

**Hamline University School of Law
Memorandum**

TO: Article 7 Drafting Committee

FROM: Linda J. Rusch, Co-Reporter

DATE: September 13, 2002

RE: Conforming Amendments to other Articles of the UCC

In order to allow for electronic documents of title in Article 7, several conforming amendments need to be made to other articles of the UCC. The draft already contains the suggested conforming amendments to Article 1. At the October drafting committee meeting, we need to consider the following other sections of the UCC. I have included sections that relate to documents of title even when I did not think it would be necessary to make conforming amendments so that the Committee could consider the issue and make the necessary judgment.

I. Article 2

§ 2-103(3)

Control, § 7-106 should be a cross-referenced definition.

§ 2-104(2)

Old Article 2	Amended Article 2
<p>(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany <u>or are associated with</u> the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 2-707).</p>	<p>(2) "Financing agency" means a bank, finance company or other person who <u>that</u> in the ordinary course of business makes advances against goods or documents of title or who <u>that</u> by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany <u>or are associated with</u> the draft. "Financing agency" includes also a bank or other person who <u>that</u> similarly intervenes between persons who <u>that</u> are in the position of seller and buyer in respect to the goods (Section 2-707).</p>

Reporter's note

This amendment may not be necessary but the concern is that a court may find that a draft that is in paper form cannot "accompany" an electronic document of title.

§ 2-308. Absence of Specified Place for Delivery.

Old Article 2	Amended Article 2
<p>Unless otherwise agreed</p> <p>(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but</p> <p>(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and</p> <p>(c) documents of title may be delivered through customary banking channels.</p>	<p>Unless otherwise agreed</p> <p>(a) the place for delivery of goods is the seller's place of business or if he <u>it</u> has none his <u>the seller's</u> residence; but</p> <p>(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and</p> <p>(c) documents of title may be delivered through customary banking channels.</p>

Reporter's note

No change is suggested here in the text. There should probably be a clarifying comment about the use of the word "delivery." The term "delivery" is defined in the Article 1 conforming amendments as including the voluntary transfer of control. In old Article 2, the word delivery was not defined. In revised Article 2, the word delivery is defined as "voluntary transfer physical possession or control of goods." § 2-103. The word "delivery" as used in this section should be read in relation to documents of title to mean delivery as defined in the conforming amendments to Article 1.

§ 2-310. Open Time for Payment or Running of Credit; Authority to Ship Under Reservation.

Old Article 2	Amended Article 2
<p>Unless otherwise agreed</p> <p>(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and</p> <p>(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and</p> <p>(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive <u>delivery of the tangible documents or at the time the buyer is to receive delivery of the electronic documents</u> regardless of where the goods are to be received; and</p> <p>(d) where the seller is required or authorized to ship the goods on credit the credit</p>	<p>Unless otherwise agreed</p> <p>(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and</p> <p>(b) if the seller is <u>required or</u> authorized to send the goods he <u>the seller</u> may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 2-513); and</p> <p>(c) if <u>tender of</u> delivery is authorized and agreed to be made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive <u>delivery of the tangible documents or at the time the buyer is to receive delivery of the electronic documents</u> regardless of where the goods are to be received; and</p> <p>(d) where the seller is required or authorized to ship the goods on credit the credit</p>

Old Article 2	Amended Article 2
period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period .	period runs from the time of shipment but post-dating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period .

Reporter's note

Subsection (b) refers to "tender" of documents of title. A clarifying comment is suggested to the effect that "tender" of an electronic document of title means ready, willing and able to transfer control of the electronic document to parallel tender of a tangible document of title as ready, willing and able to transfer possession of the tangible document.

Subsection (c) provides payment is due "at the place" where buyer is to receive the document of title. This does not make sense in the electronic document of title context as that would mean payment would be due at the location of the database which holds the electronic document of title.

The suggested language leaves the old rule in place for tangible documents and focuses on time only for the electronic documents. In addition the word "delivery" is used to as defined in the conforming amendments to Article 1. Would it be commercially appropriate to designate a place of payment when electronic documents are being used?

§ 2-319. F.O.B. and F.A.S. Terms.

(1) Unless otherwise agreed the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which

(a) when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this Article (Section 2-504) and bear the expense and risk of putting them into the possession of the carrier; or

(b) when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article (Section 2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or other vehicle, the seller must in addition at his own expense and risk load the goods on board. If the term is F.O.B. vessel the buyer must name the vessel and in an appropriate case the seller must comply with the provisions of this Article on the form of bill of lading (Section 2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free alongside") at a named port, even though used only in connection with the stated price, is a delivery term under which the seller must

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this Article (Section 2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the

goods in substitution for the documents.

Reporter's Note

The proposed amendments to Article 2 eliminate this section entirely. Although this section mentions bills of lading and documents, no change is needed to the text in order to accommodate electronic documents of title. The word "documents" as used in this section is broader than documents of title.

The comment regarding the meaning of "tender" (used in Subsection 4 above) referred to in the note to Section 2-310 could be referenced in the comments here.

§ 2-320. C.I.F. and C. & F. Terms.

(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C. & F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

Reporter's Note

This section is eliminated in the proposed amendments to Article 2. No changes suggested to the text. The word "documents" in this section is used in a broader sense than merely document of title.

A clarifying comment may be needed to make clear that concepts such as "obtain" (subsection (2)(b)), "contained in" (subsection (2)(c)), "procure" (subsection (2)(d)), "due form" (subsection (2)(e)), "indorsement" (subsection (2)(e)) and "tender" (subsections (2)(e), (4)), are consistent with the scheme of electronic documents of title set forth in Revised 7.

§ 2-321. C.I.F. or C. & F.: "Net Landed Weights"; "Payment on Arrival"; Warranty of Condition on Arrival.

Under a contract containing a term C.I.F. or C. & F.

(1) Where the price is based on or is to be adjusted according to "net landed weights", "delivered weights", "out turn" quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller the risk of ordinary deterioration, shrinkage and the like in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on or after arrival of the goods the seller must before payment allow such preliminary inspection as is feasible; but if the goods are lost delivery of the documents and payment are due when the goods should have arrived.

Reporter's Note

The proposed amendments to Article 2 eliminate this section. No change needed. The clarifying comment regarding tender could be referenced here. The proposed Article 1 definition of "delivery" would apply here. Documents is used in a broader sense than merely documents of title.

§ 2-323. Form of Bill of Lading Required in Overseas Shipment; "Overseas".

(1) Where the contract contemplates overseas shipment and contains a term C.I.F. or C. & F. or F.O.B. vessel, the seller unless otherwise agreed must obtain a negotiable bill of lading stating that the goods have been loaded in board or, in the case of a term C.I.F. or C. & F., received for shipment.

(2) Where in a case within subsection (1) a tangible bill of lading has been issued in a set of parts, unless otherwise agreed if the documents of title are not to be sent from abroad the buyer may demand tender of the full set; otherwise only one part of the bill of lading need be tendered. Even if the agreement expressly requires a full set

(a) due tender of a single part is acceptable within the provisions of this Article on cure of improper delivery (subsection (1) of Section 2-508); and

(b) even though the full set is demanded, if the documents of title are sent from abroad the person tendering an incomplete set may nevertheless require payment upon furnishing an indemnity which the buyer in good faith deems adequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

Reporter's Note

The proposed amendments to Article 2 eliminate this section. Given that Article 7 will limit bills of lading in a set to tangible bills (Rev. 7-304), subsection (2) is also so limited. Documents in subsection (2) seems to be used in the sense of document of title.

§ 2-401. Passing of Title; Reservation for Security; Limited Application of This Section.

Old Article 2	Amended Article 2
Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the	Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the

Old Article 2	Amended Article 2
<p>provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:</p> <p>(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.</p> <p>(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading</p> <p>(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but</p> <p>(b) if the contract requires delivery at destination, title passes on tender there.</p> <p>(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,</p> <p>(a) if the seller is to deliver a <u>tangible</u> document of title, title passes at the time when and the place where he delivers such documents <u>and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document;</u> or</p> <p>(b) if the goods are at the time of contracting already identified and no documents</p>	<p>provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:</p> <p>(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.</p> <p>(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading</p> <p>(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him <u>the seller</u> to deliver them at destination, title passes to the buyer at the time and place of shipment; but</p> <p>(b) if the contract requires delivery at destination, title passes on tender there.</p> <p>(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,</p> <p>(a) if the seller is to deliver a <u>tangible</u> document of title, title passes at the time when and the place where he <u>the seller</u> delivers such documents <u>and if the seller is to deliver an electronic document of title, title passes when the seller delivers the document;</u> or</p> <p>(b) if the goods are at the time of contracting already identified and no documents</p>

Old Article 2	Amended Article 2
<p><u>of title</u> are to be delivered, title passes at the time and place of contracting.</p> <p>(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale".</p>	<p><u>of title</u> are to be delivered, title passes at the time and place of contracting.</p> <p>(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance reverts title to the goods in the seller. Such reversion occurs by operation of law and is not a "sale".</p>

Reporter's Note

The word "delivery" as defined in Article 1 conforming amendments should work in subsection (2)(a). Subsection (3)(a) refers to title passing at the place where the seller delivers a document of title. As in section 2-310(c), making title pass at the place of delivery does not make sense when referring to an electronic document of title as that place could be far afield from where the goods and the parties are actually located. Would an acceptable alternative rule be either to say nothing about the place of title passage when an electronic document is used or to say that title passes at the place the goods are actually located?

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

Old Article 2	Amended Article 2
<p>(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though</p> <p>(a) the transferor was deceived as to the identity of the purchaser, or</p> <p>(b) the delivery was in exchange for a check which is later dishonored, or</p> <p>(c) it was agreed that the transaction was to be a "cash sale", or</p> <p>(d) the delivery was procured through fraud punishable as larcenous under the criminal law.</p> <p>(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.</p> <p>(3) "Entrusting" includes any delivery</p>	<p>(1) A purchaser of goods acquires all title which his <u>the purchaser's</u> transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though</p> <p>(a) the transferor was deceived as to the identity of the purchaser, or</p> <p>(b) the delivery was in exchange for a check which is later dishonored, or</p> <p>(c) it was agreed that the transaction was to be a "cash sale", or</p> <p>(d) the delivery was procured through <u>criminal</u> fraud punishable as larcenous under the criminal law.</p> <p>(2) Any entrusting of possession of goods to a merchant who that <u>that</u> deals in goods of that kind gives him the merchant <u>the merchant</u> power to transfer all rights of the entruster <u>all of the entruster's rights to the goods and to transfer the goods free of any interest of the entruster</u> to a buyer in ordinary</p>

Old Article 2	Amended Article 2
<p>and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.</p> <p>[Note: If a state adopts the repealer of Article 6-Bulk Transfers (Alternative A), subsec. (4) should read as follows:]</p> <p>(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9) and Documents of Title (Article 7).</p> <p>[Note: If a state adopts Revised Article 6-Bulk Sales (Alternative B), subsec. (4) should read as follows:]</p> <p>(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Sales (Article 6) and Documents of Title (Article 7).</p>	<p>course of business.</p> <p>(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous <u>punishable</u> under the criminal law.</p> <p>[Note: If a state adopts the repealer of Article 6-Bulk Transfers (Alternative A), subsec. (4) should read as follows:]</p> <p>(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9) and Documents of Title (Article 7).</p> <p>[Note: If a state adopts Revised Article 6-Bulk Sales (Alternative B), subsec. (4) should read as follows:]</p> <p>(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Sales (Article 6) and Documents of Title (Article 7).</p>

Reporter's Note

No change is needed to this section.

§ 2-503. Manner of Seller's Tender of Delivery.

Old Article 2	Amended Article 2
<p>(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular</p> <p>(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but</p> <p>(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.</p>	<p>(1) Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him <u>the buyer</u> to take delivery. The manner, time and place for tender are determined by the agreement and this Article, and in particular</p> <p>(a) tender must be at a reasonable hour, and if it is of goods they must be kept available for the period reasonably necessary to enable the buyer to take possession; but</p> <p>(b) unless otherwise agreed the buyer must furnish facilities reasonably suited to the receipt of the goods.</p>

Old Article 2	Amended Article 2
<p>(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.</p> <p>(3) Where the seller is required to deliver at a particular destination tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.</p> <p>(4) Where goods are in the possession of a bailee and are to be delivered without being moved</p> <p>(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee of the buyer's right to possession of the goods; but</p> <p>(b) tender to the buyer of a non-negotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buyer seasonably objects, and receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.</p> <p>(5) Where the contract requires the seller to deliver documents</p> <p>(a) he must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and</p> <p>(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying <u>or associated with</u> the documents constitutes non-acceptance or rejection.</p>	<p>(2) Where the case is within the next section respecting shipment tender requires that the seller comply with its provisions.</p> <p>(3) Where the seller is required to deliver at a particular destination tender requires that he <u>the seller</u> comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of this section.</p> <p>(4) Where goods are in the possession of a bailee and are to be delivered without being moved</p> <p>(a) tender requires that the seller either tender a negotiable document of title covering such goods or procure acknowledgment by the bailee <u>to the buyer</u> of the buyer's right to possession of the goods; but</p> <p>(b) tender to the buyer of a non-negotiable document of title or of a written direction to <u>record directing</u> the bailee to deliver is sufficient tender unless the buyer seasonably objects, and <u>except as otherwise provided in Article 9</u> receipt by the bailee of notification of the buyer's rights fixes those rights as against the bailee and all third persons; but risk of loss of the goods and of any failure by the bailee to honor the non-negotiable document of title or to obey the direction remains on the seller until the buyer has had a reasonable time to present the document or direction, and a refusal by the bailee to honor the document or to obey the direction defeats the tender.</p> <p>(5) Where the contract requires the seller to deliver documents</p> <p>(a) he <u>the seller</u> must tender all such documents in correct form, except as provided in this Article with respect to bills of lading in a set (subsection (2) of Section 2-323); and</p> <p>(b) tender through customary banking channels is sufficient and dishonor of a draft accompanying <u>or associated with</u> the documents constitutes non-acceptance or rejection.</p>

Reporter's Note

The concept of tender of an electronic document of title can be handled by a comment to that effect. The “correct form” language in subsection (5)(a) should not be a barrier to electronic documents of title. The words “or associated with” are added for the same reason those words were added to section 2-104(2). The word document in subsection 3 and 5 seems to be used in a broader sense than “document of title” which is used in subsection (4).

§ 2-504. Shipment by Seller.

Old Article 2	Amended Article 2
<p>Where the seller is required or authorized to send the goods to the buyer and the contract does not require him to deliver them at a particular destination, then unless otherwise agreed he must</p> <p style="padding-left: 40px;">(a) put the goods in the possession of such a carrier and make such a contract for their transportation as may be reasonable having regard to the nature of the goods and other circumstances of the case; and</p> <p style="padding-left: 40px;">(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and</p> <p style="padding-left: 40px;">(c) promptly notify the buyer of the shipment.</p> <p>Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.</p>	<p>Where the seller is required or authorized to send the goods to the buyer and the contract does not require him <u>the seller</u> to deliver them at a particular destination, then unless otherwise agreed he <u>the seller</u> must</p> <p style="padding-left: 40px;">(a) put the <u>the conforming</u> goods in the possession of such a carrier and make such a <u>proper</u> contract for their transportation, as may be reasonable having regard to the nature of the goods and other circumstances of the case; and</p> <p style="padding-left: 40px;">(b) obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade; and</p> <p style="padding-left: 40px;">(c) promptly notify the buyer of the shipment.</p> <p>Failure to notify the buyer under paragraph (c) or to make a proper contract under paragraph (a) is a ground for rejection only if material delay or loss ensues.</p>

Reporter’s Note

No change is needed in the text. A comment regarding “tender” of an electronic document may be in order. The words “due form” should not present a barrier to electronic documents. The word document is used in a broader sense than document of title.

§ 2-505. Seller's Shipment Under Reservation.

Old Article 2	Amended Article 2
<p>(1) Where the seller has identified goods to the contract by or before shipment:</p> <p style="padding-left: 40px;">(a) his procurement of a negotiable bill of lading to his own order or otherwise reserves in him a security interest in the goods. His procurement of the bill to the order of a financing agency or of the buyer indicates in</p>	<p>(1) Where the seller has identified goods to the contract by or before shipment:</p> <p style="padding-left: 40px;">(a) his <u>the seller’s</u> procurement of a negotiable bill of lading to his <u>the seller’s</u> own order or otherwise reserves in him <u>the seller</u> a security interest in the goods. His <u>The seller’s</u> procurement of the bill to the order of a financing</p>

<p>addition only the seller's expectation of transferring that interest to the person named.</p> <p>(b) a non-negotiable bill of lading to himself or his nominee reserves possession of the goods as security but except in a case of conditional delivery (subsection (2) of Section 2-507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession <u>or control</u> of the bill of lading.</p> <p>(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document <u>of title</u>.</p>	<p>agency or of the buyer indicates in addition only the seller's expectation of transferring that interest to the person named.</p> <p>(b) a non-negotiable bill of lading to himself the seller or his the seller's nominee reserves possession of the goods as security but except in a case of conditional delivery <u>when a seller has a right to reclaim the goods under</u> (subsection (2) of Section 2-507) a non-negotiable bill of lading naming the buyer as consignee reserves no security interest even though the seller retains possession <u>or control</u> of the bill of lading.</p> <p>(2) When shipment by the seller with reservation of a security interest is in violation of the contract for sale, it constitutes an improper contract for transportation within the preceding section but impairs neither the rights given to the buyer by shipment and identification of the goods to the contract nor the seller's powers as a holder of a negotiable document <u>of title</u>.</p>
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Reporter's Note

The words "or control" are added in subsection (1)(b) to parallel possession. The reference to document in subsection (2) is changed to "document of title." This change is to be consistent with referring to "document of title" when that is the intended meaning and to the word "document" when the word means items in addition to "documents of title."

§ 2-506. Rights of Financing agency.

Old Article 2	Amended Article 2
<p>(1) A financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.</p> <p>(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.</p>	<p>(1) ▲ <u>Except as provided in Article 5,</u> financing agency by paying or purchasing for value a draft which relates to a shipment of goods acquires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.</p> <p>(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.</p>

Reporter's Note.

The phrasing of "on its face" in subsection (2) is not appropriate for electronic documents of title. Query whether deleting the language of "on its face" dilutes the concept that the document be apparently regular. Document of title is meant in subsection (1) and the word "document" in subsection 2 could have a broader meaning.

§ 2-507. Effect of Seller's Tender; Delivery on Condition.

Old Article 2	Amended Article 2
<p>(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.</p> <p>(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.</p>	<p>(1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his <u>the buyer's</u> duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.</p> <p>(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due <u>the seller may reclaim the goods delivered upon a demand made within a reasonable time after the seller discovers or should have discovered that payment was not made.</u></p> <p>(3) <u>The sellers' right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good-faith purchaser for value under this Article (Section 2-403).</u></p>

Reporter's Note

No changes are needed to this section given the revised definition of delivery that will be in the conforming amendments to Article 1.

§ 2-509. Risk of Loss in the Absence of Breach.

Old Article 2	Amended Article 2
<p>(1) Where the contract requires or authorizes the seller to ship the goods by carrier</p> <p style="padding-left: 40px;">(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but</p> <p style="padding-left: 40px;">(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the</p>	<p>(1) Where the contract requires or authorizes the seller to ship the goods by carrier</p> <p style="padding-left: 40px;">(a) if it does not require him <u>the seller</u> to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (Section 2-505); but</p> <p style="padding-left: 40px;">(b) if it does require him <u>the seller</u> to deliver them at a particular destination</p>

Old Article 2	Amended Article 2
<p>possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.</p> <p>(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer</p> <p>(a) on his receipt of <u>possession or control of</u> a negotiable document of title covering the goods; or</p> <p>(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or</p> <p>(c) after his receipt of <u>possession or control of</u> a non-negotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of Section 2-503.</p> <p>(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.</p> <p>(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).</p>	<p>and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.</p> <p>(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer</p> <p>(a) on his <u>the buyer's</u> receipt of <u>possession or control of</u> a negotiable document of title covering the goods; or</p> <p>(b) on acknowledgment by the bailee <u>to the buyer</u> of the buyer's right to possession of the goods; or</p> <p>(c) after his <u>the buyer's</u> receipt of <u>possession or control of</u> a non-negotiable document of title or other written direction to deliver <u>in a record</u>, as provided in subsection (4)(b) of Section 2-503.</p> <p>(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his <u>the buyer's</u> receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.</p> <p>(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this Article on sale on approval (Section 2-327) and on effect of breach on risk of loss (Section 2-510).</p>

Reporter's Note.

The word "receipt" is not a defined word as it relates to documents although Article 2 defines the word as it relates to goods as "taking physical possession of them." 2-103(1)(c).

§ 2-512. Payment by Buyer Before Inspection.

Old Article 2	Amended Article 2
<p>(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless</p> <p>(a) the non-conformity appears without inspection; or</p> <p>(b) despite tender of the required documents the circumstances would justify injunction against honor under this Act (Section</p>	<p>(1) Where the contract requires payment before inspection non-conformity of the goods does not excuse the buyer from so making payment unless</p> <p>(a) the non-conformity appears without inspection; or</p> <p>(b) despite tender of the required documents the circumstances would justify injunction against honor under this Act (Section</p>

Old Article 2	Amended Article 2
<p>5-109(b)). (2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his remedies.</p>	<p>5-109(b)). (2) Payment pursuant to subsection (1) does not constitute an acceptance of goods or impair the buyer's right to inspect or any of his <u>the buyer's</u> remedies.</p>

Reporter's Note

The comment regarding "tender" of electronic documents should suffice to make this section work for electronic documents of title. Documents is used in the broader Article 5 meaning rather than just document of title.

§ 2-513. Buyer's Right to Inspection of Goods.

Old Article 2	Amended Article 2
<p>(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.</p> <p>(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.</p> <p>(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2-321), the buyer is not entitled to inspect the goods before payment of the price when the contract provides</p> <p style="padding-left: 40px;">(a) for delivery "C.O.D." or on other like terms; or</p> <p style="padding-left: 40px;">(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.</p> <p>(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids</p>	<p>(1) Unless otherwise agreed and subject to subsection (3), where goods are tendered or delivered or identified to the contract for sale, the buyer has a right before payment or acceptance to inspect them at any reasonable place and time and in any reasonable manner. When the seller is required or authorized to send the goods to the buyer, the inspection may be after their arrival.</p> <p>(2) Expenses of inspection must be borne by the buyer but may be recovered from the seller if the goods do not conform and are rejected.</p> <p>(3) Unless otherwise agreed and subject to the provisions of this Article on C.I.F. contracts (subsection (3) of Section 2-321); the buyer is not entitled to inspect the goods before payment of the price when the contract provides</p> <p style="padding-left: 40px;">(a) for delivery "<u>C.O.D.</u>" or on other like terms <u>on terms that under applicable course of performance, course of dealing, or usage of trade are interpreted to preclude inspection before payment;</u> or</p> <p style="padding-left: 40px;">(b) for payment against documents of title, except where such payment is due only after the goods are to become available for inspection.</p> <p>(4) A place or method <u>, method or standard</u> of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes</p>

Old Article 2	Amended Article 2
the contract.	impossible, inspection shall be as provided in this section unless the place or method , <u>method or standard</u> fixed was clearly intended as an indispensable condition failure of which avoids the contract.

Reporter's Note
No change needed.

§ 2-514. When Documents Deliverable on Acceptance; When on Payment.

Old Article 2	Amended Article 2
Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.	Unless otherwise agreed <u>and except as otherwise provided in Article 5,</u> documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment.

Reporter's Note
The amended definition of delivery from the conforming amendments to Article 1 should make this section workable for electronic documents of title. Documents is used in a broader sense than document of title.

§ 2-605. Waiver of Buyer's Objections by Failure to Particularize.

Old Article 2	Amended Article 2
<p>(1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach</p> <p style="padding-left: 40px;">(a) where the seller could have cured it if stated seasonably; or</p> <p style="padding-left: 40px;">(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.</p> <p>(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents. <u>apparent defects.</u></p>	<p>(1) The buyer's failure to state in connection with rejection a particular defect <u>or in connection with revocation of acceptance a defect that justifies revocation</u> which is ascertainable by reasonable inspection precludes him <u>the buyer</u> from relying on the unstated defect to justify rejection or to establish breach <u>revocation of acceptance if the defect is ascertainable by reasonable inspection</u></p> <p style="padding-left: 40px;">(a) where the seller <u>had a right to cure the defect and</u> could have cured it if stated seasonably; or</p> <p style="padding-left: 40px;">(b) between merchants when the seller has after rejection made a request in <u>writing a record</u> for a full and final written <u>written</u> statement <u>in record form</u> of all defects on which the buyer proposes to rely.</p> <p style="padding-left: 40px;">(2) <u>A buyer's</u> payment against documents</p>

Old Article 2	Amended Article 2
	<u>tendered to the buyer</u> made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents. <u>apparent defects.</u>

Reporter's Note

The rephrasing is to get rid of the idea of "on the face" without undermining the concept of the documents being apparently regular. Documents is used in a broader sense than just documents of title.

§ 2-612. "Installment contract"; Breach.

Old Article 2	Amended Article 2
<p>(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.</p> <p>(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.</p> <p>(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.</p>	<p>(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.</p> <p>(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured <u>to the buyer</u> or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.</p> <p>(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he <u>the party</u> accepts a non-conforming installment without seasonably notifying of cancellation or if he <u>the party</u> brings an action with respect only to past installments or demands performance as to future installments.</p>

Reporter's Note

No change needed. Document is used in a broader sense than just documents of title.

§ 2-705. Seller's Stoppage of Delivery in Transit or Otherwise.

Old Article 2	Amended Article 2
(1) The seller may stop delivery of goods	(1) The seller may stop delivery of goods

Old Article 2	Amended Article 2
<p>in the possession of a carrier or other bailee when he discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.</p> <p>(2) As against such buyer the seller may stop delivery until</p> <p>(a) receipt of the goods by the buyer; or</p> <p>(b) acknowledgment to the buyer by any bailee of the goods except a carrier that the bailee holds the goods for the buyer; or</p> <p>(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or</p> <p>(d) negotiation to the buyer of any negotiable document of title covering the goods.</p> <p>(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.</p> <p>(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.</p> <p>(c) If a negotiable document of title has been issued for goods the bailee is not obliged to obey a notification to stop until <u>surrender of possession or control</u> of the document.</p> <p>(d) A carrier who has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.</p>	<p>in the possession of a carrier or other bailee when he <u>the seller</u> discovers the buyer to be insolvent (Section 2-702) and may stop delivery of carload, truckload, planeload or larger shipments of express or freight <u>or</u> when the buyer repudiates or fails to make a payment due before delivery or if for any other reason the seller has a right to withhold or reclaim the goods.</p> <p>(2) As against such buyer the seller may stop delivery until</p> <p>(a) receipt of the goods by the buyer; or</p> <p>(b) acknowledgment to the buyer by any bailee of the goods_s except a carrier_s that the bailee holds the goods for the buyer; or</p> <p>(c) such acknowledgment to the buyer by a carrier by reshipment or as warehouseman; or</p> <p>(d) negotiation to the buyer of any negotiable document of title covering the goods.</p> <p>(3)(a) To stop delivery the seller must so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.</p> <p>(b) After such notification the bailee must hold and deliver the goods according to the directions of the seller but the seller is liable to the bailee for any ensuing charges or damages.</p> <p>(c) If a negotiable document of title has been issued for goods_s the bailee is not obliged to obey a notification to stop until <u>surrender of possession or control</u> of the document.</p> <p>(d) A carrier who <u>that</u> has issued a non-negotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.</p>

Reporter's Note

The change to subsection (3)(c) is to accommodate electronic documents of title.

II. Article 2A

§ 2A-103(1)

(o) "Lessee in ordinary course of business" means a person who in good faith and without knowledge that the lease to him [or her] is in violation of the ownership rights or security interest or leasehold interest of a third party in the goods leases in ordinary course from a person in the business of selling or leasing goods of that kind but does not include a pawnbroker. "Leasing" may be for cash or by exchange of other property or on secured or unsecured credit and includes ~~receiving~~ acquiring goods or documents of title under a pre-existing lease contract but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

Reporter's Note

The word "acquire" is used in the definition of buyer in ordinary course of business in Article 1 and is a medium neutral word. This change has already been made in the proposed Article 2A amendments.

SECTION 2A-510. INSTALLMENT LEASE CONTRACTS: REJECTION AND DEFAULT.

Old Article 2A	Amended Article 2A
<p>(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.</p> <p>(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.</p>	<p>(1) Under an installment lease contract a lessee may reject any delivery that is nonconforming if the nonconformity substantially impairs the value of that delivery <u>to the lessee</u> and cannot be cured or the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (2) and the lessor or the supplier gives adequate assurance of its cure, the lessee must accept that delivery.</p> <p>(2) Whenever nonconformity or default with respect to one or more deliveries substantially impairs the value of the installment lease contract as a whole there is a default with respect to the whole. But, the aggrieved party reinstates the installment lease contract as a whole if the aggrieved party accepts a nonconforming delivery without seasonably notifying of cancellation or brings an action with respect only to past deliveries or demands performance as to future deliveries.</p>

Reporter's Note

No change needed.

§ 2A-514. WAIVER OF LESSEE'S OBJECTIONS.

Old Article 2A	Amended Article 2A
<p>(1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by reasonable inspection precludes the lessee from</p>	<p><u>(1) The lessee's failure to state in connection with rejection a particular defect or in connection with revocation of acceptance a defect</u></p>

Old Article 2A	Amended Article 2A
<p>relying on the defect to justify rejection or to establish default:</p> <p>(a) if, stated seasonably, the lessor or the supplier could have cured it (Section 2A-513); or</p> <p>(b) between merchants if the lessor or the supplier after rejection has made a request in writing for a full and final written statement of all defects on which the lessee proposes to rely.</p> <p>(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for <u>apparent defects</u>. defects apparent on the face of the documents.</p>	<p><u>which justifies revocation precludes the lessee from relying on the unstated defect to justify rejection or revocation of acceptance if the defect is ascertainable by reasonable inspection</u></p> <p><u>(a) where the lessor had a right to cure the defect and could have cured it if stated seasonably; or</u></p> <p><u>(b) between merchants if the lessor or the supplier after rejection has made a request in a record for a full and final written statement of all defects on which the lessee proposes to rely.</u></p> <p>(2) A lessee's failure to reserve rights when paying rent or other consideration against documents precludes recovery of the payment for <u>apparent defects</u> apparent on the face of the documents.</p>

Reporter's Note

Change made for same reason as to section 2-605 above. The word document is used in a broader sense than just documents of title.

§ 2A-526. LESSOR'S STOPPAGE OF DELIVERY IN TRANSIT OR OTHERWISE.

Old Article 2A	Amended Article 2A
<p>(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.</p> <p>(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until</p> <p>(a) receipt of the goods by the lessee;</p> <p>(b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or</p> <p>(c) such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.</p>	<p>(1) A lessor may stop delivery of goods in the possession of a carrier or other bailee if the lessor discovers the lessee to be insolvent and may stop delivery of carload, truckload, planeload, or larger shipments of express or freight if <u>when</u> the lessee repudiates or fails to make a payment due before delivery, whether for rent, security or otherwise under the lease contract, or for any other reason the lessor has a right to withhold or take possession of the goods.</p> <p>(2) In pursuing its remedies under subsection (1), the lessor may stop delivery until</p> <p>(a) receipt of the goods by the lessee;</p> <p>(b) acknowledgment to the lessee by any bailee of the goods, except a carrier, that the bailee holds the goods for the lessee; or</p> <p>(c) such an acknowledgment to the lessee by a carrier via reshipment or as warehouseman.</p>

Old Article 2A	Amended Article 2A
<p>(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.</p> <p>(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.</p> <p>(c) A carrier who has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.</p>	<p>(3)(a) To stop delivery, a lessor shall so notify as to enable the bailee by reasonable diligence to prevent delivery of the goods.</p> <p>(b) After notification, the bailee shall hold and deliver the goods according to the directions of the lessor, but the lessor is liable to the bailee for any ensuing charges or damages.</p> <p>(c) A carrier who <u>that</u> has issued a nonnegotiable bill of lading is not obliged to obey a notification to stop received from a person other than the consignor.</p>

Reporter's Note

No change needed.

III. Article 3

No sections in Article 3 mention documents of title. Documentary drafts are cross-referenced to documentary draft (Article 4) in 3-103(c). Documentary drafts are mentioned in the following sections of Article 3: 3-104(f) (definition of check excludes documentary drafts); 3-502(b) (dishonor of nondocumentary drafts); and 3-502(c) (dishonor of a documentary draft).

IV. Article 4

§ 4-104(a)

(6) "Documentary draft" means a draft to be presented for acceptance or payment if specified documents, certificated securities (Section 8-102) or instructions for uncertificated securities (Section 8-102), or other certificates, statements, or the like are to be received by the drawee or other payor before acceptance or payment of the draft;

Reporter's Note

Is the reference to documents "received" sufficient to encompass electronic documents of title? The word "document" is used in a broader sense than document of title. Query whether there should be a cross-reference to the Article 5 definition of "document."

Notice that under Article 4, a document of title is not an "item" as defined in Article 4. ["Item" means an instrument or a promise or order to pay money handled by a bank for collection or payment. The term does not include a payment order governed by Article 4A or a credit or debit card slip." 4-104(a)(9)].

§ 4-104(c)

The Article 7 definition of control be should be cross referenced.

§ 4-202 on collection and return of items applies to items other than documentary drafts.

§ 4-204 on methods of sending and presenting applies to items other than documentary drafts.

§ 4-210. SECURITY INTEREST OF COLLECTING BANK IN ITEMS, ACCOMPANYING DOCUMENTS AND PROCEEDS.

(a) A collecting bank has a security interest in an item and any accompanying documents or the proceeds of either:

(1) in case of an item deposited in an account, to the extent to which credit given for the item has been withdrawn or applied;

(2) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given, whether or not the credit is drawn upon or there is a right of charge-back; or

(3) if it makes an advance on or against the item.

(b) If credit given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part, the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(c) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents, and proceeds. So long as the bank does not receive final settlement for the item or give up possession of the item or possession or control of the accompanying documents for purposes other than collection, the security interest continues to that extent and is subject to Article 9, but:

(1) no security agreement is necessary to make the security interest enforceable (Section 9-203(b)(3)(A));

(2) no filing is required to perfect the security interest; and

(3) the security interest has priority over conflicting perfected security interests in the item, accompanying documents, or proceeds.

Reporter's Note

The words "possession or control" are added to subsection (c) to accommodate both tangible and electronic documents of title. The word "document" is used in a broader sense than document of title.

§ 4-301 dishonor and return of items applies to items other than documentary drafts.

§ 4-302 on accountability for late return applies to items other than documentary drafts.

§ 4-501. HANDLING OF DOCUMENTARY DRAFTS; DUTY TO SEND FOR PRESENTMENT AND TO NOTIFY CUSTOMER OF DISHONOR.

A bank that takes a documentary draft for collection shall present or send the draft and accompanying documents for presentment and, upon learning that the draft has not been paid or accepted in due course, shall seasonably notify its customer of the fact even though it may have discounted or bought the draft or extended credit available for withdrawal as of right.

Reporter's Note

The word "present" a document should encompass electronic documents as one way to "present" the document would be to allow access to the electronic copy. "Send" should be taken care of through the amendments to the Article 1 definitions. The word "document" is used in a broader sense than document of title.

§ 4-503. RESPONSIBILITY OF PRESENTING BANK FOR DOCUMENTS AND GOODS; REPORT OF REASONS FOR DISHONOR; REFEREE IN CASE OF NEED.

Unless otherwise instructed and except as provided in Article 5, a bank presenting a documentary draft:

(1) must deliver the documents to the drawee on acceptance of the draft if it is payable more than three days after presentment; otherwise, only on payment; and

(2) upon dishonor, either in the case of presentment for acceptance or presentment for payment, may seek and follow instructions from any referee in case of need designated in the draft or, if the presenting bank does not choose to utilize the referee's services, it must use diligence and good faith to ascertain the reason for dishonor, must notify its transferor of the dishonor and of the results of its effort to ascertain the reasons therefor, and must request instructions.

However the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to repayment of or indemnity for those expenses.

Reporter's Note

The revised definition of delivery in the conforming amendments to Article 1 will allow this section to work for electronic documents of title. The word "document" is used in a broader sense than documents of title.

§ 4-504. PRIVILEGE OF PRESENTING BANK TO DEAL WITH GOODS; SECURITY INTEREST FOR EXPENSES.

(a) A presenting bank that, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(b) For its reasonable expenses incurred by action under subsection (a), the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

Reporter's Note

No changes needed.

V. Article 4A

No sections reference documents of title, warehouse receipts or bills of lading.

VI. Article 5

§ 5-102(a)

(6) "Document" means a draft or other demand, document of title, investment security, certificate, invoice, or other record, statement, or representation of fact, law, right, or opinion (i) which is presented in a written or other medium permitted by the letter of credit or, unless prohibited by the letter of credit, by the standard practice referred to in Section 5-108(e) and (ii) which is capable of being examined for compliance with the terms and conditions of the letter of credit. A document may not be oral.

Reporter's Note

This definition of document is much broader than a document of title. It allows for electronic mediums if permitted by the terms of the letter of credit. No change needed.

(10) "Letter of credit" means a definite undertaking that satisfies the requirements of Section 5-104 by an issuer to a beneficiary at the request or for the account of an applicant or, in the case of a financial institution,

to itself or for its own account, to honor a documentary presentation by payment or delivery of an item of value.

Reporter's Note

Given the definition of "document" which allows for electronic documents and the definition of "presentation" which allows for delivery of electronic documents, see below, this definition is compatible with having electronic documents of title.

(12) "Presentation" means delivery of a document to an issuer or nominated person for honor or giving of value under a letter of credit.

Reporter's Note

Article 5 would rely on the Article 1 definition of delivery which will accommodate electronic documents of title.

§ 5-102(c)

The Article 7 definition of control should be referenced as it applies to documents of title. See comments below regarding incorporating the control concept into Article 5.

§ 5-108. Issuer's Rights and Obligations

(a) Except as otherwise provided in Section 5-109, an issuer shall honor a presentation that, as determined by the standard practice referred to in subsection (e), appears on its face strictly to comply with the terms and conditions of the letter of credit. Except as otherwise provided in Section 5-113 and unless otherwise agreed with the applicant, an issuer shall dishonor a presentation that does not appear so to comply.

(b) An issuer has a reasonable time after presentation, but not beyond the end of the seventh business day of the issuer after the day of its receipt of possession or control of documents:

(1) to honor,

(2) if the letter of credit provides for honor to be completed more than seven business days after presentation, to accept a draft or incur a deferred obligation, or

(3) to give notice to the presenter of discrepancies in the presentation.

(c) Except as otherwise provided in subsection (d), an issuer is precluded from asserting as a basis for dishonor any discrepancy if timely notice is not given, or any discrepancy not stated in the notice if timely notice is given.

(d) Failure to give the notice specified in subsection (b) or to mention fraud, forgery, or expiration in the notice does not preclude the issuer from asserting as a basis for dishonor fraud or forgery as described in Section 5-109(a) or expiration of the letter of credit before presentation.

(e) An issuer shall observe standard practice of financial institutions that regularly issue letters of credit. Determination of the issuer's observance of the standard practice is a matter of interpretation for the court. The court shall offer the parties a reasonable opportunity to present evidence of the standard practice.

(f) An issuer is not responsible for:

(1) the performance or nonperformance of the underlying contract, arrangement, or transaction,

(2) an act or omission of others, or

(3) observance or knowledge of the usage of a particular trade other than the standard practice referred to in subsection (e).

(g) If an undertaking constituting a letter of credit under Section 5-102(a)(10) contains

nondocumentary conditions, an issuer shall disregard the nondocumentary conditions and treat them as if they were not stated.

(h) An issuer that has dishonored a presentation shall return possession or control of the documents or hold them at the disposal of, and send advice to that effect to, the presenter.

(i) An issuer that has honored a presentation as permitted or required by this article:

(1) is entitled to be reimbursed by the applicant in immediately available funds not later than the date of its payment of funds;

(2) takes the documents free of claims of the beneficiary or presenter;

(3) is precluded from asserting a right of recourse on a draft under Sections 3-414 and 3-415;

(4) except as otherwise provided in Sections 5-110 and 5-117, is precluded from restitution of money paid or other value given by mistake to the extent the mistake concerns discrepancies in the documents or tender which are apparent on the face of the presentation; and

(5) is discharged to the extent of its performance under the letter of credit unless the issuer honored a presentation in which a required signature of a beneficiary was forged.

Reporter's Note

Subsection (a) refers to a presentation that "appears on its face" to strictly comply with the letter of credit terms. Given that it was an express goal to allow for completely electronic letters of credit and electronic documentary presentations, it is curious that the paper-based phrase "on its face" continues to appear. Having said that, it is probably not worth trying to change this language in the statute. Perhaps a clarifying comment would be appropriate. See also the use of "on the face" in subsection (i)(4).

Subsection (b) refers to "receipt" of documents. In other situations, I have suggested that the phrase be altered to "receipt of possession or control" of documents and that the Article 7 definition of control be incorporated in the definition section of Article 5. See also subsection (h).

Subsection (i)(5) concerns the "forgery" of a beneficiary's required signature. Article 5 uses the Article 1 definition of "sign" as opposed to the medium neutral definition in Article 7 and Amended Article 2 or the medium neutral definition of "authenticate" in Article 9. It is unclear whether the forgery issue was intended to be limited to tangible documents (used in the broader sense than documents of title).

§ 5-109. Fraud and Forgery.

(a) If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant:

(1) the issuer shall honor the presentation, if honor is demanded by (i) a nominated person who has given value in good faith and without notice of forgery or material fraud, (ii) a confirmer who has honored its confirmation in good faith, (iii) a holder in due course of a draft drawn under the letter of credit which was taken after acceptance by the issuer or nominated person, or (iv) an assignee of the issuer's or nominated person's deferred obligation that was taken for value and without notice of forgery or material fraud after the obligation was incurred by the issuer or nominated person; and

(2) the issuer, acting in good faith, may honor or dishonor the presentation in any other case.

(b) If an applicant claims that a required document is forged or materially fraudulent or that honor of the presentation would facilitate a material fraud by the beneficiary on the issuer or applicant, a court of

competent jurisdiction may temporarily or permanently enjoin the issuer from honoring a presentation or grant similar relief against the issuer or other persons only if the court finds that:

- (1) the relief is not prohibited under the law applicable to an accepted draft or deferred obligation incurred by the issuer;
- (2) a beneficiary, issuer, or nominated person who may be adversely affected is adequately protected against loss that it may suffer because the relief is granted;
- (3) all of the conditions to entitle a person to the relief under the law of this State have been met; and
- (4) on the basis of the information submitted to the court, the applicant is more likely than not to succeed under its claim of forgery or material fraud and the person demanding honor does not qualify for protection under subsection (a)(1).

Reporter's Note

Again the tangible medium based words "forged" and "on its face" appear in subsection (a) and the word "forged" appears in subsection (b).

§ 5-110. Warranties.

- (a) If its presentation is honored, the beneficiary warrants:
 - (1) to the issuer, any other person to whom presentation is made, and the applicant that there is no fraud or forgery of the kind described in Section 5-109(a); and
 - (2) to the applicant that the drawing does not violate any agreement between the applicant and beneficiary or any other agreement intended by them to be augmented by the letter of credit.
- (b) The warranties in subsection (a) are in addition to warranties arising under Article 3, 4, 7, and 8 because of the presentation or transfer of documents covered by any of those articles.

Reporter's Note.

In addition to relying on the concept of "forgery" and my concern regarding how that would play out in the electronic document context, note that in the draft revision of section 7-507, the warranties were limited to a "delivery" of a document of title and not a "transfer" of a document of title in order to limit the warranties to the situation where voluntary movement of the document took place.

§ 5-111. Remedies.

- (a) If an issuer wrongfully dishonors or repudiates its obligation to pay money under a letter of credit before presentation, the beneficiary, successor, or nominated person presenting on its own behalf may recover from the issuer the amount that is the subject of the dishonor or repudiation. If the issuer's obligation under the letter of credit is not for the payment of money, the claimant may obtain specific performance or, at the claimant's election, recover an amount equal to the value of performance from the issuer. In either case, the claimant may also recover incidental but not consequential damages. The claimant is not obligated to take action to avoid damages that might be due from the issuer under this subsection. If, although not obligated to do so, the claimant avoids damages, the claimant's recovery from the issuer must be reduced by the amount of damages avoided. The issuer has the burden of proving the amount of damages avoided. In the case of repudiation the claimant need not present any document.
- (b) If an issuer wrongfully dishonors a draft or demand presented under a letter of credit or honors a draft or demand in breach of its obligation to the applicant, the applicant may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach.

(c) If an adviser or nominated person other than a confirmer breaches an obligation under this article or an issuer breaches an obligation not covered in subsection (a) or (b), a person to whom the obligation is owed may recover damages resulting from the breach, including incidental but not consequential damages, less any amount saved as a result of the breach. To the extent of the confirmation, a confirmer has the liability of an issuer specified in this subsection and subsections (a) and (b).

(d) An issuer, nominated person, or adviser who is found liable under subsection (a), (b), or (c) shall pay interest on the amount owed thereunder from the date of wrongful dishonor or other appropriate date.

(e) Reasonable attorney's fees and other expenses of litigation must be awarded to the prevailing party in an action in which a remedy is sought under this article.

(f) Damages that would otherwise be payable by a party for breach of an obligation under this article may be liquidated by agreement or undertaking, but only in an amount or by a formula that is reasonable in light of the harm anticipated.

Reporter's Note

No change needed as the concept of presentment encompasses electronic documents.

§ 5-113. Transfer by Operation of Law.

(a) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in the name of the beneficiary without disclosing its status as a successor.

(b) A successor of a beneficiary may consent to amendments, sign and present documents, and receive payment or other items of value in its own name as the disclosed successor of the beneficiary. Except as otherwise provided in subsection (e), an issuer shall recognize a disclosed successor of a beneficiary as beneficiary in full substitution for its predecessor upon compliance with the requirements for recognition by the issuer of a transfer of drawing rights by operation of law under the standard practice referred to in Section 5-108(e) or, in the absence of such a practice, compliance with other reasonable procedures sufficient to protect the issuer.

(c) An issuer is not obliged to determine whether a purported successor is a successor of a beneficiary or whether the signature of a purported successor is genuine or authorized.

(d) Honor of a purported successor's apparently complying presentation under subsection (a) or (b) has the consequences specified in Section 5-108(i) even if the purported successor is not the successor of a beneficiary. Documents signed in the name of the beneficiary or of a disclosed successor by a person who is neither the beneficiary nor the successor of the beneficiary are forged documents for the purposes of Section 5-109.

(e) An issuer whose rights of reimbursement are not covered by subsection (d) or substantially similar law and any confirmer or nominated person may decline to recognize a presentation under subsection (b).

(f) A beneficiary whose name is changed after the issuance of a letter of credit has the same rights and obligations as a successor of a beneficiary under this section.

Reporter's Note

Subsection (a), (b), (d), does the concept of "sign" and "forgery" allow for electronic documents?

§ 5-114. Assignment of Proceeds.

(a) In this section, "proceeds of a letter of credit" means the cash, check, accepted draft, or other item of value paid or delivered upon honor or giving of value by the issuer or any nominated person under the letter of credit. The term does not include a beneficiary's drawing rights or documents presented by the

beneficiary.

(b) A beneficiary may assign its right to part or all of the proceeds of a letter of credit. The beneficiary may do so before presentation as a present assignment of its right to receive proceeds contingent upon its compliance with the terms and conditions of the letter of credit.

(c) An issuer or nominated person need not recognize an assignment of proceeds of a letter of credit until it consents to the assignment.

(d) An issuer or nominated person has no obligation to give or withhold its consent to an assignment of proceeds of a letter of credit, but consent may not be unreasonably withheld if the assignee possesses and exhibits the letter of credit and presentation of the letter of credit is a condition to honor.

(e) Rights of a transferee beneficiary or nominated person are independent of the beneficiary's assignment of the proceeds of a letter of credit and are superior to the assignee's right to the proceeds.

(f) Neither the rights recognized by this section between an assignee and an issuer, transferee beneficiary, or nominated person nor the issuer's or nominated person's payment of proceeds to an assignee or a third person affect the rights between the assignee and any person other than the issuer, transferee beneficiary, or nominated person. The mode of creating and perfecting a security interest in or granting an assignment of a beneficiary's rights to proceeds is governed by Article 9 or other law. Against persons other than the issuer, transferee beneficiary, or nominated person, the rights and obligations arising upon the creation of a security interest or other assignment of a beneficiary's right to proceeds and its perfection are governed by Article 9 or other law.

Reporter's Note

No change needed.

§ 5-118 Security Interest of Issuer or Nominated Person

(a) An issuer or nominated person has a security interest in a document presented under a letter of credit to the extent that the issuer or nominated person honors or gives value for the presentation.

(b) So long as and to the extent that an issuer or nominated person has not been reimbursed or has not otherwise recovered the value given with respect to a security interest in a document under subsection (a), the security interest continues and is subject to Article 9, but:

(1) a security agreement is not necessary to make the security interest enforceable under Section 9-203(b)(3);

(2) if the document is presented in a medium other than a written or other tangible medium, the security interest is perfected; and

(3) if the document is presented in a written or other tangible medium and is not a certificated security, chattel paper, a document of title, an instrument, or a letter of credit, the security interest is perfected and has priority over a conflicting security interest in the document so long as the debtor does not have possession of the document.

Reporter's Note

Under this provision, a letter of credit issuer must comply with the Article 9 rules regarding perfection and priority if the document of title is tangible but is automatically perfected if the document is electronic. Notice that subsection (2) does not have a priority rule, merely a perfection rule. The priority rules of Article 9 would apply to the electronic document. No changes are suggested to this section.

VII. Article 6

No references to documents of title, bills of lading or warehouse receipt in its substantive provisions.

VIII. Article 8

No provision in Article 8 directly references documents of title. However, a document of title may be a financial asset under the indirect holding scheme that Article 8 contemplates.

A financial asset is defined as follows in 8-102(a)(9):

(9) "Financial asset," except as otherwise provided in Section 8-103, means:

(i) a security;

(ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.

As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

While a document of title is not a security as it does not fit the definition of security found in § 8-102(a)(15)¹, a document of title could be a financial asset under subsection (ii) above as an interest in property which is of a type dealt or traded on financial markets or issued or dealt with as a medium of investment. Alternatively, parties may agree to treat a document of title as a financial asset under subsection (iii) above.

If a document of title is a financial asset, the rules concerning financial assets in Article 8 and the rules regarding investment property in Article 9² could apply to the document of title. Today,

¹(15) "Security," except as otherwise provided in Section 8-103, means an obligation of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise of an issuer:

(i) which is represented by a security certificate in bearer or registered form, or the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer;

(ii) which is one of a class or series or by its terms is divisible into a class or series of shares, participations, interests, or obligations; and

(iii) which:

(A) is, or is of a type, dealt in or traded on securities exchanges or securities markets; or

(B) is a medium for investment and by its terms expressly provides that it is a security governed by this Article.

²Section 9-102(a)(49) provides that investment property "means a security, whether certificated or uncertificated, security entitlement, securities account, commodity contract, or commodity account." A "security entitlement" means "the rights and property interest of an entitlement holder with respect to a financial asset specified in Part 5." § 8-102(a)(17). Under § 8-501(b), a person acquires a security entitlement if "a securities intermediary: (1) indicates by book entry that a financial asset has been credited to the person's securities account; (2) receives a financial asset from the person or acquires a financial asset for the person and, in either case, accepts it for credit to the person's securities account; or (3) becomes obligated under other law, regulation, or rule to credit a financial asset to the person's securities account." A securities intermediary is defined in § 8-102(a)(14) as "(i) a clearing corporation; or (ii) a person, including a bank or broker, that in the ordinary course of its business maintains securities accounts for others

paper documents of title could fall within the Article 8 indirect holding system if those documents are held by someone else who credits that document to that person's account. The electronic document of title system that is being fostered in the revision of Article 7 creates the likelihood that entities, other than the issuers of the documents of title, will "hold" the electronic documents of title and could be considered securities intermediaries who credit the documents of title to a person's securities account thus creating security entitlements. (See footnote 2 below). Issuers of the documents of title (warehouses and carriers for example) should not be securities intermediaries and the crediting of rights in the document of title should not be securities accounts.³

Article 8 provides for rules regarding
the transfer of that securities entitlement, § 8-104;
notice of adverse claims⁴ to that securities entitlement, § 8-105;

and is acting in that capacity." A securities account is defined in 8-501(a) as "an account to which a financial asset is or may be credited in accordance with an agreement under which the person maintaining the account undertakes to treat the person for whom the account is maintained as entitled to exercise the rights that comprise the financial asset."

If a document of title is a financial asset, the entity that maintains the account to which the document of title is credited could be the securities intermediary and the person on whose account that was credited would then have a security entitlement. See comment 9 to § 8-102 which states:

The fact that something does or could fall within the definition of financial asset does not, without more, trigger Article 8 coverage. The indirect holding system rules of Revised Article 8 apply only if the financial asset is in fact held in a securities account, so that the interest of the person who holds the financial asset through the securities account is a security entitlement. Thus, questions of the scope of the indirect holding system rules cannot be framed as "Is such-and-such a 'financial asset' under Article 8?" Rather, one must analyze whether the relationship between an institution and a person on whose behalf the institution holds an asset falls within the scope of the term securities account as defined in Section 8-501. That question turns in large measure on whether it makes sense to apply the Part 5 rules to the relationship.

Comment 1 to § 8-501 similarly states:

Whether an arrangement between a firm and another person concerning a security or other financial asset is a "securities account" under this Article depends on whether the firm has undertaken to treat the other person as entitled to exercise the rights that comprise the security or other financial asset. Section 1-102, however, states the fundamental principle of interpretation that the Code provisions should be construed and applied to promote their underlying purposes and policies. Thus, the question whether a given arrangement is a securities account should be decided not by dictionary analysis of the words of the definition taken out of context, but by considering whether it promotes the objectives of Article 8 to include the arrangement within the term securities account.

³That reading is not crystal clear from the statutory text quoted in footnote 2 above but seems to be what is intended in light of comment 1 to 8-104 which states: "This Article deals with financial assets other than securities only insofar as they are held in the indirect holding system." The comment then gives the example of a banker's acceptance in which the transfer from the banker to the clearing corporation would be governed by Article 3, but the clearing corporation's participants' rights in the banker's acceptance would be governed by Part 5 of Article 8. By analogy, Article 7 would govern issuance of the document of title but once the document of title is being held by someone other than the issuer, that person qualified as a securities intermediary and the document is a financial asset, a security entitlement is created and Part 5 of Article 8 would apply.

⁴An adverse claim is defined as "a claim that a claimant has a property interest in a financial asset and that it is a violation of the rights of the claimant for another person to hold, transfer, or deal with the financial asset." § 8-102(a)(1).

control of the securities entitlement, § 8-106;
whether entitlement orders⁵ are effective with respect to the securities entitlement, § 8-107;
warranties regarding making of an entitlement order, § 8-109;
choice of law rules regarding securities entitlements, § 8-110;
serving process regarding entitlement orders, § 8-112;
liability of securities intermediary to person with adverse claim to securities entitlement, § 8-115;
the securities intermediary's status of purchaser for value of the securities entitlement, § 8-116;
acquiring a securities entitlement, § 8-501;
assertion of adverse claims, § 8-502;
the property rights of an entitlement holder in the financial asset, § 8-503;
the duties of the securities intermediary
 to maintain the financial asset, § 8-504,
 in regard to payments or distributions by the issuer of the financial asset, § 8-505,
 regarding following directions of the entitlement holder, § 8-506 and 8-508,
 regarding compliance with an entitlement order, § 8-507;
the relationship of duties prescribed in Article 8 and other law, § 8-509;
rights of a purchaser of a security entitlement, § 8-510;
priority of security interests granted by a securities intermediary in relationship to rights of entitlement holders, § 8-511

Article 9's rules regarding investment property address the following:

Control, § 9-106 (as to security entitlements, it refers back to § 8-106);
description of the asset, § 9-108;
attachment of the security interest, § 9-203;
permissible actions of a secured party with control or possession, § 9-207 and 9-208;
choice of law regarding perfection and priority of security interests in investment property, § 9-305, 9-316;
perfection, § 9-308, 9-309, 9-310, 9-312, 9-313, 9-314;
priority, § 9-317, 9-322, 9-328
and generally enforcement, Part 6 of Article 9.

I would propose the following amendment to § 8-103

New subsection (g)

“ A document of title, as defined in Section 1-201(15) [(16)], is not a financial asset unless Section 8-102(a)(9)(iii) applies.”

The intent of this amendment would be to prevent an inadvertent classification of a document of title as a financial asset but would allow it to be so treated if the person who owned the document

⁵An entitlement order means “a notification communicated to a securities intermediary directing transfer to or redemption of a financial asset to which the entitlement holder has a security entitlement.” § 8-102(a)(8).

of title and the intermediary expressly agree that it will be so treated.

IX. Article 9

§ 9-102(a)(30)

“Document” means a document of title or a receipt of the type described in Section 7-201(2).

Reporter’s Note.

No change needed.

9-102(a)(42)

"General intangible" means any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software.

Reporter’s Note.

No change needed.

9-102(a)(44)

"Goods" means all things that are movable when a security interest attaches. The term includes (i) fixtures, (ii) standing timber that is to be cut and removed under a conveyance or contract for sale, (iii) the unborn young of animals, (iv) crops grown, growing, or to be grown, even if the crops are produced on trees, vines, or bushes, and (v) manufactured homes. The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded. The term also does not include accounts, chattel paper, commercial tort claims, deposit accounts, documents, general intangibles, instruments, investment property, letter-of-credit rights, letters of credit, money, or oil, gas, or other minerals before extraction.

Reporter’s Note.

No change needed.

9-102(a)(77)

"Supporting obligation" means a letter-of-credit right or secondary obligation that supports the payment or performance of an account, chattel paper, a document, a general intangible, an instrument, or investment property.

Reporter’s Note.

No change needed.

9-102(b) cross-reference Article 7 definition of control as it relates to documents of title.

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

(a) **[Attachment.]** A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

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

(1) value has been given;

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

(3) one of the following conditions is met:

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

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

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

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

(c) **[Other UCC provisions.]** Subsection (b) is subject to Section 4-210 on the security interest of a collecting bank, Section 5-118 on the security interest of a letter-of-credit issuer or nominated person, Section 9-110 on a security interest arising under Article 2 or 2A, and Section 9-206 on security interests in investment property.

(d) **[When person becomes bound by another person's security agreement.]** A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

(1) the security agreement becomes effective to create a security interest in the person's property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) **[Effect of new debtor becoming bound.]** If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) another agreement is not necessary to make a security interest in the property enforceable.

(f) **[Proceeds and supporting obligations.]** The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) **[Lien securing right to payment.]** The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) **[Security entitlement carried in securities account.]** The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) **[Commodity contracts carried in commodity account.]** The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

Reporter's Note.

The amendment is designed to allow control of an electronic document of title to substitute for the requirement of a security agreement in a record and parallels the requirement for electronic chattel paper. Is this an appropriate rule to apply to both negotiable and non-negotiable documents of title?

§ 9-207. RIGHTS AND DUTIES OF SECURED PARTY HAVING POSSESSION OR CONTROL OF COLLATERAL.

(a) **[Duty of care when secured party in possession.]** Except as otherwise provided in subsection (d), a secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of chattel paper or an instrument, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) **[Expenses, risks, duties, and rights when secured party in possession.]** Except as otherwise provided in subsection (d), if a secured party has possession of collateral:

(1) reasonable expenses, including the cost of insurance and payment of taxes or other charges, incurred in the custody, preservation, use, or operation of the collateral are chargeable to the debtor and are secured by the collateral;

(2) the risk of accidental loss or damage is on the debtor to the extent of a deficiency in any effective insurance coverage;

(3) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled; and

(4) the secured party may use or operate the collateral:

(A) for the purpose of preserving the collateral or its value;

(B) as permitted by an order of a court having competent jurisdiction; or

(C) except in the case of consumer goods, in the manner and to the extent agreed

by the debtor.

(c) **[Duties and rights when secured party in possession or control.]** Except as otherwise provided in subsection (d), a secured party having possession of collateral or control of collateral under Section 9-104, 9-105, 9-106, ~~or~~ 9-107, or 7-106:

(1) may hold as additional security any proceeds, except money or funds, received from the collateral;

(2) shall apply money or funds received from the collateral to reduce the secured obligation, unless remitted to the debtor; and

(3) may create a security interest in the collateral.

(d) **[Buyer of certain rights to payment.]** If the secured party is a buyer of accounts, chattel paper, payment intangibles, or promissory notes or a consignor:

(1) subsection (a) does not apply unless the secured party is entitled under an agreement:

(A) to charge back uncollected collateral; or

(B) otherwise to full or limited recourse against the debtor or a secondary obligor based on the nonpayment or other default of an account debtor or other obligor on the collateral; and

(2) subsections (b) and (c) do not apply.

Reporter's Note

Subsection (c) amendment allows this rule to apply when a secured party has control of an

electronic document of title. Note the rule already applies to a secured party that has possession of a tangible document.

§ 9-208. ADDITIONAL DUTIES OF SECURED PARTY HAVING CONTROL OF COLLATERAL.

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

(b) **[Duties of secured party after receiving demand from debtor.]** Within 10 days after receiving an authenticated demand by the debtor:

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

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

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

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

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

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

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

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

(4) a secured party having control of investment property under Section 8-106(d)(2) or 9-106(b) shall send to the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained an authenticated record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party; ~~and~~

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

(6) a secured party having control of an electronic document shall:

(A) communicate the authoritative copy of the electronic document to the debtor or its designated custodian;

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

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

Reporter's Note

A new subsection (b)(6) is added regarding the obligation of a secured party as to electronic documents of title when no obligation is outstanding. The obligations parallel the obligations of a secured party with control of electronic chattel paper. Given that the control section in § 7-106 has the catch all test in subsection (a) and the control section for electronic chattel paper in § 9-105 does not, are there additional duties that should be imposed on a secured party in this situation?

§ 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS.

Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

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

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

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

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

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

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

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

Reporter's Note.

The rule of subsection (3) should be limited to tangible negotiable documents. For electronic documents of title, the law of the debtor's jurisdiction should control perfection, priority and effect of perfection and non perfection just as it does for electronic chattel paper.

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

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

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

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

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

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

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

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

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

(7) in a certificated security which is perfected by delivery of the security certificate to the

secured party under Section 9-313;

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

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

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

(c) **[Assignment of perfected security interest.]** If a secured party assigns a perfected security interest or agricultural lien, a filing under this article is not required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

Reporter's Note

A reference to electronic documents is added in subsection (b)(8). The rule in (b)(5) applies to both tangible and electronic documents.

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

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

(b) **[Control or possession of certain collateral.]** Except as otherwise provided in Section 9-315(c) and (d) for proceeds:

(1) a security interest in a deposit account may be perfected only by control under Section 9-314;

(2) and except as otherwise provided in Section 9-308(d), a security interest in a letter-of-credit right may be perfected only by control under Section 9-314; and

(3) a security interest in money may be perfected only by the secured party's taking possession under Section 9-313.

(c) **[Goods covered by negotiable document.]** While goods are in the possession of a bailee that has issued a negotiable document covering the goods:

(1) a security interest in the goods may be perfected by perfecting a security interest in the document; and

(2) a security interest perfected in the document has priority over any security interest that becomes perfected in the goods by another method during that time.

(d) **[Goods covered by nonnegotiable document.]** While goods are in the possession of a bailee that has issued a nonnegotiable document covering the goods, a security interest in the goods may be perfected by:

(1) issuance of a document in the name of the secured party;

(2) the bailee's receipt of notification of the secured party's interest; or

(3) filing as to the goods.

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

(f) **[Temporary perfection: goods or documents made available to debtor.]** A perfected security interest in a negotiable document or goods in possession of a bailee, other than one that has issued a negotiable document for the goods, remains perfected for 20 days without filing if the secured party makes

available to the debtor the goods or documents representing the goods for the purpose of:

(1) ultimate sale or exchange; or

(2) loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise dealing with them in a manner preliminary to their sale or exchange.

(g) **[Temporary perfection: delivery of security certificate or instrument to debtor.]** A perfected security interest in a certificated security or instrument remains perfected for 20 days without filing if the secured party delivers the security certificate or instrument to the debtor for the purpose of:

(1) ultimate sale or exchange; or

(2) presentation, collection, enforcement, renewal, or registration of transfer.

(h) **[Expiration of temporary perfection.]** After the 20-day period specified in subsection (e), (f), or (g) expires, perfection depends upon compliance with this article.

Reporter's Note

The rules of this section will apply to both electronic and tangible documents of title. As to electronic documents of title, there are two ways to perfect: filing (9-310) or control (9-314). Subsection (e) is amended to include the control concept.

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

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

(b) **[Goods covered by certificate of title.]** With respect to goods covered by a certificate of title issued by this State, a secured party may perfect a security interest in the goods by taking possession of the goods only in the circumstances described in Section 9-316(d).

(c) **[Collateral in possession of person other than debtor.]** With respect to collateral other than certificated securities and goods covered by a document, a secured party takes possession of collateral in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

(1) the person in possession authenticates a record acknowledging that it holds possession of the collateral for the secured party's benefit; or

(2) the person takes possession of the collateral after having authenticated a record acknowledging that it will hold possession of collateral for the secured party's benefit.

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

(e) **[Time of perfection by delivery; continuation of perfection.]** A security interest in a certificated security in registered form is perfected by delivery when delivery of the certificated security occurs under Section 8-301 and remains perfected by delivery until the debtor obtains possession of the security certificate.

(f) **[Acknowledgment not required.]** A person in possession of collateral is not required to acknowledge that it holds possession for a secured party's benefit.

(g) **[Effectiveness of acknowledgment; no duties or confirmation.]** If a person acknowledges that it holds possession for the secured party's benefit:

(1) the acknowledgment is effective under subsection (c) or Section 8-301(a), even if the acknowledgment violates the rights of a debtor; and

(2) unless the person otherwise agrees or law other than this article otherwise provides, the person does not owe any duty to the secured party and is not required to confirm the acknowledgment to another person.

(h) **[Secured party's delivery to person other than debtor.]** A secured party having possession of collateral does not relinquish possession by delivering the collateral to a person other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor's business if the person was instructed before the delivery or is instructed contemporaneously with the delivery:

- (1) to hold possession of the collateral for the secured party's benefit; or
- (2) to redeliver the collateral to the secured party.

(i) **[Effect of delivery under subsection (h); no duties or confirmation.]** A secured party does not relinquish possession, even if a delivery under subsection (h) violates the rights of a debtor. A person to which collateral is delivered under subsection (h) does not owe any duty to the secured party and is not required to confirm the delivery to another person unless the person otherwise agrees or law other than this article otherwise provides.

Reporter's Note

Possession to perfect a security interest in a negotiable document of title is limited to tangible documents in subsection (a). Note that subsection (c) only applies if no document of title of any kind is issued. No other changes are recommended to this section.

§ 9-314. PERFECTION BY CONTROL.

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

(b) **[Specified collateral: time of perfection by control; continuation of perfection.]** A security interest in deposit accounts, electronic chattel paper, ~~or~~ letter-of-credit rights, or electronic documents is perfected by control under Section 9-104, 9-105, ~~or~~ 9-107, or 7-106 when the secured party obtains control and remains perfected by control only while the secured party retains control.

(c) **[Investment property: time of perfection by control; continuation of perfection.]** A security interest in investment property is perfected by control under Section 9-106 from the time the secured party obtains control and remains perfected by control until:

- (1) the secured party does not have control; and
- (2) one of the following occurs:

(A) if the collateral is a certificated security, the debtor has or acquires possession of the security certificate;

(B) if the collateral is an uncertificated security, the issuer has registered or registers the debtor as the registered owner; or

(C) if the collateral is a security entitlement, the debtor is or becomes the entitlement holder.

Reporter's Note

Subsections (a) and (b) are amended to apply to electronic documents of title. The timing rule of subsection (b) means that if the secured party is perfected in an electronic negotiable document of title by control and the document is changed to another medium pursuant to 7-105, in order to maintain continuous perfection, the secured party should file as to the document before it relinquishes control in the conversion process in order to maintain continuous perfection. A

comment to this effect should probably be added to 9-308 which deals with continuous perfection.

§ 9-317. INTERESTS THAT TAKE PRIORITY OVER OR TAKE FREE OF SECURITY INTEREST OR AGRICULTURAL LIEN.

(a) **[Conflicting security interests and rights of lien creditors.]** A security interest or agricultural lien is subordinate to the rights of:

(1) a person entitled to priority under Section 9-322; and

(2) except as otherwise provided in subsection (e), a person that becomes a lien creditor before the earlier of the time:

(A) the security interest or agricultural lien is perfected; or

(B) one of the conditions specified in Section 9-203(b)(3) is met and a financing statement covering the collateral is filed.

(b) **[Buyers that receive delivery.]** Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(c) **[Lessees that receive delivery.]** Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

(d) **[Licensees and buyers of certain collateral.]** A licensee of a general intangible or a buyer, other than a secured party, of accounts, electronic chattel paper, electronic documents, general intangibles, or investment property other than a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

(e) **[Purchase-money security interest.]** Except as otherwise provided in Sections 9-320 and 9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

Reporter's Note

Subsection (b) is limited to tangible documents and subsection (d) is limited to electronic documents.

§ 9-322. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.

(a) **[General priority rules.]** Except as otherwise provided in this section, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

(1) Conflicting perfected security interests and agricultural liens rank according to priority in time of filing or perfection. Priority dates from the earlier of the time a filing covering the collateral is first made or the security interest or agricultural lien is first perfected, if there is no period thereafter when there is neither filing nor perfection.

(2) A perfected security interest or agricultural lien has priority over a conflicting unperfected security interest or agricultural lien.

(3) The first security interest or agricultural lien to attach or become effective has priority if conflicting security interests and agricultural liens are unperfected.

(b) **[Time of perfection: proceeds and supporting obligations.]** For the purposes of subsection (a)(1):

(1) the time of filing or perfection as to a security interest in collateral is also the time of

filing or perfection as to a security interest in proceeds; and

(2) the time of filing or perfection as to a security interest in collateral supported by a supporting obligation is also the time of filing or perfection as to a security interest in the supporting obligation.

(c) **[Special priority rules: proceeds and supporting obligations.]** Except as otherwise provided in subsection (f), a security interest in collateral which qualifies for priority over a conflicting security interest under Section 9- 327, 9-328, 9-329, 9-330, or 9-331 also has priority over a conflicting security interest in:

(1) any supporting obligation for the collateral; and

(2) proceeds of the collateral if:

(A) the security interest in proceeds is perfected;

(B) the proceeds are cash proceeds or of the same type as the collateral; and

(C) in the case of proceeds that are proceeds of proceeds, all intervening proceeds are cash proceeds, proceeds of the same type as the collateral, or an account relating to the collateral.

(d) **[First-to-file priority rule for certain collateral.]** Subject to subsection (e) and except as otherwise provided in subsection (f), if a security interest in chattel paper, deposit accounts, negotiable documents, instruments, investment property, or letter-of-credit rights is perfected by a method other than filing, conflicting perfected security interests in proceeds of the collateral rank according to priority in time of filing.

(e) **[Applicability of subsection (d).]** Subsection (d) applies only if the proceeds of the collateral are not cash proceeds, chattel paper, negotiable documents, instruments, investment property, or letter-of-credit rights.

(f) **[Limitations on subsections (a) through (e).]** Subsections (a) through (e) are subject to:

(1) subsection (g) and the other provisions of this part;

(2) Section 4-210 with respect to a security interest of a collecting bank;

(3) Section 5-118 with respect to a security interest of an issuer or nominated person; and

(4) Section 9-110 with respect to a security interest arising under Article 2 or 2A.

(g) **[Priority under agricultural lien statute.]** A perfected agricultural lien on collateral has priority over a conflicting security interest in or agricultural lien on the same collateral if the statute creating the agricultural lien so provides.

Reporter's Note

The rules of this section would apply to both electronic and tangible documents of title. No changes are suggested. As to tangible documents of title, if a party qualifies as a holder to which a negotiable document has been duly negotiated, that party gets the rights given by Article 7 as against a secured party who has perfected by filing and will take priority over that secured party as provided in Article 7. § 9-331. This creates an exception to the first to file or perfect rule of 9-322(a). § 9-322(f)(1). That same rule will be applied to electronic negotiable documents of title. In all other cases, the priority between secured parties will be governed by the first to file or perfect rule unless the committee thinks it is appropriate to provide a rule that perfection in a negotiable document of title by control trumps perfection in the negotiable document by filing. No such rule is currently provided as to electronic chattel paper other than a purchaser protection rule in § 9-330 which could be said to parallel the holder by due negotiation in § 9-331.

§ 9-331. PRIORITY OF RIGHTS OF PURCHASERS OF INSTRUMENTS, DOCUMENTS, AND SECURITIES UNDER OTHER ARTICLES; PRIORITY OF INTERESTS IN FINANCIAL ASSETS

AND SECURITY ENTITLEMENTS UNDER ARTICLE 8.

(a) **[Rights under Articles 3, 7, and 8 not limited.]** This article does not limit the rights of a holder in due course of a negotiable instrument, a holder to which a negotiable document of title has been duly negotiated, or a protected purchaser of a security. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8.

(b) **[Protection under Article 8.]** This article does not limit the rights of or impose liability on a person to the extent that the person is protected against the assertion of a claim under Article 8.

(c) **[Filing not notice.]** Filing under this article does not constitute notice of a claim or defense to the holders, or purchasers, or persons described in subsections (a) and (b).

Reporter's Note

No changes are recommended to this section. It will apply to both electronic and tangible negotiable documents of title.

§ 9-338. PRIORITY OF SECURITY INTEREST OR AGRICULTURAL LIEN PERFECTED BY FILED FINANCING STATEMENT PROVIDING CERTAIN INCORRECT INFORMATION.

If a security interest or agricultural lien is perfected by a filed financing statement providing information described in Section 9-516(b)(5) which is incorrect at the time the financing statement is filed:

(1) the security interest or agricultural lien is subordinate to a conflicting perfected security interest in the collateral to the extent that the holder of the conflicting security interest gives value in reasonable reliance upon the incorrect information; and

(2) a purchaser, other than a secured party, of the collateral takes free of the security interest or agricultural lien to the extent that, in reasonable reliance upon the incorrect information, the purchaser gives value and, in the case of chattel paper, tangible documents, goods, instruments, or a security certificate, receives delivery of the collateral.

Reporter's Note

Subsection (2) is limited to tangible documents. Should it be? The question here is whether there are likely to be purchasers, that are not secured parties, that rely on information required by 9-516(b)(5) in a filing against an electronic document. It is unclear to me whether this section is limited to tangible chattel paper given that the word "delivery" as defined in Article 1 is limited to "voluntary transfer of possession" which does not make sense as to electronic chattel paper. All of the collateral types listed here are tangible collateral types.

§ 9-601. RIGHTS AFTER DEFAULT; JUDICIAL ENFORCEMENT; CONSIGNOR OR BUYER OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES, OR PROMISSORY NOTES.

(a) **[Rights of secured party after default.]** After default, a secured party has the rights provided in this part and, except as otherwise provided in Section 9-602, those provided by agreement of the parties. A secured party:

(1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) if the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) **[Rights and duties of secured party in possession or control.]** A secured party in possession of collateral or control of collateral under Section 9-104, 9-105, 9-106, ~~or 9-107~~, or 7-106 has the rights and duties provided in Section 9-207.

(c) **[Rights cumulative; simultaneous exercise.]** The rights under subsections (a) and (b) are cumulative and may be exercised simultaneously.

(d) **[Rights of debtor and obligor.]** Except as otherwise provided in subsection (g) and Section 9-605, after default, a debtor and an obligor have the rights provided in this part and by agreement of the parties.

(e) **[Lien of levy after judgment.]** If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

- (1) the date of perfection of the security interest or agricultural lien in the collateral;
- (2) the date of filing a financing statement covering the collateral; or
- (3) any date specified in a statute under which the agricultural lien was created.

(f) **[Execution sale.]** A sale pursuant to an execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

(g) **[Consignor or buyer of certain rights to payment.]** Except as otherwise provided in Section 9-607(c), this part imposes no duties upon a secured party that is a consignee or is a buyer of accounts, chattel paper, payment intangibles, or promissory notes.

Reporter's Note

A cross reference to the control section in Article 7 is added to subsection (b). No change is recommended to subsection (a)(2) which would apply as to both tangible and electronic documents.

§ 9-607. COLLECTION AND ENFORCEMENT BY SECURED PARTY.

(a) **[Collection and enforcement generally.]** If so agreed, and in any event after default, a secured party:

- (1) may notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party;
- (2) may take any proceeds to which the secured party is entitled under Section 9-315;
- (3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;
- (4) if it holds a security interest in a deposit account perfected by control under Section 9-104(a)(1), may apply the balance of the deposit account to the obligation secured by the deposit account; and
- (5) if it holds a security interest in a deposit account perfected by control under Section 9-104(a)(2) or (3), may instruct the bank to pay the balance of the deposit account to or for the benefit of the secured party.

(b) **[Nonjudicial enforcement of mortgage.]** If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially, the secured party may record in the office in which a record of the mortgage is recorded:

- (1) a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and
- (2) the secured party's sworn affidavit in recordable form stating that:
 - (A) a default has occurred; and
 - (B) the secured party is entitled to enforce the mortgage nonjudicially.

(c) **[Commercially reasonable collection and enforcement.]** A secured party shall proceed in a commercially reasonable manner if the secured party:

(1) undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral; and

(2) is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or a secondary obligor.

(d) **[Expenses of collection and enforcement.]** A secured party may deduct from the collections made pursuant to subsection (c) reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

(e) **[Duties to secured party not affected.]** This section does not determine whether an account debtor, bank, or other person obligated on collateral owes a duty to a secured party.

Reporter's Note

This section would allow for enforcement against a party obligated on a document of title (the warehouse or the carrier). The extent to which the warehouse or carrier would be obliged to render the performance would be based on the warehouse and carrier's rights and obligations under the document of title and Article 7. No changes are recommended to this section. Section 9-609 would allow for a secured party to take possession of a tangible document of title after default as long as the secured party did not breach the peace. Section 9-610 would allow for sale of either an electronic or tangible document of title after the debtor's default and Section 9-620 would allow for acceptance of either an electronic or tangible document of title as full or partial satisfaction of the debt. A secured party would generally have to comply with Part 6 of Article 9 in enforcing its security interest in either a tangible or electronic document.