applying the foregoing rules, a debtor is
located in a jurisdiction whose law does not require public notice as a condition of
perfection of a security interest, the entity is deemed located in the District of
Columbia. See Section 9-307. Thus, to the extent that revised Article 9 applies to
non-U.S. debtors, perfection could be accomplished in many cases by a domestic
filing.

Priority. For tangible collateral such as goods and instruments, Section 9-
301 provides that the law applicable to priority and the effect of perfection or
nonperfection will remain the law of the jurisdiction where the collateral is located,
as under current law. For intangible collateral, such as accounts, the applicable law
for priority will be that of the jurisdiction in which the debtor is located.

Agricultural liens. Section 9-302 provides that perfection, the effect of
perfection or nonperfection, and priority of an agricultural lien are governed by the
law of the jurisdiction where the farm products subject to the lien are located.

Goods covered by certificates of title; deposit accounts; letter-of-credit
rights; investment property. The draft includes several refinements to the treatment
of choice-of-law matters for goods covered by certificates of title. See Section 9-
303. It also provides special choice-of-law rules, similar to those for investment
property under current Articles 8 and 9, for deposit accounts (Section 9-304),
investment property (Section 9-305), and letter-of-credit rights (Section 9-306).

d. Perfection.

The rules governing perfection of security interests and agricultural liens are
found in Part 3, Subpart 2, of the draft (Sections 9-308 through 9-316).
Deposit accounts; letter-of-credit rights. With certain exceptions, the draft provides that a security interest in a deposit account or a letter-of-credit right may be perfected only by the secured party’s acquiring “control” of the deposit account or letter-of-credit right. See Sections 9-312, 9-314. Under Section 9-104, a secured party has “control” of a deposit account when, with the consent of the debtor, the secured party obtains the depositor's bank's agreement to act on the secured party’s instructions (including when the secured party becomes the account holder) or when the secured party is itself the depositor's bank. The control requirements are patterned on current Section 8-106, which specifies the requirements for control of investment property. Under Section 9-107, “control” of a letter-of-credit right occurs when the issuer or nominated person consents to an assignment of proceeds under Section 5-114.

Electronic chattel paper. Responding to industry requests concerning emerging practices in electronic contracting and to the suggestions of a working group established within the ABA Business Law Section, Section 9-102 of the draft includes a new defined term: “electronic chattel paper.” This type of collateral is chattel paper that consists of information stored in an electronic medium and retrievable in perceivable form (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (sui generis definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314 (perfection by control).

Investment property. The perfection requirements for “investment property” (defined in Section 9-102), including perfection by control under Section 9-106, remain substantially as under current law. However, a new provision in Section 9-314 is designed to ensure that a secured party remains in control in “repledge transactions that are typical in the securities markets.

Instruments, agricultural liens, and commercial tort claims. The draft expands the types of collateral in which a security interest may be perfected by filing to include instruments. See Section 9-312. Agricultural liens and security interests in commercial tort claims also are perfected by filing, under the draft. See Sections 9-308, 9-310.

Sales of payment intangibles and promissory notes. Former Article 9 covers the outright sale of accounts and chattel paper. The Drafting Committee recognizes that sales of most other types of receivables likewise are financing transactions to which Article 9 should apply. Accordingly, Section 9-102 expands the definition of “account” to include many types of receivables that Article 9 currently classifies as “general intangibles,” including the newly defined “health-care-insurance receivable.” It thereby subjects to Article 9’s filing system sales of more types of receivables than does current law. Certain sales of payment intangibles—primarily bank loan participation transactions—should not be subject to the Article 9 filing rules. These transactions fall in a residual category of collateral, “payment intangibles” (general intangibles under which the account debtor’s
principal obligation is monetary), the sale of which is exempt from the filing
requirements of Article 9. See Sections 9-102, 9-109, 9-309 (perfection upon
attachment). The perfection rules for sales of promissory notes are the same as
those for sales of payment intangibles.

Possessory security interests. Several provisions of the draft address
aspects of security interests when the secured party or a third party is in possession
of the collateral. In particular, Section 9-313 resolves a number of uncertainties
under current law. It provides that a security interest in collateral in the possession
of a third party is perfected when the third party acknowledges in an authenticated
record that it holds for the secured party’s benefit. Section 9-313 also provides that
a third party need not so acknowledge and that its acknowledgment does not impose
any duties on it, unless it otherwise agrees. A special rule in Section 9-313
provides that if a secured party is already in possession of collateral, its security
interest remains perfected by possession if it delivers the collateral to a third party
and the collateral is accompanied by instructions to hold it for the secured party or
to redeliver it to the secured party. The draft also clarifies the limited
circumstances under which a security interest in goods covered by a certificate of
title may be perfected by the secured party’s taking possession.

Automatic perfection. Section 9-309 of the draft lists various types of
security interests as to which no public-notice step is required for perfection (e.g.,
purchase-money security interests in consumer goods other than automobiles). This
automatic perfection also extends to a transfer of a health-care-insurance receivable
to a health-care provider. Those transfers normally will be made by natural persons
who receive health-care services; the Drafting Committee saw little value in
requiring filing for perfection in that context. Automatic perfection also applies to
security interests created by sales of payment intangibles and promissory notes.
Section 9-308 provides that a perfected security interest in collateral supported by a
“supporting obligation” (such as an account supported by a guaranty) also is a
perfected security interest in the supporting obligation, and that a perfected security
interest in an obligation secured by a security interest or lien on property (e.g., a
real-property mortgage) also is a perfected security interest in the security interest
or lien.

e. Priority; Special Rules for Banks and Deposit Accounts.

The rules governing priority of security interests and agricultural liens are
found in Part 3, Subpart 3, of the draft (Sections 9-317 through 9-342). The draft
includes several new priority rules and some special rules relating to banks and
deposit accounts (Sections 9-340 through 9-342).

Purchase-money security interests: General; consumer-goods transactions;
inventory. Section 9-103 of the draft substantially rewrites the definition of
purchase-money security interest (PMSI) (although the term is not formally a
“definition, as such). The substantive changes, however, apply only to non-
consumer-goods transactions. (Consumer transactions and consumer-goods
transactions are discussed below in Part 5.j.) The definition makes clear that a
security interest in collateral may be (to some extent) both a PMSI as well as a non-
PMSI, in accord with the “dual status” rule applied by some courts under current
law (thereby rejecting the “transformation” rule). The definition provides an even
broader conception of a PMSI in inventory, yielding a result that accords with
private agreements entered into in response to the uncertainty of current law. It also
treats consignments as purchase-money security interests in inventory. Section 9-
324 of the draft revises the PMSI priority rules, but for the most part without
material change in substance. However, an Official Comment will make clear that
a secured party that holds a possessory purchase-money security interest in
inventory that has not been delivered to the debtor need not give notice to the
holder of a conflicting security interest in order to achieve PMSI priority. Section
9-324 also clarifies the priority rules for competing PMSIs in the same collateral.

Purchase-money security interests in livestock; agricultural liens. Section
9-324 of the draft provides a special PMSI priority, similar to the inventory PMSI
priority rule, for livestock. Section 9-322 (which contains the baseline first-to-file-
or-perfect priority rule) also recognizes special non-Article 9 priority rules for
agricultural liens, which can override the baseline first-in-time rule.

Purchase-money security interests in software. Section 9-324 contains a
new priority rule for a software purchase-money security interest. (Section 9-102
includes a definition of “software” adapted from Section 2B-102 of the April 15,
1998, draft of Article 2B.) A software PMSI under Section 9-103 includes a PMSI
in software that is used in goods that are also subject to a PMSI. (Note also that the
definition of “chattel paper” has been expanded to include records that evidence a
monetary obligation and a security interest in or lease of specific goods and
software used in the goods.)

Investment property. The priority rules for investment property are
substantially similar to the priority rules found in former Section 9-115, which were
added to current law in conjunction with the 1994 revisions to UCC Article 8. See
Section 9-328. Under Section 9-328, if a secured party has control of investment
property (Sections 8-106, 9-106), its security interest is senior to a security interest
perfected in another manner (e.g., by filing). Also under Section 9-328, security
interests perfected by control generally rank according to the time that control is
obtained or, in the case of a security entitlement and a commodity contract carried
in a commodity account, the time that the control arrangement is entered into (this
is a change from former Section 9-115 and from earlier drafts, under each of which
the security interests would rank equally). However, as between a securities
intermediary’s security interest in a security entitlement that it maintains for the
debtor and a security interest held by another secured party, the securities
intermediary’s security interest is senior.
Deposit accounts. The draft’s priority rules applicable to deposit accounts are found in Section 9-327. They are patterned on and are similar to those for investment property in former Section 9-115 and Section 9-328 of the draft. Under Section 9-327, if a secured party has control of a deposit account, its security interest is senior to a security interest perfected in another manner (i.e., as cash proceeds). Also under Section 9-327, security interests perfected by control rank according to the time that control is obtained (this is a change from earlier drafts, under which they would rank equally), but as between a depositary bank’s security interest and one held by another secured party, the depositary bank’s security interest is senior. A corresponding rule in Section 9-340 makes a depositary bank’s right of setoff generally senior to a security interest held by another secured party. However, if the other secured party becomes the depositary bank’s customer with respect to the deposit account, then its security interest is senior to the depositary bank’s security interest and right of setoff. Sections 9-327, 9-340.

Letter-of-credit rights. The draft’s priority rules for security interests in letter-of-credit rights are found in Section 9-329. They are somewhat analogous to those for deposit accounts. A security interest perfected by control has priority of one perfected in another manner (i.e., as a supporting obligation for the collateral in which a security interest is perfected). Security interests in a letter-of-credit right perfected by control rank according to the time that control is obtained (this is a change from earlier drafts, under which they would rank equally). However, the rights of a transferee beneficiary or a nominated person are independent and superior to the extent provided in Section 5-114.

Chattel paper and instruments. Section 9-330 of the draft is the successor to former Section 9-308. After extensive discussions and comment during the last year, the Drafting Committee has settled on revisions to Section 9-330 that appear to reflect a satisfactory balance to all concerned, although the result is a somewhat complicated formulation. As under former Section 9-308, differing priority rules apply to purchasers of chattel paper who give new value and take possession (or, in the case of electronic chattel paper, obtain control) of the collateral depending on whether a conflicting security interest in the collateral is claimed merely as proceeds. The principal difference relates to the role of knowledge and the effect of an indication of a previous assignment on the collateral. Section 9-330 also affords priority to purchasers of instruments who take possession in good faith and without knowledge that the purchase violates the rights of the competing secured party. In addition, to qualify for priority, purchasers of chattel paper, but not of instruments, must purchase in the ordinary course of their business.

Proceeds. Section 9-322 contains new priority rules that clarify when a special priority of a security interest in collateral continues or does not continue with respect to proceeds of the collateral. Other refinements to the priority rules for proceeds are included in Sections 9-324 (purchase money security interest priority) and 9-330 (priority of certain purchasers of chattel paper and instruments).
Miscellaneous priority provisions. The draft also includes (i) clarifications of selected good-faith-purchase and similar issues (Sections 9-317, 9-321); (ii) new priority rules to deal with the “double debtor” problem arising when a debtor creates a security interest in collateral acquired by the debtor subject to a security interest created by another person (Section 9-325); (iii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor’s after-acquired property agreement (Section 9-326); (iv) a provision enabling most transferees of money to take free of a security interest (Section 9-332); (v) substantially rewritten and refined priority rules dealing with accessions and commingled goods (Sections 9-335, 9-336); (vi) revised priority rules for security interests in goods covered by a certificate of title (Section 9-337); and (vii) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise “clog” the payments system (Sections 9-341, 9-342).

Model provisions relating to production-money security interests.
Appendix II to the draft contains model definitions and priority rules relating to “production-money security interests” held by secured parties that give new value used in the production of crops. No consensus emerged on this issue within the Task Force, the Drafting Committee, or the agricultural financing community. For this reason, the Drafting Committee has included the production-money provisions in a separate Appendix. Under this approach, the UCC sponsors would make no recommendation one way or the other. In contrast to earlier drafts, which presented the production-money priority rule as proposed uniform statutory text, Appendix II presents the rules as “model provisions.

f. Proceeds.

Section 9-102 of the draft contains an expanded definition of “proceeds of collateral which includes additional rights and property that arise out of collateral, such as distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The term also includes collections on account of “supporting obligations,” such as guarantees.


New Part 4 of the draft contains several provisions relating to the relationships between certain third parties and the parties to secured transactions. It contains provisions that are the successors to former Sections 9-311 (draft Section 9-401) (alienability of debtor’s rights), 9-317 (draft Section 9-402) (secured party not obligated on debtor’s contracts), 9-206 (draft Section 9-403) (agreement not to assert defenses against assignee), 9-318 (draft Sections 9-404, 9-405, and 9-406) (rights acquired by assignee, modification of assigned contract, discharge of account debtor, restrictions on assignment of account, chattel paper, promissory note, or payment intangible ineffective), 2A-303 (draft Section 9-407) (restrictions
on creation or enforcement of security interest in leasehold interest or lessor’s
residual interest ineffective). It also contains new draft Sections 9-408 (restrictions
on assignment of promissory notes, health-care-insurance receivables ineffective,
and certain general intangibles ineffective) and 9-409 (restrictions on assignment of
letter-of-credit rights ineffective), which are discussed above.

h. Filing.

Part 5 (formerly Part 4) of Article 9 has been substantially rewritten to
simplify the statutory text and to deal with numerous problems of interpretation and
implementation that have arisen over the years. Many of the revisions during the
last year are stylistic or structural and are not mentioned here.

Medium-neutrality. The draft continues to be “medium-neutral”; that is, it
makes clear that parties may file and otherwise communicate with a filing office by
means of records communicated and stored in media other than on paper.

Identity of person who files a record; authorization. Part 5 of the draft is
largely indifferent as to the person who effects a filing. Instead, it addresses whose
authorization is necessary for a person to file a record with a filing office. The
filing scheme does not contemplate that the identity of a “filer” will be a part of the
searchable records. This is a change from the approach reflected in many of the
earlier drafts. However, it is consistent with, and a necessary aspect of, eliminating
signatures or other evidence of authorization from the system (except to the extent
that filing offices may choose to employ authentication procedures in connection
with electronic communications). As long as the appropriate person authorizes the
filing, or, in the case of a termination statement, the debtor is entitled to the
termination, it is largely insignificant whether the secured party or another person
files any given record.

Section 9-509 of the draft collects in one place most of the rules that
determine when a record may be filed. In general, the debtor’s authorization is
required for the filing of an initial financing statement or an amendment that adds
collateral. With one further exception, a secured party of record’s authorization is
required for the filing of other amendments. The exception arises if a secured party
has failed to provide a termination statement that is required because there is no
outstanding secured obligation or commitment to give value. In that situation, a
debtor is authorized to file a termination statement indicating that it has been filed
by the debtor.

Financing statement formal requisites. The formal requisites for a
financing statement are set out in Section 9-502 of the draft. A financing statement
must provide the name of the debtor and the secured party and an indication of the
collateral that it covers. Sections 9-503 and 9-506 address the sufficiency of a
name provided on a financing statement and clarify when a debtor’s name is correct
and when an incorrect name is insufficient. Section 9-504 addresses the indication
of collateral covered. Under Section 9-504, a super-generic description (e.g., “all assets” or “all personal property”) in a financing statement is a sufficient indication of the collateral. (Note, however, that a super-generic description is inadequate for purposes of a security agreement. See Sections 9-108, 9-203.) To facilitate electronic filing, the draft does not require that the debtor’s signature or other authorization appear on a financing statement. Instead, it prohibits the filing of unauthorized financing statements and imposes liability upon those who violate the prohibition. See Sections 9-509, 9-626.

Filing-office operations. The draft, as did earlier drafts, contains several provisions governing filing operations. First, it prohibits the filing office from rejecting an initial financing statement or other record for a reason other than one of the few set forth in the draft. See Sections 9-520, 9-516. Second, the filing office is obliged to link all subsequent records (e.g., assignments, continuation statements, etc.) to the initial financing statement to which they relate. See Section 9-519. Third, under the draft, the filing office may delete a financing statement and related records from the files no earlier than one year after lapse (lapse normally is five years after the filing date), and then only if a continuation statement has not been filed. See Sections 9-515, 9-519, 9-522. Thus, a financing statement and related records would be discovered by a search of the files even after the filing of a termination statement. This approach helps eliminate filing-office discretion and also eases problems associated with multiple secured parties and multiple partial assignments. Fourth, the draft mandates performance standards for filing offices. See Section 9-519, 9-520, 9-523. Fifth, it provides for the promulgation of filing-office rules to deal with details best left out of the statute and a duty of the filing office to submit periodic reports. See Section 9-526, 9-527.

Correction of records: Missing secured parties and fraudulent filings. In some areas of the country, serious problems have arisen from fraudulent financing statements that are filed against public officials and other prominent persons. In part to address and deter fraudulent filings of all kinds, some earlier drafts included an alternative formulation that would have required that the filing office communicate to each debtor and secured party of record on a financing statement the information contained in the financing statement and in each related record. That requirement has been removed from Section 9-519 in this draft. The Drafting Committee as well as many filing officers are of the view that the enormous costs of these communications would not worthwhile, on balance. Instead, the Drafting Committee believes that the fraud problem is addressed by providing the opportunity for a debtor to file a termination statement when a secured party wrongfully refuse to provide a terminations statement, as discussed above. This opportunity also addresses the problem of secured parties that simply disappear through mergers or liquidations. In addition, Section 9-520 of the draft affords a statutory method by which a debtor who believes that a filed record is inaccurate or was wrongfully filed may indicate that fact in the files by filing a correction statement, albeit without affecting the efficacy, if any, of the challenged record.
Extended period of effectiveness for certain financing statements. Section 9-515 contains an exception to the usual rule that financing statements are effective for five years unless a continuation statement is filed to continue the effectiveness for another five years. Under that section, an initial financing statement filed in connection with a “public-finance transaction” or a “manufactured-home transaction” (terms defined in Section 9-102) is effective for 30 years.

National form of financing statement and related forms. The draft provides for uniform, national written forms of financing statements and related written records that must be accepted by a filing office that accepts written records. See Section 9-521.

i. Default and Enforcement.

Part 6 (formerly Part 5) of Article 9 extensively revises current law. Certain consumer-protection provisions are discussed below in section 5.j.

Debtor, secondary obligor; waiver. Section 9-602 clarifies the identity of persons who have rights and persons to whom a secured party owes specified duties under Part 6. Under that section, the rights and duties are enjoyed by and run to the “debtors,” defined in Section 9-102 to mean any person with a non-lien property interest in collateral, and to any “obligor.” However, with one exception (Section 9-616, as it relates to a consumer obligor), the rights and duties concerned affect only obligors that are “secondary obligors.” “Secondary obligor” is defined in Section 9-102 to include one who is secondarily obligated on the secured obligation, e.g., a guarantor, or one who has a right of recourse against the debtor or another obligor with respect to an obligation secured by collateral. However, under Section 9-628, the secured party is relieved from any duty or liability to any person unless the secured party knows that the person is a debtor or obligor. Under most earlier drafts, a non-debtor obligor (in a non-consumer transaction) could effectively waive its rights and the secured party’s duties to the extent and in the manner provided by other law, e.g., the law of suretyship. This draft changes that rule. It generally prohibits waiver by a secondary obligor. See Section 9-602. However, Section 9-624 permits a secondary obligor (and a debtor) to waive the right to notification of disposition of collateral and, in a non-consumer transaction, the right to redeem collateral, if the secondary obligor (or debtor) agrees to do so after default.

Rights of collection and enforcement of collateral. Section 9-607 explains in greater detail than former 9-502 the rights of a secured party that seeks to collect or enforce collateral, including accounts, chattel paper, and payment intangibles. It also sets forth the enforcement rights of a depositary bank holding a security interest in a deposit account maintained with the depositary bank. Section 9-607 relates solely to the rights of a secured party to vis-a-vis a debtor with respect to collections and enforcement. It does not affect the rights or duties of third parties, such as account debtors on collateral, which are addressed elsewhere (e.g., Section
9-406). Section 9-608 clarifies the manner in which proceeds of collection or enforcement are to be applied.

Disposition of collateral: Warranties of title. Section 9-610 imposes on a secured party that disposes of collateral the warranties of title, quiet possession, and the like that are otherwise applicable under other law, and it provides rules for the exclusion or modification of those warranties.

Disposition of collateral: Notification, application of proceeds, surplus and deficiency, other effects. Section 9-611 requires a secured party to give notification of a disposition of collateral to other secured parties and lienholders who have filed financing statements against the debtor which cover the collateral. (That duty was eliminated by the 1972 revisions to Article 9.) However, that section relieves the secured party from that duty when the secured party undertakes a search of the records and a report of the results is unreasonably delayed. Section 9-613, which applies to non-consumer transactions, specifies the contents of a sufficient notification of disposition and provides that a notification sent 10 days or more before the earliest time for disposition is sent within a reasonable time. Section 9-615 addresses the application of proceeds of disposition, the entitlement of a debtor to any surplus, and the liability of an obligor for any deficiency. Section 9-619 clarifies the effects of a disposition by a secured party, including the rights of transferees of the collateral.

Rights and duties of secondary obligor. Section 9-620 provides that a secondary obligor obtains the rights and assumes the duties of a secured party if the secondary obligor receives an assignment of a secured obligation, agrees to assume the secured party’s rights and duties upon a transfer to it of collateral, or becomes subrogated to the rights of the secured party with respect to the collateral. The assumption, transfer, or subrogation is not a disposition of collateral under Section 9-620, but it relieves the former secured party of further duties. In contrast, most earlier drafts provided that a secured party would not be relieved of its duties. Former Section 9-504(5) does not address whether a secured party is relieved of its duties in this situation.

Transfer of record or legal title. Section 9-619 contains a new provision making clear that a transfer of record or legal title to a secured party is not of itself a disposition under Part 6. This rule applies regardless of the circumstances under which the transfer of title occurs.

Strict foreclosure. Section 9-620 permits a secured party to accept collateral in partial satisfaction, as well as full satisfaction, of the obligations secured. This right of strict foreclosure extends to intangible as well as tangible property. Section 9-622 clarifies the effects of an acceptance of collateral on the rights of junior claimants. It rejects the approach taken by some courts—deeming a secured party to have constructively retained collateral in satisfaction of the secured obligations—in the case of a secured party’s unreasonable delay in the disposition of collateral.
Instead, unreasonable delay is relevant when determining whether a disposition under Section 9-610 is commercially reasonable. (Special consumer-protection rules affecting these provisions are described in section 5.j. below.)

**Effect of noncompliance:**  “Rebuttable presumption” test. Section 9-620 adopts the “rebuttable presumption” test for the failure of a secured party to proceed in accordance with certain provisions of Part 6. (As noted below in section 5.j., in this draft the rebuttable presumption rule applies only to transactions other than consumer transactions.) Under this approach, the deficiency claim of a noncomplying secured party is calculated by crediting the obligor with the greater of the actual net proceeds of a disposition and the amount of net proceeds that would have been realized if the disposition had been conducted in accordance with Part 6, e.g., in a commercially reasonable manner. The draft rejects the “absolute bar” test that some courts have imposed; that approach bars a noncomplying secured party from recovering any deficiency, regardless of the loss (if any) the debtor suffered as a consequence of the noncompliance.

**“Low-price” dispositions: Calculation of deficiency and surplus.** Section 9-615(f) addresses the problem of procedurally regular dispositions that fetch a low price. Subsection (f) provides a special method for calculating a deficiency if the proceeds of a disposition of collateral to a secured party, a person related to the secured party, or a secondary obligor are “significantly below the range of proceeds that a complying disposition to a person other than the secured party, a person related to the secured party, or a secondary obligor would have brought.” (“Person related to” is defined in Section 9-102.) In these situations there is reason to suspect that there may be inadequate incentives to obtain a better price. Consequently, instead of calculating a deficiency (or surplus) based on the actual net proceeds, the deficiency (or surplus) would be calculated based on the proceeds that would have been received in a disposition to person other than the secured party, a person related to the secured party, or a secondary obligor. The Drafting Committee envisions that the Official Comments would not attempt explain the test for low price sales beyond references to the statutory formulation. Application would be left to the courts.

**j. Consumer Transactions.**

The draft includes several provisions applicable only to “consumer transactions” or “consumer-goods transactions.” Each term is defined in Section 9-102.

**Background.** In 1995, NCCUSL appointed a subcommittee of the Drafting Committee to consider whether and to what extent Article 9 draft should contain consumer-protection provisions. The subcommittee made several recommendations that the Drafting Committee considered during its meetings in 1996 and 1997. Many of the provisions that the Drafting Committee adopted, and which were discussed at the annual meetings of the ALI membership and
NCCUSL, remained highly controversial. The draft that emerged proved unsatisfactory to many representatives of both consumers and consumer creditors.

Proposed compromise solution. In 1997, the Chair of the Drafting Committee initiated a renewed effort to reach a consensus solution that would not be actively opposed by consumer or consumer-creditor interests. After many rounds of discussions and much "shuttle diplomacy," a tentative solution was reached during the February, 1998, meeting of the Drafting Committee. During that meeting, the Drafting Committee approved in principle, and asked the Reporters to incorporate in the next draft, a list of proposed revisions relating to consumer transactions. Most of the proposals, but not all, related to Part 6, Default. The Chair of the Drafting Committee presented the proposals as a compromise, explaining that if the Drafting Committee and its sponsors accepted the package of proposals, then representatives of consumer creditors involved in the process would actively support, and advocates of consumer interests involved in the process would not oppose, enactment of revised Article 9. The Chair explained further that the alternative could be widespread opposition, with pitched battles in the various legislatures during the enactment process. This controversy could delay or inhibit enactment of the revisions.

In the following discussion of the proposed compromise, references are made to the section numbers of earlier drafts which were the subject of the proposal. Section references to the corresponding sections of this draft (if different and where applicable) are indicated in square brackets.

Deleted provisions. Under the proposal, several consumer-related provisions in the January, 1998, draft, which had been approved by the Drafting Committee, would be deleted:

(i) Section 9-104(d) and (e) [Section 9-103] (allocation of payments for determining purchase-money status in consumer-goods transactions);

(ii) Section 9-613(b)(3) (notice of disposition containing minor errors not seriously misleading is sufficient);

(iii) Section 9-622 (reinstatement rights of consumer debtor or secondary obligor);

(iv) Section 9-624(d) and (e) [Section 9-625] (reduction of secured party’s liability for statutory damages by amount of loss of deficiency or actual damages awarded to consumer);

(v) Section 9-625, Alternative A [Section 9-626] (absolute bar of deficiency alternative for secured party noncompliance in consumer transactions);
(vi) Section 9-627(d) [Section 9-628] (good-faith error defense to statutory damages);

(viii) Section 9-627(e) [Section 9-628] (limitation on recoveries in class actions); and

(vii) Section 9-628 (reciprocal attorney’s fees in consumer transactions).

Additional revised provisions. The proposal also called for revision of several other provisions.

(i) In addition to deleting Alternative A of Section 9-625 [Section 9-626] (absolute bar rule), the rebuttable presumption rule in Section 9-624 [Section 9-625] would be made applicable only to transactions other than consumer transactions. The draft would remain silent as to the effect of a secured party’s noncompliance in consumer transactions, leaving that issue to the courts. (During its March, 1998, meeting the Drafting Committee decided that the draft should contain a statutory statement that no inference for consumer transactions should be drawn from the statutory rebuttable presumption rule for non-consumer transactions. See Section 9-626(b) of this draft.)

(ii) Sections 9-104(f) and (g) [Section 9-103] (approving “dual status rule for purchase-money security interests (i.e., rejecting “transformation rule) and setting burden of proof) would be applicable only to non-consumer-goods transactions. (During its March, 1998, meeting the Drafting Committee decided that the draft should contain a statutory statement that no inference for consumer-goods transactions should be drawn from the statutory treatment of non-consumer-goods transactions. See Section 9-103(i) of this draft.)

(iii) Either the definition of “buyer in ordinary course of business would not be revised to provide that BIOCOB status depends on a possessory right as against the seller, or certain proposed provisions in revised Article 2 would accompany revised Article 9 to provide protection for a prepaying buyer. (During its March, 1998, meeting the Drafting Committee adopted the latter approach, reflected in this draft. See Appendix 1.)

(iv) The comment to Section 9-111 [Section 9-108] would contain no examples of sufficient collateral descriptions in consumer transactions (e.g., the previous approval of “all jewelry in the Reporters’ Comments would be deleted).

(v) Sections 9-403 and 9-404 would be expanded to make effective the FTC’s anti-holder-in-due-course rule (when applicable) even in the absence of the required legend.
(vi) Section 9-614A [Section 9-616] (post-disposition notice) would be revised to provide for a somewhat more refined statement of how a deficiency or surplus was calculated.

(vii) The comments would be modified to delete any explicit statement that “price” is not a term of a disposition which is required to be commercially reasonable, and an explanatory comment would be added to the effect that a low price mandates enhanced judicial scrutiny of the terms of a disposition.

(viii) Section 9-618 [Section 9-620] would be revised to prohibit partial strict foreclosure for consumer goods.

**Drafting Committee resolution.** During its March, 1998, meeting, the Drafting Committee considered the Reporters’ efforts, incorporated in the March, 1998, draft, to implement the proposed solution. The Drafting Committee gave its general approval to the proposed solution. It also considered a number of specific issues that had been raised by the consumer and consumer creditor representatives. The Drafting Committee resolved all remaining material issues. This draft reflects that resolution. However, we should note three caveats. First, this draft reflects changes to the March, 1998, draft which have not been reviewed by anyone other than the Reporters. Second, several elements of the proposed solution for the consumer-related issues implicate the language of the Official Comments that will accompany the final revised text of Article 9. While substantial progress has been made in formulating these comments, they have not yet been finalized. Finally, the proposed solution of the consumer-related issues has been recognized by all concerned as a compromise. The statutory text that has emerged is less than ideal in substance and approach. It represents a balance struck in the hope that it will enhance the opportunities for prompt and uniform enactment of revised Article 9.

**Additional consumer-related provisions.**

**Description of consumer goods and certain investment property.** Section 9-111 [Section 9-108] provides that in a consumer transaction a description of consumer goods, a security entitlement, securities account, or commodity account by Article 9-defined “type” alone (e.g., “all consumer goods” or “all securities accounts”) is not a sufficient collateral description in a security agreement.


**Notification of calculation of deficiency.** Section 9-614A [Section 9-616] requires a secured party to provide a debtor with a notification of how it calculated a deficiency at the time it first undertakes to collect a deficiency.
k. Good Faith.

Section 9-102 contains a new definition of “good faith” that includes not only “honesty in fact” but also “the observance of reasonable commercial standards of fair dealing.” The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.


Part 7 of the draft (Sections 9-701 through 9-707) contains transition provisions. A subcommittee of the Drafting Committee presented a report on transition issues to the Drafting Committee at its February, 1998, meeting. At the March, 1998, meeting, the Reporters presented draft provisions based on the report and the Drafting Committees discussion. Part 7 of this draft reflects the Drafting Committee’s deliberations and the Reporters’ further refinements.

m. Conforming and Related Amendments to Other UCC Articles.

Appendix I to the draft contains several proposed revisions to the provisions and Official Comments of other UCC articles. For the most part the revisions are explained in the Reporters’ Comments to the proposed revisions.

Article 1. Revised Section 1-201 contains revisions to the definitions of “buyer in ordinary course of business,” “purchaser,” and “security interest.”

Articles 2 and 2A. Sections 2-210, 2-326, 2-502, 2-716, 2A-303, and 2A-307 have been revised to address the intersection between Articles 2 and 2A and Article 9.

Article 5. New Section 5-118 is patterned on Section 4-210. It provides for a security interest in documents presented under a letter of credit in favor of the issuer and a nominated person on the letter of credit.

Article 8. Revisions to Sections 8-106, which deals with “control of securities and security entitlements, conform it to Section 8-302, which deals with “delivery.” Revisions to Section 8-110, which deals with a “securities intermediary’s jurisdiction,” conform it to the revised treatment of a “commodity intermediary’s jurisdiction” in Section 9-305. Sections 8-301 and 8-302 have been revised for clarification. Section 8-510 has been revised to conform it to the revised priority rules of Section 9-328. Several Official Comments in Article 8 also have been revised.

Finally, cross-references in other articles to sections of Article 9 have been revised.