

D R A F T

FOR ~~DISCUSSION ONLY~~ APPROVAL

# Uniform Commercial Code and Emerging Technologies

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Uniform Law Commission

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~~May 31~~ MEETING IN ITS ONE-HUNDRED-AND-THIRTY-FIRST YEAR  
PHILADELPHIA, PENNSYLVANIA  
JULY 8 – 14, 2022 ~~Informal Session~~



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*This draft, including the proposed statutory language and any comments or reporter's notes, has not been reviewed or approved by the Uniform Law Commission or the drafting committee. It does not necessarily reflect the views of the Uniform Law Commission, its commissioners, the drafting committee, or the committee's members or reporter.*

~~May 23~~ June 27, 2022

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1 UNIFORM COMMERCIAL CODE AND EMERGING TECHNOLOGIES

2 ~~May 23, 2022~~ ULC ANNUAL MEETING DRAFT

3 Submitted to the ULC ~~Informal Session~~ Annual Meeting  
4 ~~May 31~~ July 8 – 14, 2022  
5

6 *Note on formatting and style:*

7 *The amendments to provisions of the UCC and official comments in this draft are marked*  
8 *to show changes from the current UCC official text and official comments. A few provisions of*  
9 *the UCC are included for convenience of reference even though no changes are proposed.*

10  
11 *Because Article 12 is a completely new UCC article and Annex A on transition rules also*  
12 *is new, the provisions of Article 12 and Annex A are not underscored.*

13  
14 *New sections are numbered with an “A” or “B” at the end, e.g., Sections 9-107A and 9-*  
15 *306B~~;~~ and new subsections are numbered with a “.1” at the end, e.g., Section 2A-103(h.1).* *It is*  
16 *contemplated that ~~this~~these numbering ~~convention~~conventions will be retained for these sections*  
17 *and subsections that remain in the final Act. In similar fashion, new defined terms in Section 1-*  
18 *201(b) and 9-102(a) also are numbered with an “A” or “B.” This approach will avoid the need*  
19 *to renumber existing provisions.*

20  
21 ~~Note~~ Notes on ~~draft~~amended official comments and Reporter’s Notes:

22  
23 1. Most of the Reporter’s Notes from earlier drafts have been revised and converted  
24 to or incorporated into ~~draft official comments.~~ The principal exceptions are the Reporter’s  
25 Notes to Article 9. However, the draft to be submitted for the final reading at the 2022 ULC  
26 Annual Meeting will include a full set of draft and revised official comments. Reporter’s Notes  
27 will be official comments. Reporter’s Notes have been retained only to provide background or  
28 otherwise to aid in the discussion of the draft (e.g., explaining that some sections that are not  
29 being revised are included for convenience in reviewing related revisions to the official  
30 comments).

31  
32 2. Where no changes are being proposed to the statutory text of a section and the  
33 only changes proposed to the official comments to a section are not substantive (i.e., changes  
34 from “written” to “in a record” and, in Article 9, from “authenticate” to “sign”), the statutory  
35 text of the section is not reproduced in this draft.

36  
37 **Prefatory Note to ~~May 23, 2022~~ ULC Annual Meeting Draft**

38  
39 This Prefatory Note first describes the background of the project on Emerging  
40 Technologies and the Uniform Commercial Code (UCC) and the work to date. It then provides a  
41 brief overview of the ~~proposed~~ revisions to the UCC. Additional Prefatory Notes are provided  
42 below for the ~~proposed~~ amendments relating to payments (Articles 3, 4, and 4A), investment

1 securities (Article 8), secured transactions (Article 9), and controllable electronic records (new  
2 Article 12).

### 3 4 1. *Background*

5  
6 The Uniform Commercial Code has been enacted in all 50 states, the District of  
7 Columbia, Puerto Rico, and the U.S. Virgin Islands. Since its widespread enactment in the  
8 1960s, the UCC has been periodically revised to address changes in commercial practices.  
9

10 In 2019, the Uniform Law Commission and The American Law Institute (the Sponsors)  
11 appointed a Joint Committee to consider whether changes to the UCC are advisable to  
12 accommodate emerging technologies, such as artificial intelligence, distributed ledger  
13 technology, and virtual currency. At the time when the Joint Committee was formed, invitations  
14 were sent to large groups of potential stakeholders including trade organizations, financial  
15 institutions, technology companies, government agencies, academicians, and consumer groups.  
16 The Committee currently has more than 300 observers.  
17

18 The Joint Committee was initially formed as a study committee. However, the Joint  
19 Committee subsequently received the permission of the Sponsors to act as a drafting committee  
20 for amendments to the UCC dealing with digital assets, bundled transactions (i.e., transactions  
21 involving the sale or lease of goods together with the provision of services, the licensing of  
22 information, or both), and payments, as well as for certain discrete amendments to the UCC  
23 unrelated to emerging technologies. For convenience, further references are to the Drafting  
24 Committee.  
25

26 The Drafting Committee has held the following meetings:

- 27 • October 4–5, 2019, in Denver, Colorado.
- 28 • January 31–February 1, 2020, in Washington, D.C.
- 29 • Remote meetings by Zoom on: May 29–30, July 23 and 31, September 2, and  
30 December 1, 2020; February 1, March 9, April 27 and 29, May 3 and 10, July 6,  
31 and November 5–6, 2021; and January 28–29, March 7-8, and March 28, 2022.
- 32 • Remote informal open sessions, held on June 15 and 16, 2021, for ULC  
33 Commissioners and members of the Drafting Committee preliminary to the 2021  
34 ULC Annual Meeting.
- 35 • ULC Annual Meeting (remote and in-person), first reading, July 13, 2021.

- 36  
37 • ~~\_\_\_\_\_ Currently scheduled are (i) a remote~~ Remote informal open session, ~~to be~~  
38 held on May 31, 2022, for ULC Commissioners and members of the Drafting  
39 Committee; preliminary to the 2022 ULC Annual Meeting, ~~and (ii) final reading~~  
40 ~~at the 2022 ULC Annual Meeting.~~  
41

42 The Chair and Reporter along with Drafting Committee members Neil B. Cohen and  
43 Steven O. Weise presented a draft to the ALI Council meeting on January 20, 2022, which was  
44 approved by the Council with the usual caveats. In addition, several small working groups have  
45 met remotely (and continue to meet) to discuss specific topics and to hear the views of various  
46 stakeholder groups. Since the 2021 ULC Annual Meeting, the Chair, Vice Chair, Reporters, and

several members of the Drafting Committee have presented educational programs addressing the ongoing revision process to groups including the Loan Syndication and Trading Association, the ABA Business Law Section, the American College of Commercial Finance Lawyers, the Association of Commercial Finance Attorneys, and the New York City Bar Association. The Chair, Reporter and several members of the Drafting Committee participated in ALI Members Consultative Group meetings on October 1, 2021, and April 25, 2022. Members of the Drafting Committee will continue to reach out to industry groups and other stakeholders and plan to continue participating in CLE presentations to educate members of the bar and others.

The work of the Drafting Committee has focused primarily on the following areas concerning the UCC: digital assets (controllable electronic records), electronic money, chattel paper, “bundled” or “hybrid” transactions (consisting of the sale or lease of goods together with the sale, lease, or licensing of other property and the provision of services as an integrated transaction), documents of title, payment systems, miscellaneous UCC amendments, and consumer issues.

~~At its annual meeting on May 18, 2022, the~~ The ALI approved Tentative Draft No. 1 (April 2022) of the Uniform Commercial Code and Emerging Technologies, subject to the usual caveats, at its annual meeting on May 18, 2022. The Committee expects to complete the ~~draft of~~ the amendments and ~~obtain approval of the ULC following~~ present them for a final reading and approval at ~~its~~the July 2022 ~~annual meeting. Members of the Drafting Committee will continue to reach out to industry groups and other stakeholders and plan to continue participating in CLE presentations to educate members of the bar and others~~ ULC annual meeting.

## 2. Overview of UCC Revisions

The Drafting Committee’s charge is broad, and the resulting ~~draft is~~ revisions are expansive.

### a. New UCC Article 12 – Controllable electronic records, controllable accounts, controllable payment intangibles

The ~~draft includes~~ revisions include a new UCC Article 12 that ~~would govern~~ governs the transfer of property rights in certain intangible digital assets (“controllable electronic records”) that have been or may be created ~~using and may involve the use of~~ new technologies. These assets include, for example, certain types of (non-fiat) virtual currency and nonfungible tokens (NFTs). “Control” of controllable electronic records is a central organizing concept under Article 12. Controllable electronic records are defined to include only those electronic records that can be subjected to control. Control is the functional equivalent of “possession” of a controllable electronic record and a necessary condition for protection as a good faith purchaser for value (a “qualifying purchaser”) of a controllable electronic record. Article 12 confers an attribute of negotiability on controllable electronic records because a qualifying purchaser takes its interest free of conflicting property claims.

Controllable electronic records also provide a mechanism for evidencing certain rights to payment—controllable accounts and controllable payment intangibles. An account debtor

(obligor) on such a right to payment agrees to make payments to the person that has control of the controllable electronic record that evidences the right to payment. Assignments and other aspects of these rights to payment are governed by revisions to UCC Article 9, discussed below. Because a qualifying purchaser of a controllable account or controllable payment intangible will take free of competing property claims, these rights to payment also would have this attribute of negotiability. Article 12 also provides some special rules with respect to the payment obligations and conditions of discharge of account debtors on controllable accounts and controllable payment obligations.

Article 12 includes a choice-of-law rule for the matters that it covers in connection with transactions in controllable electronic records.

For a more detailed description of Article 12, see the Prefatory Note to Article 12.

#### *b. Secured transactions amendments – UCC Article 9*

*Article 12 conforming amendments.* The ~~draft includes~~ revisions include extensive amendments to UCC Article 9. Several of these amendments address security interests in controllable electronic records and in the rights to payment that are embedded in, or tethered to, controllable electronic records—controllable accounts and controllable payment intangibles. Perfection (i.e., essentially, enforceability against third-parties) of security interests in these assets may be achieved by a secured party obtaining control of the asset or filing a financing statement in the appropriate jurisdiction’s filing office. A security interest perfected by control has priority over a security interest perfected by filing. The ~~draft~~ revisions also ~~provides~~ provide special rules for the law governing perfection and priority for security interests in controllable electronic records, controllable accounts, and controllable payment intangibles. These rules draw on the ~~new~~ Article 12 choice-of-law rule.

*Chattel paper.* UCC Article 9 affords special treatment to “chattel paper” (e.g., installment sale contracts and personal property leases). The ~~draft redefines~~ revisions redefine “chattel paper” and ~~updates~~ update the Article 9 provisions applicable to this type of collateral. The ~~new~~ revised definition resolves uncertainty that has arisen under the ~~current~~ previous definition and more accurately reflects the distinction between the seller’s or lessor’s right to payment and the record (e.g., installment sale contract or lease) evidencing that right. The ~~new~~ revised definition also resolves uncertainty that has arisen when goods are leased as part of a hybrid transaction involving services or non-goods property as well as goods. ~~This draft also addresses~~ The revisions address additional issues relating to hybrid transactions, mentioned in 2.d., below. ~~The draft also provides, and provide~~ an amended definition of “control” of an authoritative electronic copy of a record evidencing chattel paper, which reflects a more accurate and technologically flexible approach than the ~~current~~ previous definition.

*Money.* The ~~draft includes~~ revisions include a ~~new~~ revised definition of “money” in Article 1, which applies throughout the UCC unless otherwise provided. ~~It~~ They also ~~includes~~ include amendments that define “electronic money” and provide a definition of “control” of electronic money that tracks the corresponding definition for control of controllable electronic records. Perfection of a security interest in electronic money (a subset of money) as original collateral

1 must be by control, not filing. The ~~draft provides~~revisions provide a ~~new~~revised Article 9  
2 definition of “money” ~~for purposes of Article 9~~ that excludes deposit accounts (which could in  
3 the future be adopted by a government as money). ~~and money in an electronic form that cannot~~  
4 ~~be subjected to control~~. The ~~draft~~revisions also ~~updates~~update the take-free rules for transferees  
5 of money—both electronic money and tangible money—and transferees of funds from deposit  
6 accounts.

7  
8 *Control through another person.* ~~Proposed revisions~~Revisions to the provisions on  
9 control in Sections 9-104 (control of deposit accounts), 9-105 (control of authoritative electronic  
10 ~~copies~~copy of ~~records~~record evidencing chattel paper), and 9-105A (control of electronic money)  
11 and ~~in a proposed~~ conforming modification to Section 8-106(d)(3) (control of security  
12 entitlement) address control through the acknowledgment of a person in control. For similar  
13 ~~revisions~~provisions, see ~~Section~~Sections 7-106 (control of electronic document of title) ~~and 12-~~  
14 ~~105 (control of controllable electronic record)~~. For a discussion of these ~~proposed~~ revisions, see  
15 Section 12-105, Comment 8.

16  
17 For a more detailed description of the Article 9 amendments, see the Prefatory Note to  
18 Article 9 Amendments.

19  
20 *c. Payments amendments – UCC Articles 3 (negotiable instruments), 4 (bank*  
21 *deposits and collections), and 4A (funds transfers)*

22  
23 ~~The draft proposes several~~These amendments include several revisions to Articles 3, 4  
24 and 4A. The amendments relate to negotiability, remote deposit capture, statements of account,  
25 the scope of Article 4A (definition of payment order), and security procedures. The  
26 ~~draft~~amendments also ~~deletes~~replace references to a “writing” ~~(which are changed with~~  
27 ~~references~~ to a “record”).” Many of the ~~proposed~~ changes are to the official comments and are  
28 intended to further clarify the black letter text.

29  
30 For a more detailed description of the payments amendments, see the Prefatory Note to  
31 Payments Amendments.

32  
33 *d. Other emerging technologies-related amendments*

34  
35 The ~~draft contains~~revisions contain a revised definition of “conspicuous” in Article 1 and  
36 a revised and an updated ~~draft~~-official comment on ~~the~~that term. ~~It adds~~They also add to Article  
37 1 the ~~current~~-standard definition of “electronic” used by the ULC. ~~It also adopts a new definition~~  
38 and adopt revised definitions of “send” and “sign” in Article 1, which ~~addresses~~address records  
39 other than writings.

40  
41 The ~~draft revises~~revisions amend Sections 2-102 and 2A-102 and related definitions to  
42 clarify the scope of Articles 2 and 2A with respect to hybrid transactions. ~~It~~They also  
43 ~~includes~~include amendments to several provisions of Articles 2 and 2A to change previous  
44 references to a “writing” or “written” communication to refer instead to a “record.”

45  
46 The ~~draft~~revision proposes a revised Section 7-106, defining “control” for electronic



1 documents of title. The revised section retains the general rule and the safe harbor under the  
2 ~~current~~previous provision and adds an additional safe harbor along the lines of the revised  
3 section on control of chattel paper. The ~~draft also includes~~ revisions also include amendments to  
4 the official comments to several provisions of Articles 7 and 9, in particular to clarify the  
5 treatment of nonnegotiable documents of title.

6  
7 Finally, the ~~draft proposes~~revisions include several amendments to the official comments  
8 to Article 8 (investment securities), in particular to make clear that a controllable electronic  
9 record may be a “financial asset” credited to a securities account.

#### 10 11 *e. Miscellaneous amendments*

12  
13 The ~~draft contains~~revisions contain new definitions ~~for~~in Article 9 of the terms  
14 “assignee” and “assignor,” which conform to ~~current~~the descriptions in the official comments. ~~It~~  
15 ~~also amends, and amend~~ the definition of “person” to include a protected series established under  
16 non-UCC law.

17  
18 The ~~draft proposes to revise~~revisions amend Section 5-116 to cure an ambiguity relating  
19 to the separate status of bank branches in the current provision and to ~~override~~reject incorrectly  
20 decided case law arising from that ambiguity.

21  
22 *f. Draft-Official Comments.* The ~~draft includes revised~~revisions include amended  
23 official comments to many sections. ~~These revisions are presented not only to explain the draft~~  
24 ~~statutory text but also to encourage feedback on the draft comments. Of course, none~~None of the  
25 revisions to official comments will be finalized until completion of the usual processes for the  
26 preparation of official comments.

27  
28 In the preparation of ~~revised~~amended official comments consideration will be given to  
29 removing references to obsolete and withdrawn uniform laws except as may be necessary or  
30 useful to explain particular issues.

#### 31 32 *3. Organization of ~~the draft~~amendments.*

33  
34 Revised provisions of the UCC text and comments appear in the order that they would  
35 appear in the UCC—beginning with Article 1 and continuing through Article 12. Following  
36 Article 12, a new Annex A, also to be codified as a part of the UCC, provides transition rules.



1                   **UNIFORM COMMERCIAL CODE AND EMERGING TECHNOLOGIES**

2                                   **ARTICLE 1**

3   **GENERAL PROVISIONS**

4                   **Section 1-101. Short Titles.**

5                   (a) This [Act] may be cited as the Uniform Commercial Code.

6                   (b) This article may be cited as Uniform Commercial Code-General Provisions.

7   **Official Comment**

8  
9                   \* \* \*

10  
11                   1. Each other article of the Uniform Commercial Code (~~except Articles 10 and 11~~)  
12 may also be cited by its own short title. See Sections 2-101, 2A-101, 3-101, 4-101,  
13 4A-101, 5-101, 6-101, 7-101, 8-101, ~~and~~ 9-101, 12-101, and A-101.

14  
15   **Reporter's Note**

16  
17                   *No change.* No change is proposed to Section 1-101, which is provided for convenience.

18  
19                   \* \* \*

20                   **Section 1-103. Construction of [Uniform Commercial Code] to Promote its**  
21 **Purposes and Policies; Applicability of Supplemental Principles of Law.**

22                   (a) [The Uniform Commercial Code] must be liberally construed and applied to promote  
23 its underlying purposes and policies, which are:

24                                   (1) to simplify, clarify, and modernize the law governing commercial  
25 transactions;

26                                   (2) to permit the continued expansion of commercial practices through custom,  
27 usage, and agreement of the parties; and

28                                   (3) to make uniform the law among the various jurisdictions.

29                   (b) Unless displaced by the particular provisions of [the Uniform Commercial Code], the

principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

#### Official Comment

\* \* \*

2. **Applicability of supplemental principles of law.** Subsection (b) states the basic relationship of the Uniform Commercial Code to supplemental bodies of law. The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement ~~its~~ provisions in many important ways. At the same time, the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.

The language of subsection (b) is intended to reflect both the concept of supplementation and the concept of preemption. Some courts, however, had difficulty in applying the identical language of former Section 1-103 to determine when other law appropriately may be applied to supplement the Uniform Commercial Code, and when that law has been displaced by the Code. Some decisions erroneously applied other law in situations in which that application, while not inconsistent with the text of any particular provision of the Uniform Commercial Code, clearly was inconsistent with the underlying purposes and policies reflected in the relevant provisions of the Code. See, e.g., *Sheerbonnet, Ltd. v. American Express Bank, Ltd.*, 951 F. Supp. 403 (S.D.N.Y. 1995). In part, these errors arose from Comment 1 to former Section 1-103, which stated that “this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act.” The “explicitly displaced” language of that Comment did not accurately reflect the proper scope of Uniform Commercial Code preemption, which extends to displacement of other law that is inconsistent with the purposes and policies of the Uniform Commercial Code, as well as with its text.

~~These~~The supplemental principles of law and equity to which subsection (b) refers may evolve over time to take into account developments in technology. For These developments may include, for example, developing case law on contract formation in an electronic environment and the use of automated transactions and electronic agents (which are now widely not “agents” under the law of agency) . The supplementation recognized as being capable of acting for a person who employs such tools. See generally Uniform Electronic Transactions Act §§ 2(2);

~~2(6), and 14~~ by subsection (b) should reflect this evolution.

\* \* \*

#### **Reporter's Note**

*No change.* No change is proposed to Section 1-103, which is provided for convenience.

\* \* \*

#### **Section 1-107. Section Captions.**

Section captions are part of [the Uniform Commercial Code].

#### **Official Comment**

\* \* \*

1. Section captions are a part of the text of the Uniform Commercial Code, and not mere surplusage. This is not the case, however, with respect to subsection headings appearing in Article 9 Articles 9 and 12 and Annex A (Transition Provisions). See Comment 3 to Section Section 9-101, Comment 3 ("subsection headings are not a part of the official text itself and have not been approved by the sponsors."); Section 12-101, Comment; Section A-101, Comment.

#### **Reporter's Note**

*No change.* No change is proposed to Section 1-107, which is provided for convenience.

\* \* \*

#### **Section 1-201. General Definitions.**

\* \* \*

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

\* \* \*

(3) "Agreement", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in Section 1-303.

\* \* \*

1 (10) “Conspicuous”, with reference to a term, means so written, displayed, or  
2 presented that, based on the totality of the circumstances, a reasonable person against which it is  
3 to operate ought to have noticed it. Whether a term is “conspicuous” or not is a decision for the  
4 court. ~~Conspicuous terms include the following:~~

5 (A) ~~a heading in capitals equal to or greater in size than the surrounding~~  
6 ~~text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and~~

7 (B) ~~language in the body of a record or display in larger type than the~~  
8 ~~surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or~~  
9 ~~set off from surrounding text of the same size by symbols or other marks that call attention to the~~  
10 ~~language.~~

11 \* \* \*

12 (15) “Delivery”, with respect to an electronic document of title, means voluntary  
13 transfer of control and, with respect to an instrument, a tangible document of title, or an  
14 authoritative tangible copy of a record evidencing chattel paper, means voluntary  
15 transfer of possession.

16 (16) “Document of title” means a record (i) that in the regular course of business  
17 or financing is treated as adequately evidencing that the person in possession or control of the  
18 record ~~it~~ is entitled to receive, control, hold, and dispose of the record and the goods the record  
19 covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the  
20 bailee’s possession which are either identified or are fungible portions of an identified mass. The  
21 term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt,  
22 and order for delivery of goods. An electronic document of title means a document of title  
23 evidenced by a record consisting of information stored in an electronic medium. A tangible

document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(16A) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

\* \* \*

(21) “Holder” means:

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

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

(C) the person in control, other than pursuant to Section 7-106(g), of a negotiable electronic document of title.

\* \* \*

(24) “Money” means a medium of exchange that is currently authorized or adopted by a domestic or foreign government. The term includes a monetary unit of account established by an intergovernmental organization, or pursuant to an agreement between two or more countries. The term does not include an electronic record that is a medium of exchange recorded and transferable in a system that existed and operated for the medium of exchange before the medium of exchange was authorized or adopted by the government.

\* \* \*

(27) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial

1 entity. The term includes a protected series, however denominated, of an entity if the protected  
2 series is established under law other than [the Uniform Commercial Code] that limits, or limits if  
3 conditions specified under the law are satisfied, the ability of a creditor of the entity or of any  
4 other protected series of the entity to satisfy a claim from assets of the protected series.

5 \* \* \*

6 (33) “Representative” means a person empowered to act for another, including an  
7 agent, an officer of a corporation or association, and a trustee, executor, or administrator of an  
8 estate.

9 \* \* \*

10 (36) “Send”, in connection with a writing, record, or notice notification means:  
11 (A) to deposit in the mail, or deliver for transmission, or transmit by any  
12 other usual means of communication, with postage or cost of transmission provided for, and  
13 properly addressed and, in the case of an instrument, to an address specified thereon or otherwise  
14 agreed, or if there be none addressed to any address reasonable under the circumstances; or  
15 (B) in any other way to cause to be received any record or notice  
16 within the time it would have arrived if properly sent to cause the record or notification to be  
17 received within the time that it would have been received if properly sent under subparagraph  
18 (A).

19 ~~(37) “Signed” includes using any symbol executed or adopted with present~~  
20 ~~intention to adopt or accept a writing. “Sign” means, with present intent to authenticate or adopt~~  
21 a record:

22 (A) execute or adopt a tangible symbol; or

23 (B) attach to or logically associate with the record an electronic symbol,

1 sound, or process. ~~“Signed” and “signature” have corresponding meanings.~~

2 “Signed” and “signature” have corresponding meanings.

3 \* \* \*

4 **Legislative Note:**

5  
6 *A state should review and adjust any of its other statutes or regulations that rely on or refer to*  
7 *the definition of “money” in the state’s Uniform Commercial Code, subsection (b)(24), to take*  
8 *account of the amendment to that definition.*  
9

10 *A state should enact the amendment to subsection (b)(27) whether the state has enacted the*  
11 *Uniform Protected Series Act (2017) or otherwise recognizes a protected series under its law.*  
12 *Because the amendment applies only under the enacting state’s Uniform Commercial Code,*  
13 *inclusion of the amendment does not require the enacting state to recognize a limit on liability of*  
14 *a protected series organized under the law of another ~~state~~jurisdiction or a limit on liability of*  
15 *the entity that established the protected series. The amendment clarifies the status of a protected*  
16 *series as a “person” under the choice-of-law and substantive law rules of the enacting state’s*  
17 *Uniform Commercial Code.*  
18

19 **Official Comment**

20  
21 \* \* \*

22  
23 3. “Agreement.” Derived from former Section 1-201. As used in the Uniform  
24 Commercial Code the word is intended to include full recognition of usage of trade, course of  
25 dealing, course of performance and the surrounding circumstances as effective parts thereof, and  
26 of any agreement permitted under the provisions of the Uniform Commercial Code to displace a  
27 stated rule of law. Whether an agreement has legal consequences is determined by applicable  
28 provisions of the Uniform Commercial Code and, to the extent provided in Section 1-103, by the  
29 law of contracts. Concerning developments in technology, including, e.g., contract formation in  
30 electronic environments, automated transactions, and electronic agents, see Section 1-103,  
31 Comment 2.  
32

33 \* \* \*

34  
35 10. “Conspicuous.” Derived from former Section 1-201(10). This definition states the  
36 general standard that to be conspicuous a term ought to be noticed by a reasonable person against  
37 which the term is to operate. Whether a term is conspicuous is an issue for the court.  
38 ~~Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring~~  
39 ~~that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning~~  
40 ~~function (giving guidance to the party relying on the term regarding how that result can be~~  
41 ~~achieved). Although these paragraphs indicate some of the methods for making a term attention-~~  
42 ~~calling, the test is whether attention can reasonably be expected to be called to it. The statutory~~  
43 ~~language should not be construed to permit a result that is inconsistent with that test. Whether the~~

1 appearance and presentation of a particular term satisfy this standard is determined by reference  
2 to the totality of the circumstances and requires a case-by-case analysis.

3  
4 Historically, contract terms were presented in writing, making the use of standards that  
5 relate to the size and appearance of type relevant to the determination of conspicuousness. Today  
6 terms in a record are frequently communicated electronically. New technologies have created  
7 opportunities for terms to be displayed or presented in novel ways, such as by the use of pop-up  
8 windows, text balloons, dynamically expanding or dynamically magnifying text, and non-visual  
9 elements such as vibrations, to name a few.

10  
11 The definition has been revised by deleting the statutory examples relating to the  
12 appearance of type and instead indicating in the comments a broader universe of factors that are  
13 applicable to both written and electronic presentations. This approach is intended to be both  
14 more protective of consumers and more useful to drafters by providing more clarity and  
15 flexibility in the methods that may be used to call attention to a term.

16  
17 The attributes of a reasonable person against which a term is to operate can vary  
18 depending upon the nature of the transaction and the market in which the transaction occurs. For  
19 example, assume that a merchant of goods wishes to enter into a transaction for the sale or lease  
20 of goods which does not include an implied warranty of merchantability or fitness for particular  
21 purpose. Depending on the particular transaction, the person against which the term excluding  
22 implied warranties is to operate may be a large business buyer or lessee, a small business, or a  
23 consumer. Similarly, the determination of whether a term is conspicuous may, depending on the  
24 context, yield a different conclusion when the term is used in a standard form agreement than  
25 when terms of the agreement are the subject of negotiation or discussion.

26  
27 Terms presented in an online record raise issues that differ in some respects from the  
28 issues associated with presenting the same terms in a writing. For example, how a term appears  
29 depends to some extent on the equipment and settings of the person presented with the term.

30  
31 The test of whether a term is conspicuous remains constant notwithstanding the different  
32 contexts referenced above. A term is conspicuous if its appearance and presentation are such that  
33 it ought to be noticed by a reasonable person against which the term is to operate. If the term is  
34 in a standard form intended for use in many agreements, the determination of whether the term is  
35 conspicuous may be made with reference to typical likely parties to the agreements, taking into  
36 account all aspects of the transaction, the range of likely equipment and settings used by such  
37 parties, and the education, sophistication, disabilities, and other attributes of such parties. If the  
38 term is not in a standard form, the determination of whether it is conspicuous should be made  
39 with reference to a reasonable person in the position of the actual person against which it is to  
40 operate.

41  
42 Factors relevant to whether a term is conspicuous include, but are not limited to, the  
43 following:

44  
45 (i) The use of headings and text that contrast with the surrounding text. For example, a  
46 term is likely to be conspicuous if it is introduced by a heading in uppercase letters equal to or



1 greater in size than the surrounding text. Similarly, a term is likely to be conspicuous if set out in  
2 language in the body of a record or display in larger type than the surrounding text, or in  
3 contrasting type, font, or color to the surrounding text of the same size, or set off from  
4 surrounding text of the same size by symbols or other marks that call attention to the language.  
5 However, even with those characteristics, for a term to be conspicuous the overall statutory test  
6 must always be met. For example, even if in bold, uppercase letters, a term might not be  
7 conspicuous if placed among other terms also in bold, uppercase letters so there is no contrast  
8 with the surrounding text or if the application of other factors causes the term not to be provided  
9 such that a reasonable person against which it is to operate ought to have noticed it.

10  
11 (ii) The placement of the term in the record. A term appearing at, or hyperlinked from,  
12 text at the beginning of a record, or near the place where the person against which the term is to  
13 operate must signify assent, is more likely to be conspicuous than a term in the middle of a  
14 lengthy record absent the use of a method reasonably designed to draw the person's attention to  
15 the term in middle of the record (for example, by providing separate reasonable notice of the  
16 term before presenting the record containing the term to the person for assent or forcing the  
17 person to stop on a screen highlighting the term during the presentation of the record for assent).

18  
19 (iii) If terms are available only through the use of a hyperlink, in addition to the  
20 placement of the hyperlink as described above, factors to be considered include whether there is  
21 language drawing attention to the hyperlink and describing its function, and the size and color of  
22 the text used for the hyperlink and any related language.

23  
24 (iv) The language of the heading, if any. A misleading heading – such as the heading  
25 “Warranty” for a paragraph that contains a disclaimer of warranties – might cause a reasonable  
26 person to fail to notice the language that would disclaim warranties, so that the term would not  
27 be conspicuous.

28  
29 (v) The effort needed to access the term. The process and flow of the display and  
30 presentation is also relevant. For example, a term accessible only by triggering multiple  
31 hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.

32  
33 (vi) Whether the person against which the term is to operate must separately assent to or  
34 acknowledge the term. Obtaining separate assent or acknowledgment of a term is generally  
35 sufficient to make the term conspicuous.

36  
37 As noted above, the evolution of technology has led to an evolution in the ways in which  
38 terms in an electronic record are displayed or presented. A term displayed or presented in a novel  
39 way utilizing emerging technologies is, of course, conspicuous if the effect of the display or  
40 presentation is that a reasonable person against which the term is to operate ought to have  
41 noticed it.

42  
43 This definition deals only with requirements of that a term be conspicuous (or noted  
44 conspicuously) that are stated in particular provisions of the Uniform Commercial Code. Other  
45 protective doctrines designed to assure that assent is meaningful that are part of general contract  
46 law may also apply. See Section 1-103(b).

1  
2       \* \* \*

3  
4       15. “Delivery.” Derived from former Section 1-201. The reference to certificated  
5 securities ~~has been~~ in a former version was deleted in light of the more specific treatment of the  
6 matter in Section 8-301. The definition ~~has been~~ was revised to accommodate electronic  
7 documents of title. Control of an electronic document of title is defined in Article 7 (Section  
8 7-106). Another revision conformed the reference to chattel paper to the revised definition of that  
9 term and the revised methods of perfection. See Sections 9-102(a)(11) (defining “chattel paper”);  
10 9-314A (perfection by possession and control of chattel paper).

11  
12       16. “Document of title.” \* \* \*

13  
14       \* \* \*

15  
16       A document of title may be either tangible or electronic. ~~Tangible~~ Traditional paper  
17 documents of title ~~should be construed to mean traditional paper documents.~~ are “tangible  
18 documents of title.” Electronic documents of title are documents that are stored in an electronic  
19 medium instead of in tangible form. ~~The concept of an electronic medium should be construed~~  
20 ~~liberally to include electronic, digital, magnetic, optical, electromagnetic, or any other current or~~  
21 ~~similar emerging technologies.~~ “Electronic” is defined in paragraph 16A. As to reissuing a  
22 document of title in an alternative medium, see Article 7, Section 7-105. Control for electronic  
23 documents of title is defined in Article 7 (Section 7-106).

24  
25       16A. “Electronic.” The basic nature of most current technologies and the need for a  
26 recognized, single term warrants the use of “electronic” as the defined term. The definition is  
27 intended to ensure that the Uniform Commercial Code will be applied broadly as new technologies  
28 develop. The term must be construed broadly in light of developing technologies in order to ~~fulfill~~  
29 ~~the purpose of the Uniform Commercial Code to~~ validate commercial transactions regardless of the  
30 medium used by the parties ~~to document them~~. Current legal requirements for “writings” can be  
31 satisfied by almost any tangible media, whether paper, other fibers, or even stone. The purpose and  
32 applicability of the Uniform Commercial Code covers intangible media that are technologically  
33 capable of storing, transmitting, and reproducing information in human perceivable form, but which  
34 lack the tangible aspect of paper, papyrus, or stone.

35  
36       \* \* \*

37  
38       20. “Good faith.” \* \* \*

39  
40       Over time, however, amendments to the Uniform Commercial Code brought the Article 2  
41 merchant concept of good faith (subjective honesty and objective commercial ~~reasonableness~~ fair  
42 dealing) into other Articles. First, Article 2A explicitly incorporated the Article 2 standard. See  
43 Section ~~2A-103(7)~~. Then, other Articles broadened the applicability of that standard by adopting  
44 it for all parties rather than just for merchants. See, e.g., Sections ~~3-103(a)(4), 4A-105(a)(6), 7-~~  
45 ~~102(a)(6), 8-102(a)(10), and 9-102(a)(43)~~. Finally, Articles 2 and 2A were amended so as to  
46 apply the standard to non-merchants as well as merchants. See Sections ~~2-103(1)(j), 2A-~~  
47 ~~103(1)(m)~~. All of these definitions are comprised of two elements-honesty in fact and the

1 observance of reasonable commercial standards of fair dealing. Only revised Article 5 defines  
2 “good faith” solely in terms of subjective honesty, and only Article 6 (in the few states that have  
3 not chosen to delete the Article) is without a definition of good faith. \* \* \*

4 \* \* \*

5  
6 Thus, the definition of “good faith” in this section merely confirms what has been the  
7 case for a number of years as Articles of the UCC have been amended

8  
9 21. “Holder.” ~~Derived from former Section 1-201.~~ The definition has been  
10 reorganized for clarity and amended to provide for electronic negotiable documents of title. ~~The~~  
11 definition excludes persons who have control pursuant to Section 7-106(g) through the  
12 acknowledgment by a person in control.

13  
14 \* \* \*

15  
16 24. “Money.” Substantively identical to former Section 1-201. The test is that of  
17 sanction of government, whether by authorization before issue or adoption afterward, which  
18 recognizes the circulating medium as a part of the official currency of that government. The  
19 narrow view that money is limited to legal tender is rejected. The definition of “money” applies  
20 to the term **only** as used in the Uniform Commercial Code. The definition does not determine  
21 whether an asset constitutes “money” for other purposes. Only something currently authorized or  
22 adopted as a medium of exchange by a government can be money. As further elaborated in the  
23 second sentence of the definition, adoption by a government may occur through establishment by  
24 an intergovernmental organization or pursuant to an agreement between governments. Coins and  
25 paper currency formerly issued by a government but ~~now~~currently owned and traded only for  
26 their numismatic or historical value, and not as a medium of exchange, are not money.

27  
28 An electronic medium of exchange established pursuant to a country’s law and that is  
29 recorded and transferable in a system that did not exist and did not operate for that medium of  
30 exchange before the electronic medium of exchange was authorized or adopted by the country’s  
31 government also constitutes money. This is so even if ownership is established or maintained  
32 through a system not operated by the government. In contrast, an existing medium of exchange  
33 created or distributed by one or more private ~~parties~~persons is not money solely because the  
34 government of one or more countries later authorizes or adopts the pre-existing medium of  
35 exchange.

36  
37 Although the term “money” is used in several articles, the definition is particularly  
38 significant under Article 9. ~~Prior to the amendments to~~Under an earlier version of this  
39 ~~section~~definition, money was generally understood to include only tangible coins, bills, notes,  
40 and the like, ~~although the statutory text did not explicitly so limit the term.~~ This worked well  
41 under Article 9, which provided that the only method of perfecting a security interest in money  
42 as original collateral was by taking possession. See former ~~SECTION~~Section 9-312(b)(3). The  
43 ~~amended~~revised definition of money in Section 1-201(b)(24) is broader and includes both  
44 “tangible money” ~~(things that were money under the prior, more limited definition)~~ and  
45 “electronic money” ~~(a new type~~types of collateral under Article 9). ~~As under the former~~  
46 provision, a security interest in tangible money as original collateral may be perfected only by

possession. Section 9-322(b)(3). A security interest in electronic money as original collateral may be perfected only by control. Section 9-102(a)(31A) (defining “electronic money”); 9-312(b)(4) (perfection by control for electronic money). The definition of “money” for purposes of Article 9 (a subset of this definition) is more limited than the definition in this section—the Article 9 definition excludes deposit accounts and money in electronic form that cannot be subjected to control under Section 9-105A. See ~~SECTION~~Section 9-102(a)(54A).

*Examples:* The following examples illustrate the ~~revised~~ definition of “money.”

**Example 1:** Nation A enacts legislation authorizing or adopting an existing crypto currency (spitcoin), created on a private blockchain, as a medium of exchange. Because spitcoin was recorded and transferable in a system that existed and operated for that crypto currency before the electronic record was authorized or adopted by Nation A, spitcoin does not become “money” as a result of Nation A’s legislation.

**Example 2:** Nation B creates a new crypto currency (beebuck) and authorizes or adopts it as a medium of exchange. Beebuck is “money.” Beebuck is not recorded and transferable in a system that existed and operated for that crypto currency before the electronic record was authorized or adopted by Nation B.

**Example 3:** Nation C enacts legislation authorizing or adopting as a medium of exchange beebuck, the crypto currency previously adopted by Nation B in Example 2. Although beebuck is recorded and transferable in a system that existed and operated for beebuck before it was authorized or adopted by Nation C, beebuck was already money when authorized or adopted by Nation C. Consequently, beebuck is “money.” Nation C’s action had no relevance or effect on the characterization of beebuck as money.

\* \* \*

27. “Person.” ~~The former definition of this word has been replaced with the standard definition used in acts prepared by the National Conference of Commissioners on Uniform State Laws.~~ This definition recognizes the wide range of subjects that can enjoy legal rights and possess legal duties, including the catchall residual category of “any other legal or commercial entity.” See, e.g., JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland Gray rev., 2d ed., The MacMillan Co. 1931) (“a ‘person’ is a subject of legal rights and duties”). For additional authorities, see Permanent Editorial Board for the UCC, Commentary No. 23, Protected Series Under the Uniform Protected Series Act (2017), n. 5.

The second sentence of the definition provides needed clarity as to the status of a protected series for purposes of the Uniform Commercial Code. Several states have enacted statutes that provide for protected series within a limited liability company or other unincorporated organization. These statutes afford rights and impose duties upon a protected series and generally empower a protected series to conduct its own activities under its own name. The types of protected series that are included as persons under the definition include, but are not limited to, those established under the Uniform Protected Series Act.

1        Providing that a protected series is a “person” for purposes of the enacting state’s  
2        Uniform Commercial Code will expressly permit a protected series, whether created under the  
3        law of the enacting state or of another ~~state jurisdiction~~, to be a “seller” or a “buyer” under Article  
4        2, a “lessor” or a “lessee” under Article 2A, or an “organization” and a “debtor” under Article 9,  
5        and, if the law under which the protected series is organized requires a public filing for the  
6        protected series to be recognized under that law, a “registered organization” under Article 9.

7  
8        \* \* \*

9  
10       33.    “Representative.” ~~Derived from former Section 1-201. Reorganized, and form~~  
11       ~~changed from “includes” to “means.”~~ Concerning developments in technology, including, e.g.,  
12       contract formation in electronic environments, automated transactions, and electronic agents, see  
13       Section 1-103, Comment 2.

14  
15       \* \* \*

16  
17       36.    “Send.” ~~Derived from former Section 1-201. Compare “notifies”.~~ The definition  
18       of “send” adopts former Section 9-102(a)(75). The explicit statement in the previous text of this  
19       definition on the appropriateness of sending to an agreed upon address or to an “address  
20       reasonable under the circumstances” was limited to “the case of an instrument.” The definition  
21       no longer includes that limitation relating to an instrument. Moreover, nothing in the definition  
22       limits the effectiveness of sending a record or notification to an address that has been agreed  
23       upon by affected persons.

24  
25       37.    “Signed.” “Sign.” ~~Derived from former Section 1-201. Former Section 1-201~~  
26       ~~referred to “intention to authenticate”;~~ because other articles now use the term  
27       ~~“authenticate,”~~ the language has been changed to ~~“intention to adopt or accept.”~~ The latter  
28       ~~formulation is derived from the definition of “authenticate” in Section 9-102(a)(7). This~~  
29       ~~provision refers only to writings, because the term “signed,” as used in some articles, refers~~  
30       ~~only to writings. The definition of “sign” is broad—it encompasses the authentication or~~  
31       ~~adoption of all records, not just writings—. The definition replaces the definition of “signed”~~  
32       ~~in earlier texts of this article.~~ Article. This ~~provision~~ definition also makes it clear that, as the term  
33       terms “sign,” “signed,” is or “signature” are used in the Uniform Commercial Code, a  
34       complete signature is not necessary. ~~The~~ A symbol may be printed, stamped or written on, or  
35       electronically attached or associated with, a record; ~~it~~ It may be by initials or by thumbprint or  
36       by electronic symbol, sound, or process. It may be on any part of ~~the document~~ a writing or other  
37       record and in appropriate cases may be found in a billhead or letterhead. No catalog of possible  
38       situations can be complete and the court must use common sense and commercial experience in  
39       passing upon these matters. The question always is whether the symbol, sound, or process was  
40       executed or adopted by the party with present intention to authenticate or adopt or accept the  
41       writing record. ~~Concerning developments in technology, including automated transactions and~~  
42       ~~electronic agents, see also Section 1-103, Comment 2.~~

43  
44       A “writing,” which necessarily is in tangible form, must exist at the time it is signed and  
45       must be signed by the execution or adoption of a tangible symbol to qualify as a signed writing. A  
46       writing signed by use of an electronic symbol, sound, or process would not be a signed writing.

1 Moreover, if an electronic record is electronically signed and subsequently printed in tangible form,  
2 the resulting writing does not constitute a signed writing.

3  
4 Concerning developments in technology, including, e.g., contract formation in electronic  
5 environments, automated transactions, and electronic agents, see also Section 1-103, Comment 2.

6  
7 \* \* \*

## 8 9 **Reporter's Note**

10  
11 1. *No change.* No change is proposed to the definitions of “agreement,” “document  
12 of title,” or “representative,” which are provided for convenience.

13  
14 2. *Current UCC Provisions Using “Conspicuous” or “Conspicuously.”*

15  
16 Article 2. Certain disclaimers of warranty (2-316(2)).

17  
18 Article 2A. Certain disclaimers of warranty (2A-214(2), (3), (4)); certain terms in  
19 consumer leases (2A-303(7)).

20  
21 Article 3. Statement that promise or order is not negotiable (3-104(d)); certain statements  
22 related to tender of instrument in full satisfaction of claim (3-311(b), (c)(1)).

23  
24 Article 7. Statement that document is not negotiable (7-104(c)); statement that issuer does  
25 not know whether goods were received or conform to description (7-203(1)); statement in  
26 relation to foreclosure of warehouse’s lien that goods will be advertised for sale and sold at  
27 auction (7-210(b)(2-~~3~~)); requirement that notice of sale be posted in conspicuous places (not used  
28 with reference to a term) (7-210(b)(5)); statement identifying document as duplicate (7-402);  
29 indication by bailee of partial delivery (7-403(c)(2)).

30  
31 Article 8. Transfer restriction noted on certificate (8-204(a)).

32  
33 \* \* \*

34 **Section 1-204. Value.** Except as otherwise provided in Articles 3, 4, ~~[and] 5, [and 6],~~  
35 [6,] and 12, a person gives value for rights if the person acquires them:

36 (1) in return for a binding commitment to extend credit or for the extension of  
37 immediately available credit, whether or not drawn upon and whether or not a charge-back is  
38 provided for in the event of difficulties in collection;

39 (2) as security for, or in total or partial satisfaction of, a preexisting claim;



(3) by accepting delivery under a preexisting contract for purchase; or

(4) in return for any consideration sufficient to support a simple contract.

### Official Comment

**Source:** Former Section 1-201(44).

**Changes from former law:** Unchanged from former Section 1-201, which was derived from Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act; Section 53, Uniform Bills of Lading Act; Section 58, Uniform Warehouse Receipts Act; Section 22(1), Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. These provisions are substantive rather than purely definitional. Accordingly, they have been relocated from former Section 1-201 to this section.

1. ~~All the~~ Historically, most Uniform Acts in the commercial law field ~~(except the Uniform Conditional Sales Act)~~ have carried definitions of “value.” ~~All those~~ Those definitions provided that value was any consideration sufficient to support a simple contract, including the taking of property in satisfaction of or as security for a pre-existing claim. Subsections (1), (2), and (4) in substance continue the definitions of “value” in the earlier acts. Subsection (3) makes explicit that “value” is also given in a third situation: where a buyer by taking delivery under a pre-existing contract converts a contingent into a fixed obligation.

This definition is not applicable to Articles 3 and 4, but the express inclusion of immediately available credit as value follows the separate definitions in those articles. See Sections 4-208, 4-209, 3-303. ~~Article 12 adopts the Article 3 definition. See Section 12-102(a)(4).~~ A bank or other financing agency which in good faith makes advances against property held as collateral becomes a bona fide purchaser of that property even though provision may be made for charge-back in case of trouble. Checking credit is “immediately available” within the meaning of this section if the bank would be subject to an action for slander of credit in case checks drawn against the credit were dishonored, and when a charge-back is not discretionary with the bank, but may only be made when difficulties in collection arise in connection with the specific transaction involved. Article 12 adopts the Article 3 definition. See Section 12-102(a)(4).

\* \* \*

### Section 1-301. Territorial Applicability; Parties’ Power to Choose Applicable

**Law.**

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of

1 this state or of such other state or nation shall govern their rights and duties.

2 (b) In the absence of an agreement effective under subsection (a), and except as provided  
3 in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate  
4 relation to this state.

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

8 (1) Section 2-402;

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

10 (3) Section 4-102;

11 (4) Section 4A-507;

12 (5) Section 5-116;

13 ~~[(6) Section 6-103;]~~

14 (7) Section 8-110;

15 (8) Sections 9-301 through 9-307;

16 (9) Section 12-107.

17 \* \* \*

18 **Section 1-306. Waiver or Renunciation of Claim or Right After Breach.**

19 A claim or right arising out of an alleged breach may be discharged in whole or in part  
20 without consideration by agreement of the aggrieved party in an authenticated a signed record.

21 **Official Comment**

22 \* \* \*

23 **Changes from former law:** This section changes former law in two respects. First,  
24 former Section 1-107, requiring the “delivery” of a “written waiver or renunciation” merges the



1 separate concepts of the aggrieved party's agreement to forego rights and the manifestation of  
2 that agreement. This section separates those concepts, and explicitly requires agreement of the  
3 aggrieved party. Second, the revised section reflects developments in electronic commerce by  
4 providing for memorialization in an authenticated record. In this context, a party may  
5 "authenticate" a record by (i) signing a record that is a writing or (ii) attaching to or logically  
6 associating with a record that is not a writing an electronic sound, symbol or process with the  
7 present intent to adopt or accept the record. Sections 1-201(b)(37) and 9-102(a)(7).

8  
9 1. This section makes consideration unnecessary to the effective renunciation or  
10 waiver of rights or claims arising out of an alleged breach of a commercial contract where the  
11 agreement effecting such renunciation is memorialized in a record authenticated signed by the  
12 aggrieved party. Its provisions, however, must be read in conjunction with the section imposing  
13 an obligation of good faith. (Section 1-304).

14  
15 2. Consistent with the revised definition of "sign" in Section 1-201, the cognate term  
16 "signed" replaces the reference to "authenticated" in the previous text of this section.

17  
18 \* \* \*

## 20 ARTICLE 2

### 21 SALES

22 \* \* \*

23 ~~Section 2-102. Scope; Certain Security and Other Transactions Excluded from~~  
24 ~~this Article.~~

25 ~~(1) Unless the context otherwise requires, and except as provided in subsections (3) and~~  
26 ~~(4), this article~~Article applies to transactions in goods; it ~~goods.~~

27 ~~—— (2) If the sale of goods aspects of a hybrid transaction predominate, this article applies to~~  
28 ~~the transaction.~~

29 ~~—— (3) If the sale of goods aspects of a hybrid transaction do not predominate, only the~~  
30 ~~provisions of this article which relate primarily to the sale of goods aspects of the transaction~~  
31 ~~apply, and not provisions that relate primarily to the transaction as a whole.~~

32 ~~—— (4) This article does not apply to any transaction which although in the form of an~~  
33 ~~unconditional contract to sell or present sale is intended to operate only as a security transaction~~

nor does this ~~article~~ Article impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers.

~~(5) This section~~ Section 2-102. Scope; Certain Security and Other Transactions Excluded from this Article.

(1) Unless the context otherwise requires, and except as provided in subsection (3), this Article applies to transactions in goods and, in the case of a hybrid transaction, it applies to the extent provided in subsection (2).

(2) In a hybrid transaction:

(a) If the sale-of-goods aspects do not predominate, only the provisions of this Article which relate primarily to the sale-of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply.

(b) If the sale-of-goods aspects predominate, this Article applies to the transaction, but this does not preclude the application in appropriate circumstances of other law to the aspects of ~~a hybrid~~ the transaction which do not relate to the sale of goods, ~~even if the sale-of-goods aspects of the~~.

(3) This Article does not apply to any transaction ~~predominate~~ that, although in the form of an unconditional contract to sell or present sale, operates only to create a security interest and this Article does not impair or repeal any statute regulating sales to consumers, farmers, or other specified classes of buyers.

**Official Comment**

\* \* \*

**Purposes of Changes and New Matter:**

1. To make ~~This section makes~~ it clear that: The ~~this~~ article leaves substantially unaffected the law relating to purchase money security such as conditional sale or chattel

1 mortgage though it regulates the general sales aspects of such transactions. “Security  
2 transaction” is used in the same sense as in the article on Secured Transactions (Article 9).  
3 Subsection (3) makes it clear that this Article does not govern aspects of a transaction that,  
4 although in the form of a sale or contract to sell, create a security interest. See Sections 1-  
5 201(b)(35); 9-109(a)(1). Of course, this Article does apply to any sales aspects of such a  
6 transaction.

7  
8 2. Many ordinary transactions involve both a sale of goods and the provision of  
9 services, a lease of other goods, or a sale, lease, or license of property other than goods. In its  
10 original formulation, Article 2 provided no guidance on whether or to what extent the  
11 ~~article~~Article applied to such a hybrid transaction, although by defining a “sale” as “the passing  
12 of title [to goods] from the seller to the buyer for a price,” Section 1-206 arguably regarded such  
13 transactions as sales.

14  
15 ~~Most courts~~In dealing with the issue of whether and to what extent under the previous  
16 version of this section Article 2 applied to hybrid transactions, ~~most courts~~ used the  
17 “predominant purpose” test.” Under that test, Article 2 ~~applies~~applied either in full or not at all,  
18 depending on whether the hybrid transaction, at its inception, ~~is was~~ predominantly about the  
19 goods. Some courts looked instead to the “gravamen of the claim,” applying Article 2 to issues  
20 relating to the goods and applying other law to issues relating to other aspects of the transaction.  
21 Still other courts used what was sometimes referred to as the “bifurcation approach,” under  
22 which Article 2 ~~applies~~applied to the sale-of-goods aspect of a hybrid transaction and other law  
23 applies to the other aspects of the transaction. The bifurcation approach ~~is was~~ similar to the  
24 gravamen of the claim, but instead of applying all of Article 2 to some, but not all, types of  
25 claims relating to a hybrid transaction, it ~~distinguishes~~distinguished the provisions in Article 2  
26 that deal with the goods from those that deal with the transaction as a whole, and ~~applies~~applied  
27 only the former in a hybrid transaction.

28  
29 ~~Subsections~~Subsection (2) ~~and (3) codify a combination~~codifies aspects of the  
30 predominant purpose test and the bifurcation approach, ~~thereby~~ establishing a two-tiered test. If  
31 the sale-of-goods aspects of a hybrid transaction predominate, then Article 2 applies. If the other  
32 aspects of the hybrid transaction predominate, then the provisions of Article 2 which relate  
33 primarily to the sale of goods, ~~but not as~~ opposed to the transaction as a whole, apply. This  
34 approach has the benefit, for example, of ensuring that a ~~buyer~~person acquiring ownership of  
35 goods in a transaction in which the sale-of-goods aspects do not predominate is a buyer that  
36 benefits from the warranty provisions of this Article and may have a right to recover the goods  
37 from the seller and thereby may qualify as a buyer in ordinary course of business under Section  
38 1-201(b)(9).

39  
40 3.  
41 3. It is important to note that, notwithstanding the frequent reference (under prior  
42 case law) to the predominant *purpose* of a hybrid transaction, subsection (2) asks which aspect of  
43 the transaction predominates without requiring a finding of the “purpose” of either or both  
44 parties (although that purpose, when evident, may be a relevant factor in deciding which aspect  
45 predominates). Relevant factors in determining whether the sale-of-goods aspects of a hybrid  
46 transaction predominate include the language of the agreement and the portion of the total price

1 that is attributable to the sale of goods, although neither is determinative. An agreed-upon  
2 allocation of a portion of the total price to the sale of goods is ordinarily binding on the parties.  
3 Other relevant factors include the nature of the seller's business (i.e., whether the seller is in the  
4 business of selling goods of that kind) and, as previously noted, the buyer's purpose in entering  
5 into the transaction. Because the definition of "goods" expressly includes "specially  
6 manufactured goods," services involved in manufacturing goods are normally attributable to the  
7 sale-of-goods aspects of the transaction. Services in designing specially manufactured goods,  
8 however, would not normally be attributable to the sale-of-goods aspects of the transaction.

9  
10 4. If the sale-of-goods aspects of a hybrid transaction predominate, then this  
11 articleArticle applies to the transaction. However, the application of this articleArticle to a hybrid  
12 transaction does not preclude the application of principles of law and equity to supplement the  
13 provisions of this articleArticle, see Section 1-103(b), nor does it preclude, in appropriate  
14 circumstances, the application of other law to the non-sale-of-goods aspects of the transaction.  
15 Whether it is appropriate to apply such other law will depend in part on what purposes the other  
16 law is designed to achieve and whether application of the other law would be likely to interfere  
17 with the application of this articleArticle.

18  
19 **Example 1.** Owner hires Contractor to replace the roof on a structure. As part of  
20 the transaction, Contractor promises to remove the existing shingles and install  
21 new shingles, which Contractor is providing. The transaction is a hybrid  
22 transaction because it involves the passing of title to the new shingles and the  
23 provision of services. If the sale-of-goods aspects of the transaction predominate,  
24 this articleArticle applies to the transaction.

25  
26 **Example 2.** Same facts as in Example 1. Even if the sale-of-goods aspects of the  
27 transaction predominate, other law might apply to the services aspects of the  
28 transaction. For example, if applicable law regulates the provision of roofing  
29 services, such as by requiring the roofer to be licensed, requiring specified  
30 disclosures, requiring or implying a warranty with respect to the quality of  
31 services, or giving the property owner a brief period of time to cancel the contract,  
32 such other law might apply.

33  
34 **Example 3.** In a single transaction, Seller agrees to sell a warehouse full of goods  
35 to Buyer. The transaction includes the goods contained in the warehouse, the  
36 warehouse itself, and the real property on which the warehouse is situated.  
37 Assume the goods aspects of the transaction predominate. The application of this  
38 articleArticle to the transaction does not preclude the application of real property  
39 law to the real-property aspects of the transaction. Accordingly, whether the sale  
40 of the real property complies with the applicable requirements of real property  
41 law is determined by law other than this articleArticle. Other law will also  
42 determine whether consummation of the sale of the real property is a condition to  
43 the parties' obligations to buy and sell the goods.

44  
45 5. If the sale-of-goods aspects of a hybrid transaction do not predominate, under  
46 subsection (3), the provisions of this articleArticle relating primarily to the sale of goods, as

1 opposed to the transaction as a whole, apply. These provisions include those relating to:  
2 warranties under Sections 2-212, 2-313, 2-314, 2-315, 2-316, 2-317, 2-318; tender of delivery  
3 and risk of loss under Sections 2-503, 2-504, 2-509, 2-510; acceptance, rejection, and cure under  
4 Sections 2-508, 2-601, 2-602, 2-603, 2-604, 2-605, 2-606; and remedies for non-delivery of the  
5 goods or for tender of nonconforming goods under Sections 2-711, 2-712, 2-713, 2-714, 2-715,  
6 2-716. In contrast, the provisions of this ~~article~~Article dealing with the transaction as a whole do  
7 not apply. These provisions include those relating to: the requirement of a ~~writing~~signed record,  
8 Section 2-201; contract formation, Sections 2-204 through 2-207; and whether consideration is  
9 needed to modify the agreement, Section 2-209.

10  
11 **Example 4.** Owner sends a purchase order to Contractor offering to hire  
12 Contractor to replace the roof on a structure. The proposed transaction involves  
13 Contractor removing the existing shingles and installing new shingles, which  
14 Contractor is to provide. Contractor responds with a confirmation purporting to  
15 accept but containing additional and different terms. The transaction is a hybrid  
16 transaction because it involves the passing of title to the new shingles and the  
17 provision of services. If the sale-of-goods aspects of the transaction do not  
18 predominate, this ~~article~~Article does not apply to determine whether a contract  
19 was formed. That issue is governed by other law.

20  
21 **Example 5.** Under the facts of Example 1, assume that the sale-of-goods aspects  
22 of the transaction do not predominate. The agreement provides that the job will be  
23 completed by December 31. Due to unforeseen circumstances affecting the  
24 availability of supplies and labor, the job is not completed by the agreed-upon  
25 deadline. Whether Contractor's failure to perform on time is excused is  
26 determined by general contract law, rather than by this ~~article~~Article (Section  
27 2-615).

28  
29 **Example 6.** Under the facts of Example 1, assume that the sale-of-goods aspects  
30 of the transaction do not predominate. A dispute between the parties arises and  
31 during litigation one party seeks to admit evidence of usage of trade to  
32 supplement or explain the parties' written agreement. If the proffered evidence  
33 relates to the sale-of-goods aspects of the transaction, the parol evidence rule in  
34 this ~~article~~Article, Section 2-202 applies. If the proffered evidence relates to the  
35 other aspects of the transaction or to the transaction as a whole, other law will  
36 govern the admissibility of the evidence.

37  
38 **Example 7.** Restaurateur hires Remodeler to remodel Restaurateur's kitchen. The  
39 transaction requires Remodeler to supply a new oven meeting detailed  
40 specifications, but the services aspects of the transaction predominate. The oven  
41 supplied does not meet a minor aspect of those specifications (but does  
42 substantially satisfy the specifications as a whole). Whether Restaurateur may  
43 reject the oven (or must retain it subject to price adjustment), whether  
44 Restaurateur has a right to cover by purchasing a substitute oven, and the measure  
45 of Restaurateur's damages for the oven's nonconformity to the specifications are  
46 determined by this ~~article~~Article.

**Example 8.** Restaurateur hires Remodeler to remodel Restaurateur’s kitchen by a specified completion date. The transaction requires Remodeler to supply a new oven, but the services aspects of the transaction predominate. Remodeler breaches by failing to complete the project by the specified date. The measure of Restaurateur’s damages for Remodeler’s failure to timely complete the project is not determined by this ~~article~~Article.

6. The rules of subsections (21) and (32) are essentially gap fillers that apply when the parties’ agreement is silent on what legal rules govern the different aspects of their transaction. In general, parties are free to preclude the application of this ~~article~~Article to the aspects of their transaction that are not about the sale of goods.

**Example 9.** Robotics Manufacturer contracts to design, build, and sell customized robotics to Car Maker. The transaction includes a sale of goods and the provision of services and is therefore a hybrid transaction. The parties may, in their agreement, provide that Article 2 does not govern the services aspects of the transaction.

As Example 9 illustrates, parties may agree that Article 2 will not govern non-goods aspects of a hybrid transaction, even though the sale-of-goods aspects predominate. But an opt-out of the Article 2 rules should not apply to matters that relate to the transaction as a whole, such as contract formation and enforceability. For example, in a situation such as Example 9, if the sale-of-goods aspect of the agreement is unenforceable for failure to satisfy the Section 2-201 Statute of Frauds, it would make little sense to hold parties to the services aspects of their agreement when the provision of services is clearly dependent on the existence of the sale-of-goods aspect. Of course, even when this article applies, its provisions may be varied by agreement to the extent provided in section 1-302.

\* \* \*

**Section 2-106. Definitions: “Contract”; “Agreement”; “Contract for Sale”; “Sale”; “Present Sale”; “Conforming” to Contract; “Termination”; “Cancellation”; “Hybrid Transaction”.**

(1) In this ~~article~~Article unless the context otherwise requires “contract” and “agreement” are limited to those relating to the present or future sale of goods. “Contract for sale” includes both a present sale of goods and a contract to sell goods at a future time. A “sale” consists in the passing of title from the seller to the buyer for a price (Section 2–401). A “present sale” means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are “conforming” or conform to the contract when they are in accordance with the obligations under the contract.

(3) “Termination” occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On “termination” all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the cancelling party also retains any remedy for breach of the whole contract or any unperformed balance.

(5) “Hybrid transaction” means a single transaction involving a sale of goods and:

(a) the provision of services;

(b) a lease of other goods; or

(c) a sale, lease, or license of property other than goods.

### Official Comment

\* \* \*

#### Purposes of Changes and New Matter:

1. Subsection (1): “Contract for sale” is used as a general concept throughout this ~~article~~[Article](#), but the rights of the parties do not vary according to whether the transaction is a present sale or a contract to sell unless the ~~article~~[Article](#) expressly so provides.

2. Subsection (2): It is in general intended to continue the policy of requiring exact performance by the seller of his obligations as a condition to his right to require acceptance. However, the seller is in part safeguarded against surprise as a result of sudden technicality on the buyer’s part by the provisions of Section 2–508 on seller’s cure of improper tender or delivery. Moreover, usage of trade frequently permits commercial leeways in performance and the language of the agreement itself must be read in the light of such custom or usage and also, prior course of dealing, and in a long-term contract, the course of performance.

3. Subsections (3) and (4): These subsections are intended to make clear the distinction carried forward throughout this ~~article~~[Article](#) between termination and cancellation.



1  
2 4. In some transactions, the passing of title to goods from the seller to the buyer in  
3 return for a price is part of a larger transaction. The other aspects of the transaction might involve  
4 the seller providing services to the buyer, the seller leasing other goods to the buyer, or the seller  
5 transferring to the buyer rights to property other than goods. Such a transaction is a “hybrid  
6 transaction,” as defined in ~~new~~ subsection (5). Section 2-102 indicates the extent to which this  
7 ~~article~~Article applies to a hybrid transaction.  
8

9 5. A hybrid transaction is a single transaction. If contracting parties enter into  
10 separate agreements at the same time, each agreement creating a separate transaction, each  
11 transaction must be evaluated separately to determine if it is a hybrid transaction.  
12

13 **Example 1.** To sell an ongoing business, Seller and Buyer enter into three  
14 separate written agreements: (i) a sale of goods used in the business; (ii) an  
15 agreement for Seller to provide consulting services to Buyer for a period of six  
16 months; and (iii) a sale of intangible assets associated with the business. ~~Because~~  
17 ~~the parties executed three~~Each agreement creates a separate ~~agreements;~~  
18 transaction. None of those transactions involves both a sale of goods and the  
19 agreement for provision of services, the lease of other goods, or the sale of goods  
20 does not involve a sale, lease, or license of other property or other than goods.  
21 Thus, none of the provision of services, that agreement is notseparate transactions  
22 constitutes a hybrid transaction.  
23

24 **Example 2.** To sell an ongoing business, Seller and Buyer enter into two separate  
25 written agreements: (i) a sale of goods and intangible assets used in the business;  
26 and (ii) an agreement for Seller to provide consulting services to Buyer for a  
27 period of six months, and not to compete with Buyer for a period of one year. The  
28 agreement to sell goods and intangible assets ~~is~~creates a hybrid transaction. The  
29 agreement for consulting services, a separate transaction, is not a hybrid  
30 transaction.  
31

32 Even when contracting parties enter into a single agreement involving both a sale of goods  
33 and a sale, lease, or license of other property or the provision of services, the elements of  
34 the single agreement would not involve a single transaction, and hence the transaction  
35 would notmay be also independent that they create separate transactions. In that case, no  
36 hybrid transaction, if would exist merely because the sale of goods is unrelated to and  
37 independentseparate transactions arose out of the ~~other aspects of the transaction and the~~  
38 terms of the same agreement ~~relating to the sale of goods are readily severable from the~~  
39 terms of the agreement relating to the other aspects of the transaction.  
40

41 **Example 3.** Farmer A and Farmer B sign a written agreement pursuant to which  
42 Farmer A will sell a tractor to Farmer B and Farmer A will board and feed Farmer  
43 B’s cattle until the cattle are sold. The agreement specifies a price for the tractor,  
44 which is due upon delivery, and specifies a mechanism for determining the price  
45 for Farmer A’s services, which is to be paid when the cattle are sold. The parties  
46 would have entered into an agreement to buy and sell the tractor even if they had



not entered into an agreement to board and feed the cattle, and vice-versa. ~~The transaction~~ Two separate transactions arise from the single agreement, neither of which is not a hybrid transaction. Article 2 applies to the sale of the tractor. Other law applies to the agreement to board and feed the cattle.

**Example 4.** In a single record, Landscaper agrees to sell plants to Homeowner and to install the plants on Homeowner's property. The agreement specifies a total price but provides no mechanism for determining what portion of the price is allocable to the sale of plants and what portion is allocable to the installation services. ~~The~~ Because the terms of the agreement relating to the sale of goods and those relating to services are not severable, the transaction is a hybrid transaction.

\* \* \*

## **Section 2-201. Formal Requirements; Statute of Frauds.**

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is ~~some writing~~ a record sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by ~~his~~ the party's authorized agent or broker. A ~~writing~~ record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this ~~paragraph~~ subsection beyond the quantity of goods shown in ~~such writing~~ the record.

(2) Between merchants if within a reasonable time a ~~writing~~ record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against ~~such~~ the party unless ~~written~~ a record containing a notice of objection to its contents is given within 10 days after it is received.

\* \* \*

## **Official Comment**

\* \* \*

1 ~~Purposes of Changes: The changed phraseology of this~~ **Purposes:** This section is intended to  
2 make it clear that:

3  
4 1. The required ~~writing record~~ need not contain all the material terms of the contract  
5 and such material terms as are stated need not be precisely stated. All that is required is that the  
6 ~~writing record~~ afford a basis for believing that the offered oral evidence rests on a real  
7 transaction. It may be written in lead pencil on a scratch pad or another medium. It need not  
8 indicate which party is the buyer and which the seller. The only term which must appear is the  
9 quantity term which need not be accurately stated but recovery is limited to the amount stated.  
10 The price, time and place of payment or delivery, the general quality of the goods, or any  
11 particular warranties may all be omitted.

12  
13 Special emphasis must be placed on the permissibility of omitting the price term in view  
14 of the insistence of some courts on the express inclusion of this term even where the parties have  
15 contracted on the basis of a published price list. In many valid contracts for sale the parties do  
16 not mention the price in express terms, the buyer being bound to pay and the seller to accept a  
17 reasonable price which the trier of the fact may well be trusted to determine. Again, frequently  
18 the price is not mentioned since the parties have based their agreement on a price list or  
19 catalogue known to both of them and this list serves as an efficient safeguard against perjury.  
20 Finally, "market" prices and valuations that are current in the vicinity constitute a similar check.  
21 Thus, if the price is not stated in the ~~memorandum~~ record evidencing the contract it can normally  
22 be supplied without danger of fraud. Of course, if the "price" consists of goods rather than  
23 money the quantity of goods must be stated.

24  
25 Only three definite and invariable requirements as to the ~~memorandum~~ record are made  
26 by this subsection. First, it must evidence a contract for the sale of goods; second, it must be  
27 "signed", a word which includes any authentication which identifies the party to be charged; and  
28 third, it must specify a quantity.

29  
30 \* \* \*

31  
32 3. Between merchants, failure to answer a ~~written confirmation of~~ record confirming  
33 a contract within ten days of receipt is tantamount to a ~~writing record~~ under subsection (2) and is  
34 sufficient against both parties under subsection (1). The only effect, however, is to take away  
35 from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading  
36 the trier of fact that a contract was in fact made orally prior to ~~the written confirmation giving a~~  
37 record confirming a contract is unaffected. Compare the effect of a failure to reply under Section  
38 2-207.

39  
40 4. Failure to satisfy the requirements of this section does not render the contract void  
41 for all purposes, but merely prevents it from being judicially enforced in favor of a party to the  
42 contract. For example, a buyer who takes possession of goods as provided in an oral contract  
43 which the seller has not meanwhile repudiated, is not a trespasser. Nor would the Statute of  
44 Frauds provisions of this section be a defense to a third person who wrongfully induces a party to  
45 refuse to perform an oral contract, even though the injured party cannot maintain an action for  
46 damages against the party so refusing to perform.

1  
2           5.       The requirement of “signing” is discussed in ~~the Comment to~~ Section 1-201,  
3 Comment 37.

4  
5           6.       ~~If~~ For purposes of subsection (1), it is not necessary that the ~~writing~~ record be  
6 delivered to anybody. It need not be signed by both parties but it is, of course, not sufficient  
7 against one who has not signed it. Prior to a dispute no one can determine which party’s signing  
8 of the memorandum may be necessary but from the time of contracting each party should be  
9 aware that to him it is signing by the other which is important.

10  
11           7.       If the making of a contract is admitted in court, either in a written pleading, by  
12 stipulation or by oral statement before the court, no additional ~~writing~~ record is necessary for  
13 protection against fraud. Under this section it is no longer possible to admit the contract in court  
14 and still treat the Statute as a defense. However, the contract is not thus conclusively  
15 established. The admission so made by a party is itself evidential against him of the truth of the  
16 facts so admitted and of nothing more; as against the other party, it is not evidential at all.

17  
18           8.       In furtherance of medium neutrality, references to “writing” and “written” in the  
19 former section have been changed to refer to a “record.”

20  
21           \* \* \*

22           **Section 2-202. Final ~~Written~~ Expression: Parol or Extrinsic Evidence.**

23           Terms with respect to which the confirmatory memoranda of the parties agree or which  
24 are otherwise set forth in a ~~writing~~ record intended by the parties as a final expression of their  
25 agreement with respect to such terms as are included therein may not be contradicted by  
26 evidence of any prior agreement or of a contemporaneous oral agreement but may be explained  
27 or supplemented;

28                   (a) by course of performance, course of dealing, or usage of trade (Section 1-303);  
29 and

30                   (b) by evidence of consistent additional terms unless the court finds the ~~writing~~  
31 record to have been intended also as a complete and exclusive statement of the terms of the  
32 agreement.

33   **Official Comment**  
34

1           \* \* \*

2   **Purposes:**

3  
4           1.     This section definitely rejects:

5  
6                   (a) Any assumption that because a writing record has been worked out which is  
7 final on some matters, it is to be taken as including all the matters agreed upon;

8  
9                   (b) The premise that the language used has the meaning attributable to such  
10 language by rules of construction existing in the law rather than the meaning which arises out of  
11 the commercial context in which it was used; and

12  
13                   (c) The requirement that a condition precedent to the admissibility of the type of  
14 evidence specified in paragraph (a) is an original determination by the court that the language  
15 used is ambiguous.

16  
17           2.     Paragraph (a) makes admissible evidence of course of dealing, usage of trade and  
18 course of performance to explain or supplement the terms of any writing record stating the  
19 agreement of the parties in order that the true understanding of the parties as to the agreement  
20 may be reached. Such writings records are to be read on the assumption that the course of prior  
21 dealings between the parties and the usages of trade were taken for granted when the document  
22 was phrased. Unless carefully negated they have become an element of the meaning of the words  
23 used. Similarly, the course of actual performance by the parties is considered the best indication  
24 of what they intended the writing record to mean.

25  
26           3.     Under paragraph (b) consistent additional terms, not reduced to writing a record,  
27 may be proved unless the court finds that the writing record was intended by both parties as a  
28 complete and exclusive statement of all the terms. If the additional terms are such that, if agreed  
29 upon, they would certainly have been included in the document record in the view of the court,  
30 then evidence of their alleged making must be kept from the trier of fact.

31  
32           4.     In furtherance of medium neutrality, references to a “writing” in the former  
33 section have been changed to refer to a “record.”

34  
35   \* \* \*

36   **Section 2-203. Seals Inoperative.**

37           The affixing of a seal to a writing record evidencing a contract for sale or an offer to buy  
38 or sell goods does not constitute the writing record a sealed instrument and the law with respect  
39 to sealed instruments does not apply to such a contract or offer.

40                   **Official Comment**

\* \* \*

3. In furtherance of medium neutrality, the reference to a “writing” in the former section has been changed to refer to a “record.”

\* \* \*

## Section 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing record which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

### Official Comment

\* \* \*

~~Purposes of Changes:~~ **Purposes:**

1. This section is intended to modify the former rule which required that “firm offers” be sustained by consideration in order to bind, and to require instead that they must merely be characterized as such and expressed in signed writings records.

2. The primary purpose of this section is to give effect to the deliberate intention of a merchant to make a current firm offer binding. The deliberation is shown in the case of an individualized document by the merchant's signature to the offer, and in the case of an offer included on a form supplied by the other party to the transaction by the separate signing of the particular clause which contains the offer. "Signed" here also includes authentication but the reasonableness of the authentication herein allowed must be determined in the light of the purpose of the section. The circumstances surrounding the signing may justify something less than a formal signature or initialing but typically the kind of authentication involved here would consist of a minimum of initialing of the clause involved. A handwritten memorandum on the writer's letterhead purporting in its terms to "confirm" a firm offer already made would be enough to satisfy this section, although not subscribed, since under the circumstances it could not be considered a memorandum of mere negotiation and it would adequately show its own authenticity. Similarly, an authorized telegram will suffice, and this is true even though the original draft contained only a typewritten signature. See generally Section 1-201(b)(37) (defining "sign") and Comment 37. However, despite settled courses of dealing or usages of the trade whereby firm offers are made by oral communication and relied upon without more evidence, such offers remain revocable under this ~~article~~Article since authentication by a writing

1 record is the essence of this section.

2  
3 3. In furtherance of medium neutrality, the references to a “writing” or “writings”  
4 have been changed to refer to a ~~signed~~ “record” or “records.”

5  
6 \* \* \*

7  
8 **Section 2-207. Additional Terms in Acceptance or Confirmation.**

9 (1) A definite and seasonable expression of acceptance or a written confirmation which is  
10 sent within a reasonable time operates as an acceptance even though it states terms additional to  
11 or different from those offered or agreed upon, unless acceptance is expressly made conditional  
12 on assent to the additional or different terms.

13 (2) The additional terms are to be construed as proposals for addition to the contract.

14 Between merchants such terms become part of the contract unless:

15 (a) the offer expressly limits acceptance to the terms of the offer;

16 (b) they materially alter it; or

17 (c) notification of objection to them has already been given or is given within a  
18 reasonable time after notice of them is received.

19 (3) Conduct by both parties which recognizes the existence of a contract is sufficient to  
20 establish a contract for sale although the writings of the parties do not otherwise establish a  
21 contract. In such case the terms of the particular contract consist of those terms on which the  
22 writings of the parties agree, together with any supplementary terms incorporated under any  
23 other provisions of this Act.

24 **Official Comment**

25 \* \* \*

26  
27 8. Notwithstanding references in this section and throughout this ~~article~~Article to  
28 “writing,” “writings,” or “written,” the use by parties of a record other than a writing may be  
29 given effect for purposes of this ~~article~~Article under law other than the Uniform Commercial  
30 Code, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C.

1 Section 7001, *et seq.*, and the Uniform Electronic Transactions Act.

2  
3 **Reporter's Note**

4  
5 *No change.* No change is proposed to Section 2-207, which is provided for convenience.

6  
7 \* \* \*

8 **Section 2-209. Modification, Rescission, and Waiver.**

9 (1) An agreement modifying a contract within this ~~article~~[Article](#) needs no consideration  
10 to be binding.

11 (2) A signed agreement which excludes modification or rescission except by a signed  
12 writing or other signed record cannot be otherwise modified or rescinded, but except as between  
13 merchants such a requirement on a form supplied by the merchant must be separately signed by  
14 the other party.

15 \* \* \*

16 **Official Comment**

17 \* \* \*

18  
19 3. Subsections (2) and (3) are intended to protect against false allegations of oral  
20 modifications. "Modification or rescission" includes abandonment or other change by mutual  
21 consent, contrary to the decision in *Green v. Doniger*, 300 N.Y. 238, 90 N.E.2d 56 (1949); it  
22 does not include unilateral "termination" or "cancellation" as defined in Section 2-106.

23  
24 The Statute of Frauds provisions of this ~~article~~[Article](#) are expressly applied to  
25 modifications by subsection (3). Under those provisions the "delivery and acceptance" test is  
26 limited to the goods which have been accepted, that is, to the past. "Modification" for the future  
27 cannot therefore be conjured up by oral testimony if the price involved is \$500.00 or more since  
28 such modification must be shown at least by a signed memo. And since a memo is limited in its  
29 effect to the quantity of goods set forth in it there is safeguard against oral evidence.

30  
31 Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards  
32 any future modification of the contract by giving effect to a clause in a signed agreement which  
33 expressly requires any modification to be by signed writing or other signed record. But note that  
34 if a consumer is to be held to such a clause on a form supplied by a merchant it must be  
35 separately signed.  
36

1           4.       Subsection (4) is intended, despite the provisions of subsections (2) and (3), to  
2 prevent contractual provisions excluding modification except by a signed ~~writing~~ record from  
3 limiting in other respects the legal effect of the parties' actual later conduct. The effect of such  
4 conduct as a waiver is further regulated in subsection (5).

5  
6           5.       In furtherance of medium neutrality, the reference to a signed "writing" has been  
7 supplemented to refer as well to a signed "record."

8  
9           \* \* \*

## 10           **Section 2-316. Exclusion or Modification of Warranties.**

11           (1) Words or conduct relevant to the creation of an express warranty and words or  
12 conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent  
13 with each other; but subject to the provisions of this Article on parol or extrinsic evidence  
14 (Section 2-202) negation or limitation is inoperative to the extent that such construction is  
15 unreasonable.

16           (2) Subject to subsection (3), to exclude or modify the implied warranty of  
17 merchantability or any part of it the language must mention merchantability and in case of a  
18 writing must be conspicuous, and to exclude or modify any implied warranty of fitness the  
19 exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of  
20 fitness is sufficient if it states, for example, that "There are no warranties which extend beyond  
21 the description on the face hereof."

22           (3) Notwithstanding subsection (2)

23                   (a) unless the circumstances indicate otherwise, all implied warranties are  
24 excluded by expressions like "as is", "with all faults," or other language which in common  
25 understanding calls the buyer's attention to the exclusion of warranties and makes plain that there  
26 is no implied warranty; and

27                   (b) when the buyer before entering into the contract has examined the goods or



1 the sample or model as fully as he desired or has refused to examine the goods there is no  
2 implied warranty with regard to defects which an examination ought in the circumstances to have  
3 revealed to him; and

4 (c) an implied warranty can also be excluded or modified by course of dealing or  
5 course of performance or usage of trade.

6 (4) Remedies for breach of warranty can be limited in accordance with the provisions of  
7 this Article on liquidation or limitation of damages and on contractual modification of remedy  
8 (Sections 2-718 and 2-719.

#### 9 **Official Comment**

10 \* \* \*

11 10. As to the use of a record other than a writing and communications that are not  
12 written, see Section 2-207, Comment 8. Whether a term is conspicuous, including a term in a  
13 record other than a writing, is discussed in Section 1-201, Comment 10.  
14

#### 15 **Reporter's Note**

16  
17 *No change.* No change is proposed to Section 2-316, which is provided for convenience.  
18

19 \* \* \*

#### 20 **Section 2-605. Waiver of Buyer's Objections by Failure to Particularize.**

21  
22 (1) The buyer's failure to state in connection with rejection a particular defect which is  
23 ascertainable by reasonable inspection precludes him from relying on the unstated defect to  
24 justify rejection or to establish breach

25 (a) where the seller could have cured it if stated seasonably; or

26 (b) between merchants when the seller has after rejection made a request in  
27 writing for a full and final written statement of all defects on which the buyer proposes to rely.

28 (2) Payment against documents made without reservation of rights precludes recovery of

1 the payment for defects apparent in the documents.

2 **Official Comment**

3  
4 \* \* \*

5  
6 5. As to the use of a record other than a writing and communications that are not  
7 written, see Section 2-207, Comment 8.  
8

9 **Reporter's Note**

10  
11 *No change.* No change is proposed to Section 2-605, which is provided for convenience.

12  
13 \* \* \*

14 **Section 2-607. Effect of Acceptance; Notice of Breach; Burden of Establishing**  
15 **Breach After Acceptance; Notice of Claim or Litigation to Person Answerable Over.**

16 (1) The buyer must pay at the contract rate for any goods accepted.

17 (2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if  
18 made with knowledge of a non-conformity cannot be revoked because of it unless the acceptance  
19 was on the reasonable assumption that the non-conformity would be seasonably cured, but  
20 acceptance does not of itself impair any other remedy provided by this Article for non-  
21 conformity.

22 (3) Where a tender has been accepted

23 (a) the buyer must within a reasonable time after ~~he~~ it discovers or should have  
24 discovered any breach notify the seller of breach or be barred from any remedy; and

25 (b) if the claim is one for infringement or the like (subsection (3) of Section 2-  
26 312) and the buyer is sued as a result of ~~such a~~ the breach, ~~he~~ the buyer must so notify the seller  
27 within a reasonable time after ~~he~~ the buyer receives notice of the litigation or be barred from any  
28 remedy over for liability established by the litigation.

29 (4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over

(a) ~~he~~ the buyer may give ~~his~~ the seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by ~~his~~ the buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend ~~he~~ it is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of Section 2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of Section 2-312).

#### Official Comment

\* \* \*

9. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

\* \* \*

#### Reporter's Note

*Stylistic changes.* Only stylistic changes are proposed to Section 2-609.

\* \* \*

#### Section 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of

1 receiving due performance will not be impaired. When reasonable grounds for insecurity arise  
2 with respect to the performance of either party the other may in writing demand adequate  
3 assurance of due performance and until he receives such assurance may if commercially  
4 reasonable suspend any performance for which he has not already received the agreed return.

5 (2) Between merchants the reasonableness of grounds for insecurity and the adequacy of  
6 any assurance offered shall be determined according to commercial standards.

7 (3) Acceptance of any improper delivery or payment does not prejudice the aggrieved  
8 party's right to demand adequate assurance of future performance.

9 (4) After receipt of a justified demand failure to provide within a reasonable time not  
10 exceeding thirty days such assurance of due performance as is adequate under the circumstances  
11 of the particular case is a repudiation of the contract.

#### 12 **Official Comment**

13 \* \* \*

14 7. As to the use of a record other than a writing and communications that are not  
15 written, see Section 2-207, Comment 8.

#### 16 **Reporter's Note**

17  
18  
19 *No change.* No change is proposed to Section 2-609, which is provided for convenience.

20  
21 \* \* \*

#### 22 **Section 2-616. Procedure on Notice Claiming Excuse.**

23  
24 (1) Where the buyer receives notification of a material or indefinite delay or an allocation  
25 justified under the preceding section he may by written notification to the seller as to any  
26 delivery concerned, and where the prospective deficiency substantially impairs the value of the  
27 whole contract under the provisions of this Article relating to breach of installment contracts  
28 (Section 2-612), then also as to the whole,

1 (a) terminate and thereby discharge any unexecuted portion of the contract; or

2 (b) modify the contract by agreeing to take his available quota in substitution.

3 (2) If after receipt of such notification from the seller the buyer fails so to modify the  
4 contract within a reasonable time not exceeding thirty days the contract lapses with respect to  
5 any deliveries affected.

6 (3) The provisions of this section may not be negated by agreement except in so far as the  
7 seller has assumed a greater obligation under the preceding section.

8 **Official Comment**

9 1. \* \* \*

10  
11 2. As to the use of a record other than a writing and communications that are not  
12 written, see Section 2-207, Comment 8.

13  
14 **Reporter's Note**

15  
16 *No change.* No change is proposed to Section 2-616, which is provided for convenience.

17  
18 \* \* \*

19 **Section 2-702. Seller's Remedies on Discovery of Buyer's Insolvency.**

20 (1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for  
21 cash including payment for all goods theretofore delivered under the contract, and stop delivery  
22 under this Article (Section 2-705).

23 (2) Where the seller discovers that the buyer has received goods on credit while insolvent  
24 he may reclaim the goods upon demand made within ten days after the receipt, but if  
25 misrepresentation of solvency has been made to the particular seller in writing within three  
26 months before delivery the ten day limitation does not apply. Except as provided in this  
27 subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent  
28 misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them.

#### Official Comment

\* \* \*

4. As to the use of a record other than a writing and communications that are not written, see Section 2-207, Comment 8.

#### Reporter's Note

*No change.* No change is proposed to Section 2-702, which is provided for convenience.

\* \* \*

### ARTICLE 2A

#### LEASES

\* \* \*

#### Section 2A-102. Scope.

(1) This Article ~~Except as provided in subsection (3), this article~~ applies to any transaction, regardless of form, that creates a lease.

~~(2) If and, in the lease-of-goods aspects~~ case of a hybrid lease ~~predominate, this article, it~~ applies to the ~~transaction, extent~~ provided in subsection (2).

~~(3) In a hybrid lease:~~

(a) If the lease-of-goods aspects of a hybrid lease do not predominate:

~~(a)~~ (i) only the provisions of this ~~article~~ Article which relate primarily to the lease-of-goods aspects of the transaction apply, and ~~not the~~ provisions that relate primarily to the transaction as a whole do not apply;

~~(b)~~ (ii) Section 2A-209 applies if the lease is a finance lease; and

~~(e)~~ (iii) Section 2A-407 applies to the promises of the lessee in a finance lease to the extent the promises are consideration for the right to possession and use of the leased goods.

~~(4) This section~~ b) If the lease-of-goods aspects of a hybrid lease predominate, this Article applies to the transaction, but this does not preclude the application in appropriate circumstances of other law to the aspects ~~of a hybrid~~ lease which do not relate to the lease of goods ~~even if the lease-of-goods aspects of the transaction predominate.~~

### Official Comment

\* \* \*

#### Purposes:

1. This Article ~~article~~ governs transactions as diverse as the lease of a hand tool to an individual for a few hours and the leveraged lease of a complex line of industrial equipment to a multi-national organization for a number of years.

To achieve that end it was necessary to provide that this Article ~~article~~ applies to any transaction, regardless of form, that creates a lease. Since lease is defined as a transfer of an interest in goods (Section 2A-103(1)(j)) and goods is defined to include fixtures (Section 2A-103(1)(h)), application is limited to the extent the transaction relates to goods, including fixtures. Further, since the definition of lease does not include a sale (Section 2-106(1)) or retention or creation of a security interest (Section ~~1-201(37)~~ 1-201(b)(35)), application is further limited; sales and security interests are governed by other Articles ~~articles~~ of this Act.

2. ~~Finally, in~~ In recognition of the diversity of the transactions to be governed, the sophistication of many of the parties to these transactions, and the common law tradition as it applies to the bailment for hire or lease, freedom of contract has been preserved. DeKoven, Proceedings After Default by the Lessee Under a True Lease of Equipment, in 1C P. Coogan, W. Hogan, D. Vagts, Secured Transactions Under the Uniform Commercial Code, § 29B.02[2] (1986). Thus, despite the extensive regulatory scheme established by this Article ~~article~~, the parties to a lease will be able to create private rules to govern their transaction. Sections 2A-103(4) and 1-102(3). However, there are special rules in this Article ~~article~~ governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

3. A court may apply this Article ~~article~~ by analogy to any transaction, regardless of form, that creates a lease of personal property other than goods, taking into account the expressed intentions of the parties to the transaction and any differences between a lease of

goods and a lease of other property. Such application has precedent as the provisions of the Article on Sales (Article 2) have been applied by analogy to leases of goods. E.g., Hawkland, The Impact of the Uniform Commercial Code on Equipment Leasing, 1972 Ill.L.F. 446; Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code, 39 Fordham L.Rev. 447 (1971). Whether such application would be appropriate for other bailments of personal property, gratuitous or for hire, should be determined by the facts of each case. See Mieske v. Bartell Drug Co., 92 Wash.2d 40, 46-48, 593 P.2d 1308, 1312 (1979).

Further, parties to a transaction creating a lease of personal property other than goods, or another bailment of personal property, may provide by agreement that this Article ~~article~~ applies. Upholding the parties' choice is consistent with the spirit of this Article ~~article~~.

~~4. Under subsection (2), if the lease-of-goods aspects of a hybrid lease predominate, this article applies to the transaction.~~ 4. If the lease-of-goods aspects of a hybrid lease do not predominate, under subsection (3)(a) ~~applies and~~ (i) the provisions of this ~~article~~ Article which relate primarily to the lease-of-goods aspects of the transaction ~~apply~~ and ~~not those that relate primarily~~ to the transaction as a whole ~~apply do not apply~~. Under subsection (2)(b), if the lease-of-goods aspects of a hybrid lease predominate, this Article applies to the transaction.

5. Relevant factors in determining whether the lease-of-goods aspects of a hybrid lease predominate include the language of the agreement and the portion of the total price that is attributable to the lease of goods, although neither is determinative. An agreed-upon allocation of a portion of the total price to the right to possession and use of the goods is ordinarily binding on the parties, as is an agreement that the transaction includes or does not include a finance lease.

6. A finance lease, defined in Section 2A-103(1)(g), may be included in a hybrid lease in which the lease-of-goods aspects of the transaction do not predominate. In such a situation, subsection (3)(b)(a)(ii) makes Section 2A-209 applicable to the transaction and subsection (3)(e)(2)(a)(iii) addresses the application of Section 2A-407 to the promises made by the lessee under the finance lease. That latter section applies to those promises that are consideration for the lessee's right to possession and use of the leased goods. Whether a promise of a lessee so qualifies is a question of fact but an agreed-upon allocation of a portion of the total price to the right to possession and use of the leased goods is ordinarily binding on the parties. The fact that subsection (3)(b)(a)(ii) and (e)(iii) expressly make Sections 2A-209 and 2A-407 applicable if the lease is a finance lease does not prevent application of other provisions of this ~~article~~ Article relating to finance leases pursuant to subsection (3)(a)(b).

**Example 1.** Lessor and Customer enter into a contract that provides for Lessor to:

(i) lease equipment to Customer; and (ii) provide to Customer a variety of maintenance and consulting services. The services aspects of the transaction predominate. Lessor did not select, manufacture, or supply the goods; instead, the goods were selected by Customer, and Lessor acquired the goods from Supplier for the sole purpose of leasing the goods to Customer. Assume that the lease aspects of the transaction involve a finance lease under Section 2A-103(1)(g). Pursuant to subsection (3)(a), Sections 2A-212 and 2A-213 apply. Under those sections, because the lease aspect of the transaction is a finance lease, Lessor



1 makes no implied warranty of merchantability or implied warranty of fitness for  
2 particular purpose. Pursuant to subsection ~~(3)(b2)(a)(ii)~~, Section 2A-209 applies  
3 to the transaction. Under that section, all warranties made by Supplier to Lessor  
4 extend to Customer.

5  
6 **Example 2.** Same facts as Example 1. As consideration for Lessor's obligations  
7 under the contract, Customer promises to pay a single monthly fee of a specified  
8 amount. The contract does not indicate what portion of the monthly fee is  
9 consideration for the services or what portion is consideration for possession and  
10 use of the equipment. Section 2A-407 applies to the lessee's promises that are  
11 consideration for the lessee's right to possession and use of the equipment. In an  
12 action involving the application of Section 2A-407, the determination of what  
13 portion of the monthly fee is for the right to possession and use of the equipment  
14 is a question of fact.

15  
16 **Example 3.** Same facts as Example 1 except that the lease-of-goods aspects of the  
17 transaction predominate. Section 2A-407 applies to all of the lessee's promises  
18 under the transaction.

19  
20 7. ~~If~~Even if the lease-of-goods aspects of a hybrid lease predominate, ~~then~~ and this  
21 ~~article~~Article applies to the transaction. ~~However~~, the application of this ~~article~~Article to a hybrid  
22 lease does not preclude the application of principles of law and equity to supplement the  
23 provisions of this ~~article~~Article, see Section 1-103(b), nor does it preclude, in appropriate  
24 circumstances, the application of other law to the non-lease-of-goods aspects of the transaction.  
25 Whether it is appropriate to apply such other law will depend in part on what purposes the other  
26 law is designed to achieve and whether application of the other law would be likely to interfere  
27 with the application of this ~~article~~Article.

28  
29 **Example 4.** Same facts as Example 3 (the lease-of-goods aspects of the  
30 transaction predominate) except that the lease is not a finance lease. This  
31 ~~article~~Article applies to the transaction. Nevertheless, because principles of law  
32 and equity also apply unless displaced by particular provisions the Uniform  
33 Commercial Code, see Section 1-103(b), and this ~~article~~Article does not displace  
34 other law relating to whether Lessor's performance of services conforms to the  
35 contract, other law determines whether the services conform to the contract.

36  
37 8. The rules of subsections ~~(2)(a)~~ and ~~(32)(b)~~ are essentially gap fillers that apply  
38 when the parties' agreement is silent on what legal rules govern the different aspects of  
39 their transaction. In general, parties are free to preclude the application of this  
40 ~~article~~Article to the aspects of their transaction that are not about the lease of goods. See  
41 Comment 5 to Section 2-102.

42 \* \* \*

43  
44 **Section 2A-103. Definitions and Index of Definitions.**  
45

(1) In this ~~article~~Article, unless the context otherwise requires:

\* \* \*

(h.1) — “Hybrid lease” means a single transaction involving a lease of goods and:

(i) the provision of services;

(ii) a sale of other goods; or

(iii) a sale, lease, or license of property other than goods.

\* \* \*

### Official Comment

\* \* \*

(g) “Finance Lease”. \* \* \*

\* \* \*

Notwithstanding references in this section and throughout this ~~article~~Article to “writing,” “writings,” or “written,” the use by parties of a record other than a writing may be given effect for purposes of this ~~article~~Article under law other than the Uniform Commercial Code, such as the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 *et seq.*, and the Uniform Electronic Transactions Act.

\* \* \*

(h.1) “Hybrid lease”. In some transactions, the transfer of the right to possession and use of goods for a term in return for consideration (i.e., a lease), is part of a larger transaction. The other aspects of the transaction might involve the provision of services, a sale of other goods, or a transfer of rights to property other than goods. Such a transaction is a hybrid lease. Section 2A-102 indicates the extent to which this ~~article~~Article applies to a hybrid lease.

A hybrid lease is a single transaction. If contracting parties enter into separate agreements at the same time, each agreement must be evaluated separately to determine if it is a hybrid lease.

**Example 1.** Lessor and Customer A enter into a single agreement that provides for Lessor, in return for periodic payments from Customer A, to: (i) lease a photocopier to Customer A for twelve months; (ii) supply all the paper, staples, and toner needed to operate the copier during that period, and (iii) provide routine maintenance and repair services needed to keep the copier operating during that period. The transaction is a hybrid lease because it involves a lease of goods (the copier), a sale of goods (the paper, staples, and toner), and the provision of

1        services.

2  
3        **Example 2.** Lessor and Customer B enter into three separate written agreements  
4        at the same time: (i) a lease of a photocopier to Customer B for twelve months;  
5        (ii) a contract for Lessor to supply Customer B with all the paper, staples, and  
6        toner needed to operate the copier during that period, and (iii) a contract for  
7        Lessor to provide routine maintenance and repair services needed to keep the  
8        copier operating during that period. Because the parties executed three separate  
9        agreements, and the lease does not involve a sale, lease, or license of other  
10       property or the provision of services, the lease is not a hybrid lease.

11  
12       Even when contracting parties enter into a single agreement involving both a lease of goods  
13       and a sale, lease, or license of other property or the provision of services, the agreement  
14       ~~would not~~ may involve separate transactions and not a single transaction, ~~and hence.~~ In that  
15       situation, the lease transaction would not be a hybrid lease, if the lease of goods is unrelated  
16       to the other aspects of the ~~transaction~~ agreement and the terms of the agreement relating to  
17       the lease of goods are readily severable from the terms of the agreement relating to the other  
18       ~~aspects of the transaction~~ transactions.

19  
20       **Example 3.** Farmer A and Farmer B sign a written agreement pursuant to which  
21       Farmer A will lease a tractor to Farmer B for one year and Farmer B will board  
22       and feed Farmer A's cattle until the cattle are sold. The agreement specifies a  
23       rental payment for the tractor, which is due monthly, and a mechanism for  
24       determining the price for Farmer B's services, which is to be paid when the cattle  
25       are sold. The parties would have entered into an agreement to lease the tractor  
26       even if they had not entered into an agreement to board and feed the cattle, and  
27       vice-versa. The transaction is not a hybrid lease. Article 2A applies to the lease of  
28       the tractor. Other law applies to the agreement to board and feed the cattle.

29  
30       \* \* \*

### 31       **Section 2A-107. Waiver or Renunciation of Claim or Right After Default.**

32  
33       Any claim or right arising out of an alleged default or breach of warranty may be  
34       discharged in whole or in part without consideration by a ~~written~~ waiver or renunciation in a  
35       signed ~~and~~ record delivered by the aggrieved party.

### 36       **Official Comment**

37  
38       \* \* \*

39  
40       1.       \* \* \*

41  
42       2.       In furtherance of medium neutrality, the reference to a signed "written" waiver or

1 renunciation has been changed to refer to a waiver in a signed “record.”

2  
3 \* \* \*

4 **Section 2A-201. Statute of Frauds.**

5 (1) A lease contract is not enforceable by way of action or defense unless:

6 (a) the total payments to be made under the lease contract, excluding payments for  
7 options to renew or buy, are less than \$1,000; or

8 (b) there is a ~~writing~~ record, signed by the party against whom enforcement is  
9 sought or by that party’s authorized agent, sufficient to indicate that a lease contract has been  
10 made between the parties and to describe the goods leased and the lease term.

11 (2) Any description of leased goods or of the lease term is sufficient and satisfies  
12 subsection (1)(b), whether or not it is specific, if it reasonably identifies what is described.

13 (3) A ~~writing~~ record is not insufficient because it omits or incorrectly states a term agreed  
14 upon, but the lease contract is not enforceable under subsection (1)(b) beyond the lease term and  
15 the quantity of goods shown in the ~~writing~~ record.

16 (4) A lease contract that does not satisfy the requirements of subsection (1), but which is  
17 valid in other respects, is enforceable:

18 (a) if the goods are to be specially manufactured or obtained for the lessee and are  
19 not suitable for lease or sale to others in the ordinary course of the lessor’s business, and the  
20 lessor, before notice of repudiation is received and under circumstances that reasonably indicate  
21 that the goods are for the lessee, has made either a substantial beginning of their manufacture or  
22 commitments for their procurement;

23 (b) if the party against whom enforcement is sought admits in that party’s  
24 pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is

1 not enforceable under this provision beyond the quantity of goods admitted; or

2 (c) with respect to goods that have been received and accepted by the lessee.

3 (5) The lease term under a lease contract referred to in subsection (4) is:

4 (a) if there is a ~~writing~~ record signed by the party against whom enforcement is  
5 sought or by that party's authorized agent specifying the lease term, the term so specified;

6 (b) if the party against whom enforcement is sought admits in that party's  
7 pleading, testimony, or otherwise in court a lease term, the term so admitted; or

8 (c) a reasonable lease term.

9 **Official Comment**

10 \* \* \*

11 **Changes:**

12 1. This section is modeled on Section 2-201, with changes to reflect the differences  
13 between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds  
14 a requirement that the ~~writing~~ record "describe the goods leased and the lease term", borrowing  
15 that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying  
16 on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that  
17 requirement.

18 2. In furtherance of medium neutrality, the references to a "writing" have been  
19 changed to refer to a "record."

20 \* \* \*

21 **Section 2A-202. Final ~~Written~~ Expression: Parol or Extrinsic Evidence.**

22 Terms with respect to which the confirmatory memoranda of the parties agree or which  
23 are otherwise set forth in a ~~writing~~ record intended by the parties as a final expression of their  
24 agreement with respect to such terms as are included therein may not be contradicted by  
25 evidence of any prior agreement or of a contemporaneous oral agreement but may be explained  
26 or supplemented:

27 (a) by course of dealing or usage of trade or by course of performance; and

1 (b) by evidence of consistent additional terms unless the court finds the ~~writing~~  
2 record to have been intended also as a complete and exclusive statement of the terms of the  
3 agreement.

4 **Official Comment**

5 \* \* \*

6  
7 In furtherance of medium neutrality, the references to a “writing” have been changed to  
8 refer to a “record.”

9  
10 \* \* \*

11 **Section 2A-203. Seals Inoperative.**

12 The affixing of a seal to a ~~writing~~ record evidencing a lease contract or an offer to enter  
13 into a lease contract does not render the ~~writing~~ record a sealed instrument and the law with  
14 respect to sealed instruments does not apply to the lease contract or offer.

15 **Official Comment**

16  
17 \* \* \*

18  
19 In furtherance of medium neutrality, the references to a “writing” have been changed to  
20 refer to a “record.”

21  
22 \* \* \*

23 **Section 2A-205. Firm Offers.**

24 An offer by a merchant to lease goods to or from another person in a signed ~~writing~~  
25 record that by its terms gives assurance it will be held open is not revocable, for lack of  
26 consideration, during the time stated or, if no time is stated, for a reasonable time, but in no event  
27 may the period of irrevocability exceed 3 months. Any such term of assurance on a form  
28 supplied by the offeree must be separately signed by the offeror.

29 **Official Comment**

30  
31 \* \* \*

1  
2 In furtherance of medium neutrality, the reference to a signed “writing” has been changed  
3 to refer to a signed “record.”  
4

5 \* \* \*

6 **Section 2A-208. Modification, Rescission, and Waiver.**

7 (1) An agreement modifying a lease contract needs no consideration to be binding.

8 (2) A signed lease agreement that excludes modification or rescission except by a signed  
9 ~~writing~~ record may not be otherwise modified or rescinded, but, except as between merchants,  
10 such a requirement on a form supplied by a merchant must be separately signed by the other  
11 party.

12 \* \* \*

13 **Official Comment**

14  
15 \* \* \*

16 **Changes:**

17  
18  
19 1. Revised to reflect leasing practices and terminology, except that the provisions of  
20 subsection 2-209(3) were omitted.

21  
22 2. In furtherance of medium neutrality, the reference to a signed “writing” has been  
23 changed to refer to a signed “record.”  
24

25 \* \* \*

26 **Section 2A-214. Exclusion or Modification of Warranties.**

27 (1) Words or conduct relevant to the creation of an express warranty and words or  
28 conduct tending to negate or limit a warranty must be construed wherever reasonable as  
29 consistent with each other; but, subject to the provisions of Section 2A-202 on parol or extrinsic  
30 evidence, negation or limitation is inoperative to the extent that the construction is unreasonable.

31 (2) Subject to subsection (3), to exclude or modify the implied warranty of

1 merchantability or any part of it the language must mention “merchantability”, be by a writing,  
2 and be conspicuous. Subject to subsection (3), to exclude or modify any implied warranty of  
3 fitness the exclusion must be by a writing and be conspicuous. Language to exclude all implied  
4 warranties of fitness is sufficient if it is in writing, is conspicuous and states, for example, “There  
5 is no warranty that the goods will be fit for a particular purpose”.

6 (3) Notwithstanding subsection (2), but subject to subsection (4),

7 (a) unless the circumstances indicate otherwise, all implied warranties are  
8 excluded by expressions like “as is,” or “with all faults,” or by other language that in common  
9 understanding calls the lessee's attention to the exclusion of warranties and makes plain that  
10 there is no implied warranty, if in writing and conspicuous;

11 (b) if the lessee before entering into the lease contract has examined the goods or  
12 the sample or model as fully as desired or has refused to examine the goods, there is no implied  
13 warranty with regard to defects that an examination ought in the circumstances to have revealed;  
14 and

15 (c) an implied warranty may also be excluded or modified by course of dealing,  
16 course of performance, or usage of trade.

17 (4) To exclude or modify a warranty against interference or against infringement (Section  
18 2A-211) or any part of it, the language must be specific, be by a writing, and be conspicuous,  
19 unless the circumstances, including course of performance, course of dealing, or usage of trade,  
20 give the lessee reason to know that the goods are being leased subject to a claim or interest of  
21 any person.

## 22 Official Comment

23 \* \* \*



1 **Purposes:**

2 1. \* \* \*

3  
4 2. As to the use of a record other than a writing and communications that are not  
5 written, see Section 2A-103, Comment (g). Whether a term is conspicuous, including a term in a  
6 record other than a writing, is discussed in Section 1-201, Comment 10.

7  
8 \* \* \*

9  
10 **Reporter's Note**

11  
12 *No change.* No change is proposed to Section 2A-214, which is provided for  
13 convenience.

14  
15 \* \* \*

16 **Section 2A-303. Alienability of Party's Interest Under Lease Contract or of**  
17 **Lessor's Residual Interest in Goods; Delegation of Performance; Transfer of Rights.**

18 (1) As used in this section, "creation of a security interest" includes the sale of a lease  
19 contract that is subject to Article 9, Secured Transactions, by reason of Section 9-109(a)(3).

20 (2) Except as provided in subsection (3) and Section 9-407, a provision in a lease  
21 agreement which (i) prohibits the voluntary or involuntary transfer, including a transfer by sale,  
22 sublease, creation or enforcement of a security interest, or attachment, levy, or other judicial  
23 process, of an interest of a party under the lease contract or of the lessor's residual interest in the  
24 goods, or (ii) makes such a transfer an event of default, gives rise to the rights and remedies  
25 provided in subsection (4), but a transfer that is prohibited or is an event of default under the  
26 lease agreement is otherwise effective.

27 (3) A provision in a lease agreement which (i) prohibits a transfer of a right to damages  
28 for default with respect to the whole lease contract or of a right to payment arising out of the  
29 transferor's due performance of the transferor's entire obligation, or (ii) makes such a transfer an  
30 event of default, is not enforceable, and such a transfer is not a transfer that materially impairs

1 the prospect of obtaining return performance by, materially changes the duty of, or materially  
2 increases the burden or risk imposed on, the other party to the lease contract within the purview  
3 of subsection (4).

4 (4) Subject to subsection (3) and Section 9-407:

5 (a) if a transfer is made which is made an event of default under a lease  
6 agreement, the party to the lease contract not making the transfer, unless that party waives the  
7 default or otherwise agrees, has the rights and remedies described in Section 2A-501(2);

8 (b) if paragraph (a) is not applicable and if a transfer is made that (i) is prohibited  
9 under a lease agreement or (ii) materially impairs the prospect of obtaining return performance  
10 by, materially changes the duty of, or materially increases the burden or risk imposed on, the  
11 other party to the lease contract, unless the party not making the transfer agrees at any time to the  
12 transfer in the lease contract or otherwise, then, except as limited by contract, (i) the transferor is  
13 liable to the party not making the transfer for damages caused by the transfer to the extent that  
14 the damages could not reasonably be prevented by the party not making the transfer and (ii) a  
15 court having jurisdiction may grant other appropriate relief, including cancellation of the lease  
16 contract or an injunction against the transfer.

17 (5) A transfer of “the lease” or of “all my rights under the lease”, or a transfer in similar  
18 general terms, is a transfer of rights and, unless the language or the circumstances, as in a  
19 transfer for security, indicate the contrary, the transfer is a delegation of duties by the transferor  
20 to the transferee. Acceptance by the transferee constitutes a promise by the transferee to perform  
21 those duties. The promise is enforceable by either the transferor or the other party to the lease.

22 (6) Unless otherwise agreed by the lessor and the lessee, a delegation of performance  
23 does not relieve the transferor as against the other party of any duty to perform or of any liability

1 for default.

2 (7) In a consumer lease, to prohibit the transfer of an interest of a party under the lease  
3 contract or to make a transfer an event of default, the language must be specific, by a writing,  
4 and conspicuous.

### 5 **Official Comment**

6 \* \* \*

7 10. As to the use of a record other than a writing and communications that are not  
8 written, see Section 2A-103, Comment (g).

9 \* \* \*

### 11 **Reporter's Note**

12 *No change.* No change is proposed to Section 2A-303, which is provided for  
13 convenience.

14 \* \* \*

### 16 **Section 2A-309. Lessor's and Lessee's Rights When Goods Become Fixtures.**

17 (1) In this section:

18 (a) goods are "fixtures" when they become so related to particular real estate that  
19 an interest in them arises under real estate law;

20 (b) a "fixture filing" is the filing, in the office where a record of a mortgage on the  
21 real estate would be filed or recorded, of a financing statement covering goods that are or are to  
22 become fixtures and conforming to the requirements of Section 9-502(a) and (b);

23 (c) a lease is a "purchase money lease" unless the lessee has possession or use of  
24 the goods or the right to possession or use of the goods before the lease agreement is  
25 enforceable;

26 (d) a mortgage is a "construction mortgage" to the extent it secures an obligation  
27

1 incurred for the construction of an improvement on land including the acquisition cost of the  
2 land, if the recorded writing so indicates; and

3 (e) “encumbrance” includes real estate mortgages and other liens on real estate  
4 and all other rights in real estate that are not ownership interests.

5 (2) Under this Article a lease may be of goods that are fixtures or may continue in goods  
6 that become fixtures, but no lease exists under this Article of ordinary building materials  
7 incorporated into an improvement on land.

8 (3) This Article does not prevent creation of a lease of fixtures pursuant to real estate law.

9 (4) The perfected interest of a lessor of fixtures has priority over a conflicting interest of  
10 an encumbrancer or owner of the real estate if:

11 (a) the lease is a purchase money lease, the conflicting interest of the  
12 encumbrancer or owner arises before the goods become fixtures, the interest of the lessor is  
13 perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and  
14 the lessee has an interest of record in the real estate or is in possession of the real estate; or

15 (b) the interest of the lessor is perfected by a fixture filing before the interest of  
16 the encumbrancer or owner is of record, the lessor's interest has priority over any conflicting  
17 interest of a predecessor in title of the encumbrancer or owner, and the lessee has an interest of  
18 record in the real estate or is in possession of the real estate.

19 (5) The interest of a lessor of fixtures, whether or not perfected, has priority over the  
20 conflicting interest of an encumbrancer or owner of the real estate if:

21 (a) the fixtures are readily removable factory or office machines, readily  
22 removable equipment that is not primarily used or leased for use in the operation of the real  
23 estate, or readily removable replacements of domestic appliances that are goods subject to a

1 consumer lease, and before the goods become fixtures the lease contract is enforceable; or

2 (b) the conflicting interest is a lien on the real estate obtained by legal or equitable  
3 proceedings after the lease contract is enforceable; or

4 (c) the encumbrancer or owner has consented in writing to the lease or has  
5 disclaimed an interest in the goods as fixtures; or

6 (d) the lessee has a right to remove the goods as against the encumbrancer or  
7 owner. If the lessee's right to remove terminates, the priority of the interest of the lessor  
8 continues for a reasonable time.

9 (6) Notwithstanding subsection (4)(a) but otherwise subject to subsections (4) and (5), the  
10 interest of a lessor of fixtures, including the lessor's residual interest, is subordinate to the  
11 conflicting interest of an encumbrancer of the real estate under a construction mortgage recorded  
12 before the goods become fixtures if the goods become fixtures before the completion of the  
13 construction. To the extent given to refinance a construction mortgage, the conflicting interest of  
14 an encumbrancer of the real estate under a mortgage has this priority to the same extent as the  
15 encumbrancer of the real estate under the construction mortgage.

16 (7) In cases not within the preceding subsections, priority between the interest of a lessor  
17 of fixtures, including the lessor's residual interest, and the conflicting interest of an  
18 encumbrancer or owner of the real estate who is not the lessee is determined by the priority rules  
19 governing conflicting interests in real estate.

20 (8) If the interest of a lessor of fixtures, including the lessor's residual interest, has  
21 priority over all conflicting interests of all owners and encumbrancers of the real estate, the  
22 lessor or the lessee may (i) on default, expiration, termination, or cancellation of the lease  
23 agreement but subject to the agreement and this Article, or (ii) if necessary to enforce other

1 rights and remedies of the lessor or lessee under this Article, remove the goods from the real  
2 estate, free and clear of all conflicting interests of all owners and encumbrancers of the real  
3 estate, but the lessor or lessee must reimburse any encumbrancer or owner of the real estate who  
4 is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury,  
5 but not for any diminution in value of the real estate caused by the absence of the goods removed  
6 or by any necessity of replacing them. A person entitled to reimbursement may refuse permission  
7 to remove until the party seeking removal gives adequate security for the performance of this  
8 obligation.

9 (9) Even though the lease agreement does not create a security interest, the interest of a  
10 lessor of fixtures, including the lessor's residual interest, is perfected by filing a financing  
11 statement as a fixture filing for leased goods that are or are to become fixtures in accordance  
12 with the relevant provisions of the Article on Secured Transactions (Article 9).

### 13 Official Comment

14  
15 \* \* \*

16  
17 7. As to the use of a record other than a writing and communications that are not written,  
18 see Section 2A-103, Comment (g).

19  
20 \* \* \*

### 21 Reporter's Note

22  
23  
24 *No change.* No change is proposed to Section 2A-309, which is provided for  
25 convenience.

26  
27 \* \* \*

### 28 Section 2A-310. Lessor's and Lessee's Rights When Goods Become Accessions.

29 (1) Goods are "accessions" when they are installed in or affixed to other goods.

30 (2) The interest of a lessor or a lessee under a lease contract entered into before the goods

1 became accessions is superior to all interests in the whole except as stated in subsection (4).

2 (3) The interest of a lessor or a lessee under a lease contract entered into at the time or  
3 after the goods became accessions is superior to all subsequently acquired interests in the whole  
4 except as stated in subsection (4) but is subordinate to interests in the whole existing at the time  
5 the lease contract was made unless the holders of such interests in the whole have in writing  
6 consented to the lease or disclaimed an interest in the goods as part of the whole.

7 (4) The interest of a lessor or a lessee under a lease contract described in subsection (2) or  
8 (3) is subordinate to the interest of

9 (a) a buyer in the ordinary course of business or a lessee in the ordinary course of  
10 business of any interest in the whole acquired after the goods became accessions; or

11 (b) a creditor with a security interest in the whole perfected before the lease  
12 contract was made to the extent that the creditor makes subsequent advances without knowledge  
13 of the lease contract.

14 (5) When under subsections (2) or (3) and (4) a lessor or a lessee of accessions holds an  
15 interest that is superior to all interests in the whole, the lessor or the lessee may (a) on default,  
16 expiration, termination, or cancellation of the lease contract by the other party but subject to the  
17 provisions of the lease contract and this Article, or (b) if necessary to enforce his [or her] other  
18 rights and remedies under this Article, remove the goods from the whole, free and clear of all  
19 interests in the whole, but he [or she] must reimburse any holder of an interest in the whole who  
20 is not the lessee and who has not otherwise agreed for the cost of repair of any physical injury  
21 but not for any diminution in value of the whole caused by the absence of the goods removed or  
22 by any necessity for replacing them. A person entitled to reimbursement may refuse permission  
23 to remove until the party seeking removal gives adequate security for the performance of this

obligation.

## Official Comment

\* \* \*

### Purposes:

\* \* \*

As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

\* \* \*

## Reporter's Note

*No change.* No change is proposed to Section 2A-310, which is provided for convenience.

\* \* \*

### Section 2A-401. Insecurity: Adequate Assurance of Performance.

(1) A lease contract imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired.

(2) If reasonable grounds for insecurity arise with respect to the performance of either party, the insecure party may demand in writing adequate assurance of due performance. Until the insecure party receives that assurance, if commercially reasonable the insecure party may suspend any performance for which he [or she] has not already received the agreed return.

(3) A repudiation of the lease contract occurs if assurance of due performance adequate under the circumstances of the particular case is not provided to the insecure party within a reasonable time, not to exceed 30 days after receipt of a demand by the other party.

(4) Between merchants, the reasonableness of grounds for insecurity and the adequacy of any assurance offered must be determined according to commercial standards.



(5) Acceptance of any nonconforming delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

#### Official Comment

\* \* \*

As to the use of a record other than a writing and communications that are not written, see Section 2A-103, Comment (g).

\* \* \*

#### Reporter's Note

*No change.* No change is proposed to Section 2A-401 which is provided for convenience.

\* \* \*

#### Section 2A-406. Procedure on Excused Performance.

(1) If the lessee receives notification of a material or indefinite delay or an allocation justified under Section 2A-405, the lessee may by written notification to the lessor as to any goods involved, and with respect to all of the goods if under an installment lease contract the value of the whole lease contract is substantially impaired (Section [2A-510](#)):

~~2A-510~~);

(a) terminate the lease contract. (Section 2A-505(2)); or

(b) except in a finance lease that is not a consumer lease, modify the lease contract by accepting the available quota in substitution, with due allowance from the rent payable for the balance of the lease term for the deficiency but without further right against the lessor.

(2) If, after receipt of a notification from the lessor under Section 2A-405, the lessee fails so to modify the lease agreement within a reasonable time not exceeding 30 days, the lease contract lapses with respect to any deliveries affected.

1 **Official Comment**

2 \* \* \*

3 As to the use of a record other than a writing and communications that are not written,  
4 see Section 2A-103, Comment (g).

5  
6 **Reporter's Note**

7  
8 *No change.* No change is proposed to Section 2A-406, which is provided for  
9 convenience.

10  
11 \* \* \*

12 **Section 2A-514. Waiver of Lessee's Objections.**

13 (1) In rejecting goods, a lessee's failure to state a particular defect that is ascertainable by  
14 reasonable inspection precludes the lessee from relying on the defect to justify rejection or to  
15 establish default:

16 (a) if, stated seasonably, the lessor or the supplier could have cured it (Section  
17 2A-513); or

18 (b) between merchants if the lessor or the supplier after rejection has made a  
19 request in writing for a full and final written statement of all defects on which the lessee  
20 proposes to rely.

21 (2) A lessee's failure to reserve rights when paying rent or other consideration against  
22 documents precludes recovery of the payment for defects apparent in the documents.

23 **Official Comment**

24 \* \* \*

25 **Purposes:**

26 1. \* \* \*

27 2. As to the use of a record other than a writing and communications that are not  
28 written, see Section 2A-103, Comment (g).

1  
2 \* \* \*

3  
4 **Reporter's Note**

5  
6 *No change.* No change is proposed to Section 2A-514, which is provided for  
7 convenience.

8 \* \* \*

9 **Section 2A-516. Effect of Acceptance of Goods; Notice of Default; Burden of**  
10 **Establishing Default After Acceptance; Notice of Claim or Litigation to Person**  
11 **Answerable Over.**

12 (1) A lessee must pay rent for any goods accepted in accordance with the lease contract,  
13 with due allowance for goods rightfully rejected or not delivered.

14 (2) A lessee's acceptance of goods precludes rejection of the goods accepted. In the case  
15 of a finance lease, if made with knowledge of a nonconformity, acceptance cannot be revoked  
16 because of it. In any other case, if made with knowledge of a nonconformity, acceptance cannot  
17 be revoked because of it unless the acceptance was on the reasonable assumption that the  
18 nonconformity would be seasonably cured. Acceptance does not of itself impair any other  
19 remedy provided by this Article or the lease agreement for nonconformity.

20 (3) If a tender has been accepted:

21 (a) within a reasonable time after the lessee discovers or should have discovered  
22 any default, the lessee shall notify the lessor and the supplier, if any, or be barred from any  
23 remedy against the party not notified;

24 (b) except in the case of a consumer lease, within a reasonable time after the  
25 lessee receives notice of litigation for infringement or the like (Section 2A-211) the lessee shall  
26 notify the lessor or be barred from any remedy over for liability established by the litigation; and

27 (c) the burden is on the lessee to establish any default.

1 (4) If a lessee is sued for breach of a warranty or other obligation for  
2 which a lessor or a supplier is answerable over the following apply:

3 (a) The lessee may give the lessor or the supplier, or both, written notice of the  
4 litigation. If the notice states that the person notified may come in and defend and that if the  
5 person notified does not do so that person will be bound in any action against that person by the  
6 lessee by any determination of fact common to the two litigations, then unless the person notified  
7 after seasonable receipt of the notice does come in and defend that person is so bound.

8 (b) The lessor or the supplier may demand in writing that the lessee turn over  
9 control of the litigation including settlement if the claim is one for infringement or the like  
10 (Section 2A-211) or else be barred from any remedy over. If the demand states that the lessor or  
11 the supplier agrees to bear all expense and to satisfy any adverse judgment, then unless the lessee  
12 after seasonable receipt of the demand does turn over control the lessee is so barred.

13 (5) Subsections (3) and (4) apply to any obligation of a lessee to hold the lessor or the  
14 supplier harmless against infringement or the like (Section 2A-211).

#### 15 **Official Comment**

16 \* \* \*

17  
18 4. As to the use of a record other than a writing and communications that are not  
19 written, see Section 2A-103, Comment (g).

20 \* \* \*

#### 21 **Reporter's Note**

22  
23  
24  
25 *No change.* No change is proposed to Section 2A-516, which is provided for  
26 convenience.

27 \* \* \*

#### 28 **Prefatory Note to [2022](#) Payments Amendments**

1 The changes relating to payments address both statutory text and official comments and  
2 concern the following five topics:

3  
4 *Negotiability.* An amendment to Section 3-104 specifies that negotiability is not negated  
5 by the inclusion of either a choice-of-law term or a choice-of-forum term in an instrument.

6  
7 *Remote Deposit Capture.* Amendments to Sections 3-105 and 3-604, and to the official  
8 comments to Sections 3-309 and 4-207, clarify that an instrument is “issued” if a drawer sends  
9 an image of and information describing an item but never delivers the item.

10  
11 *Scope of Article 4A – Definition of Payment Order.* An amendment to the official  
12 comment to Section 4A-104 (which includes the comments to Section 4A-103) clarifies when an  
13 instruction sent pursuant to a so-called “smart contract” constitutes a payment order.

14  
15 *References to a “Writing.”* Amendments to Sections 4A-103, 4A-202, 4A-203, 4A-207,  
16 4A-208, 4A-210, 4A-211 and 4A-305 change the references to a “writing” or “written” to a  
17 “record.”

18  
19 *Security Procedures.* Amendments to Sections 4A-201 and 4A-202, and to the official  
20 comment to Section 4A-203, clarify that: (i) a security procedure may impose obligations on the  
21 receiving bank, the customer, or both; (ii) a security procedure may require the use of symbols,  
22 sounds, or biometrics; and (iii) a requirement that a payment order be sent from a known email  
23 address, IP address, or phone number is not by itself a security procedure.

## 24 25 **ARTICLE 3**

### 26 **NEGOTIABLE INSTRUMENTS**

#### 27 **Section 3-104. Negotiable Instrument.**

28 (a) Except as provided in subsections (c) and (d), “negotiable instrument” means an  
29 unconditional promise or order to pay a fixed amount of money, with or without interest or other  
30 charges described in the promise or order, if it:

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

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

34 (3) does not state any other undertaking or instruction by the person promising or  
35 ordering payment to do any act in addition to the payment of money, but the promise or order

1 may contain (i) an undertaking or power to give, maintain, or protect collateral to secure  
2 payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose  
3 of collateral, ~~or~~ (iii) a waiver of the benefit of any law intended for the advantage or protection of  
4 an obligor, (iv) a term that specifies the law that governs the promise or order, or (v) an  
5 undertaking to resolve in a specified forum a dispute concerning the promise or order.

6 \* \* \*

### 7 Official Comment

8  
9 1. The definition of “negotiable instrument” defines the scope of Article 3 since  
10 Section 3-102 states: “This Article applies to negotiable instruments.” The definition in Section  
11 3-104(a) incorporates other definitions in Article 3. An instrument is either a “promise,” defined  
12 in Section 3-103(a)(12), or “order,” defined in Section 3-103(a)(8). A promise is a written  
13 undertaking to pay money signed by the person undertaking to pay. An order is a written  
14 instruction to pay money signed by the person giving the instruction. Thus, the term “negotiable  
15 instrument” is limited to a signed writing that orders or promises payment of money. “Money” is  
16 defined in Section 1-201(b)(24) and is not limited to United States dollars. It also includes a  
17 medium of exchange established by a foreign government or monetary units of account  
18 established by an intergovernmental organization or by agreement between two or more nations.  
19 Five other requirements are stated in Section 3-104(a): First, the promise or order must be  
20 “unconditional.” The quoted term is explained in Section 3-106. Second, the amount of money  
21 must be “a fixed amount . . . with or without interest or other charges described in the promise or  
22 order.” Section 3-112(b) relates to “interest.” Third, the promise or order must be “payable to  
23 bearer or to order.” The quoted phrase is explained in Section 3-109. An exception to this  
24 requirement is stated in subsection (c). Fourth, the promise or order must be payable “on demand  
25 or at a definite time.” The quoted phrase is explained in Section 3-108. Fifth, the promise or  
26 order may not state “any other undertaking or instruction by the person promising or ordering  
27 payment to do any act in addition to the payment of money” with ~~three~~ five exceptions. The  
28 quoted phrase is based on the first sentence of N.I.L. Section 5 which is the precursor of “no  
29 other promise, order, obligation or power given by the maker or drawer” appearing in former  
30 Section 3-104(1)(b). The words “instruction” and “undertaking” are used instead of “order” and  
31 “promise” that are used in the N.I.L. formulation because the latter words are defined terms that  
32 include only orders or promises to pay money. The first three exceptions stated in Section  
33 3-104(a)(3) are based on and are intended to have the same meaning as former Section  
34 3-112(1)(b), (c), (d), and (e), as well as N.I.L. § 5(1), (2), and (3). The final two exceptions stated  
35 in Section 3-104(a)(3) deal with choice-of-law and choice-of-forum clauses. The latter of these  
36 includes an agreement to arbitrate. Subsection (b) states that “instrument” means a “negotiable  
37 instrument.” This follows former Section 3-102(1)(e) which treated the two terms as  
38 synonymous.

39 \* \* \*

1  
2           **Section 3-105. Issue of Instrument.**

3           (a) “Issue” means:

4                   (1) the first delivery of an instrument by the maker or drawer, whether to a holder  
5           or nonholder, for the purpose of giving rights on the instrument to any person; or

6                   (2) if agreed by the payee, the first transmission by the drawer to the payee of an  
7           image of an item and information derived from the item that enables the depository bank to  
8           collect the item by transferring or presenting under federal law an electronic check.

9           (b) An unissued instrument, or an unissued incomplete instrument that is completed, is  
10          binding on the maker or drawer, but nonissuance is a defense. An instrument that is conditionally  
11          issued or is issued for a special purpose is binding on the maker or drawer, but failure of the  
12          condition or special purpose to be fulfilled is a defense.

13          (c) “Issuer” applies to issued and unissued instruments and means a maker or drawer of  
14          an instrument.

15                                   **Official Comment**

16  
17          1.       Under former Section 3–102(1)(a) “issue” was defined as the first delivery to a  
18          “holder or a remitter” but the term “remitter” was neither defined nor otherwise used. In revised  
19          Article 3, Section 3–105(a) defines “issue” more broadly to include the first delivery to anyone  
20          by the drawer or maker for the purpose of giving rights to anyone on the instrument. “Delivery”  
21          with respect to instruments is defined in ~~Section 1–201(14)~~ Section 1-201(b)(15) as meaning  
22          “voluntary transfer of possession.” The reference in subsection (a)(2) to transmission of an image  
23          of an item and information derived from the item is derived from Section 4–110(a), dealing with  
24          electronic presentment.

25  
26          Subsection (a) permits an instrument to be issued by an electronic transmission of an  
27          image of and information derived from the instrument by maker and drawer, rather than by  
28          delivery. Thus, for example, a drawer might, with the permission of the payee, write and sign a  
29          check, take a photograph of the check, send the photograph to the drawee for processing  
30          electronically, and destroy the original check. If the electronic image and the information derived  
31          from it can be processed as an “electronic check” under Regulation CC, see 12 C.F.R.  
32          § 229.2(ggg), the check is “issued” and hence can be enforced pursuant to this ~~article~~Article.  
33

1           \* \* \*

2  
3           **Section 3-309. Enforcement of Lost, Destroyed, or Stolen Instrument.**

4           (a) A person not in possession of an instrument is entitled to enforce the instrument if:

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

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

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

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

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

16           (b) A person seeking enforcement of an instrument under subsection (a) must prove the  
17 terms of the instrument and the person's right to enforce the instrument. -If that proof is made,  
18 Section 3-308 applies to the case as if the person seeking enforcement had produced the  
19 instrument. -The court may not enter judgment in favor of the person seeking enforcement unless  
20 it finds that the person required to pay the instrument is adequately protected against loss that  
21 might occur by reason of a claim by another person to enforce the instrument. -Adequate  
22 protection may be provided by any reasonable means.

23                           **Official Comment**

24           \* \* \*



1       4.       The destruction of a check in connection with a truncation process in which  
2 information is extracted from the check and an image of the check is made, and then such  
3 information and image are transmitted for payment does not, by itself, prevent application of this  
4 section. See Section 3-604 Comment 1.

5  
6       **Example:** The payee of a check creates an image of the check, destroys the check, and  
7 transmits the image and information derived from the check for payment. Due to an error  
8 in transmission, the depository bank never receives the transmission. The payee may be  
9 able to enforce the check if the payee can prove the terms of the check and otherwise  
10 satisfy the requirements of this section. The result would be different if there were no  
11 error in the transmission and the payor discharged its obligation on the check.

12  
13       \* \* \*

### 14 15                               **Reporter's Note**

16  
17       *No change.* No change is proposed to Section 3-309, which is provided for convenience.

18  
19       \* \* \*

### 20       **Section 3-401. Signature Necessary for Liability on Instrument.**

21       (a) A person is not liable on an instrument unless (i) the person signed the instrument, or  
22 (ii) the person is represented by an agent or representative who signed the instrument and the  
23 signature is binding on the represented person under Section 3-402.

24       (b) A signature may be made (i) manually or by means of a device or machine, and (ii) by  
25 the use of any name, including a trade or assumed name, or by a word, mark, or symbol executed  
26 or adopted by a person with present intention to authenticate a writing.

### 27                               **Official Comment**

28  
29       1.       ~~Obligation~~ This section provides the fundamental rule that an obligation on an  
30 instrument depends on a signature that is binding on the obligor. The signature may be made by  
31 the obligor personally or by an agent or other representative authorized to act for the obligor.  
32 Signature by agents and other representatives is covered by Section 3-402. It is not necessary  
33 that the name of the obligor appear on the instrument, so long as there is a signature that binds  
34 the obligor. Signature includes an indorsement. These obligations include those on an "order"  
35 (Section 3-103(a)(6)) and a "promise" (Section 3-103(a)(9)) and those of an "issuer," "maker,"  
36 or "drawer" (Sections 3-103(a)(5) and (7), 3-105(c), 3-412, and 3-414), an "acceptor" (Sections  
37 3-409 and 3-413), and an indorser (Sections 3-204(b) and 3-415).

1 2. A signature may be handwritten, typed, printed or made in any other manner. It  
2 need not be subscribed, and may appear in the body of the instrument, as in the case of "I, John  
3 Doe, promise to pay \*\*\* " without any other signature. It may be made by mark, or even by  
4 thumbprint. It may be made in any name, including any trade name or assumed name, however  
5 false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the  
6 signer, and when the signer is identified the signature is effective. Indorsement in a name other  
7 than that of the indorser is governed by Section 3-204(d). Subsection (b) of the previous text of  
8 this section has been deleted as unnecessary in view of the revised definition of "sign." See  
9 Section 1-201(b)(37) and Comment 37. Former subsection (b) provided examples of the means  
10 of making a signature with the present intention of authenticating a writing, such as by means of  
11 a device or machine, by the use of a trade name or assumed name, or by the use of a word, mark,  
12 or symbol. These means are encompassed by the broad, general terms of the revised definition of  
13 "sign." A signature may appear in the body of the instrument, as in the case of "I, John Doe,  
14 promise to pay \*\*\* " without any other signature. It may be made in any name, including a name  
15 other than a designated payee. However, to be signed an instrument (a writing) must exist at the  
16 time it is signed by the execution or adoption of a tangible symbol on the instrument. The  
17 deletion of former subsection (b) effected no change in the law.

18  
19 3. This section is not intended to affect any other law requiring a signature by mark  
20 to be witnessed, or any signature to be otherwise authenticated, or requiring any form of proof.

### 21 Reporter's Note

22  
23  
24 As explained in Comment 2, Subsection (b) was deleted because the revised definition of  
25 "sign" made the subsection unnecessary and not because the provision had proved problematic.  
26 In particular, its removal eliminated any implication that the revised definition was inadequate  
27 for purposes of this Article

28  
29 \* \* \*

### 30 Section 3-604. Discharge by Cancellation or Renunciation.

31 (a) A person entitled to enforce an instrument, with or without consideration, may  
32 discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such  
33 as surrender of the instrument to the party, destruction, mutilation, or cancellation of the  
34 instrument, cancellation or striking out of the party's signature, or the addition of words to the  
35 instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights  
36 against the party by a signed record. The obligation of a party to pay a check is not discharged  
37 solely by the destruction of the check in connection with a process in which information is

1 extracted from the check and an image of the check is made and, subsequently, the information  
2 and image are transmitted for payment.

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

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

## 8 **Official Comment**

9 1. Section 3–604 replaces former Section 3–605.

10  
11 2. The destruction of a check in connection with a truncation process in which  
12 information is extracted from the check and an image of the check is made, and then such  
13 information and image are transmitted for payment is not within the scope of this section and  
14 does not by itself discharge the obligation of a party to pay the instrument. The destruction of the  
15 check also does not affect whether the check has been issued. See Section 3-105(a) and  
16 Comment 1.

17  
18 3. Former subsection (c) has been deleted as unnecessary in view of the [revised](#)  
19 definition of “sign” in Section 1-201.

20  
21 \* \* \*

## 22 **ARTICLE 4**

### 23 **BANK DEPOSITS AND COLLECTIONS**

24 \* \* \*

#### 25 **Section 4-207. Transfer Warranties.**

26 (a) A customer or collecting bank that transfers an item and receives a settlement or other  
27 consideration warrants to the transferee and to any subsequent collecting bank that:

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

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

(3) the item has not been altered;

(4) the item is not subject to a defense or claim in recoupment (Section 3-305(a)) of any party that can be asserted against the warrantor; and

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

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

(b) If an item is dishonored, a customer or collecting bank transferring the item and receiving settlement or other consideration is obliged to pay the amount due on the item (i) according to the terms of the item at the time it was transferred, or (ii) if the transfer was of an incomplete item, according to its terms when completed as stated in Sections 3-115 and 3-407. The obligation of a transferor is owed to the transferee and to any subsequent collecting bank that takes the item in good faith.- A transferor cannot disclaim its obligation under this subsection by an indorsement stating that it is made “without recourse” or otherwise disclaiming liability.

(c) A person to whom the warranties under subsection (a) are made and who took the item in good faith may recover from the warrantor as damages for breach of warranty an amount equal to the loss suffered as a result of the breach, but not more than the amount of the item plus expenses and loss of interest incurred as a result of the breach.

(d) The warranties stated in subsection (a) cannot be disclaimed with respect to checks. Unless notice of a claim for breach of warranty is given to the warrantor within 30 days after the claimant has reason to know of the breach and the identity of the warrantor, the warrantor is

1 discharged to the extent of any loss caused by the delay in giving notice of the claim.

2 (e) A cause of action for breach of warranty under this section accrues when the claimant  
3 has reason to know of the breach.

#### 4 **Official Comment**

5 1. Except for subsection (b), this section conforms to Section 3–416 and extends its  
6 coverage to items. The substance of this section is discussed in the Comment to Section 3–416.  
7 Subsection (b) provides that customers or collecting banks that transfer items, whether by  
8 indorsement or not, undertake to pay the item if the item is dishonored. This obligation cannot be  
9 disclaimed by a “without recourse” indorsement or otherwise. With respect to checks, Regulation  
10 CC Section 229.34 states the warranties made by paying and returning banks.

11  
12 2. For an explanation of subsection (a)(6), see comment 8 to Section 3-416.

13  
14 3. The warranties provided for in this section and in Sections 4-208 and 4-209 are  
15 supplemented by warranties created under federal law. For example, under Section 4-209(b), a  
16 person who undertakes to retain an item in connection with an agreement for electronic  
17 presentment makes a warranty that retention and presentment comply with the agreement. Under  
18 federal law, a person might also make a warranty that no person will be asked to make payment  
19 based on a check already paid. See 12 C.F.R. § 229.34(a).

20  
21 \* \* \*

#### 22 Reporter’s Note

#### 23 Reporter’s Note

24  
25 *No change.* No change is proposed to Section 4-207, which is provided for convenience.

26  
27 \* \* \*

### 28 **ARTICLE 4A**

#### 29 **FUNDS TRANSFERS**

#### 30 **Section 4A-103. Payment Order – Definitions.**

31  
32 (a) In this ~~article~~Article:

33 (1) “Payment order” means an instruction of a sender to a receiving bank,  
34 transmitted orally, ~~electronically, or in writing~~ or in a record, to pay, or to cause another bank to

1 pay, a fixed or determinable amount of money to a beneficiary if:

2 (i) the instruction does not state a condition to payment to the beneficiary  
3 other than time of payment,

4 (ii) the receiving bank is to be reimbursed by debiting an account of, or  
5 otherwise receiving payment from, the sender, and

6 (iii) the instruction is transmitted by the sender directly to the receiving  
7 bank or to an agent, funds-transfer system, or communication system for transmittal to the  
8 receiving bank.

9 \* \* \*

#### 10 Official Comment

11  
12 1. This section is discussed in the Comment following Section 4A-104.

13  
14 2. In furtherance of medium neutrality, the reference to “electronically, or in  
15 ~~“writing”~~ has been changed to refer to “in a ~~“record.”~~”

#### 16 17 Section 4A-104. Funds Transfer – Definitions.

18 In this Article:

19 (a) “Funds transfer” means the series of transactions, beginning with the  
20 originator's payment order, made for the purpose of making payment to the beneficiary of the  
21 order. -The term includes any payment order issued by the originator's bank or an intermediary  
22 bank intended to carry out the originator's payment order. -A funds transfer is completed by  
23 acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the  
24 originator's payment order.

25 (b) “Intermediary bank” means a receiving bank other than the originator's bank  
26 or the beneficiary's bank.

27 (c) “Originator” means the sender of the first payment order in a funds transfer.

(d) Originator's bank" means (i) the receiving bank to which the payment order of the originator is issued if the originator is not a bank, or (ii) the originator if the originator is a bank.

### Official Comment

\* \* \*

3. Further limitations on the scope of Article 4A are found in the three requirements found in subparagraphs (i), (ii), and (iii) of Section 4A-103(a)(1). Subparagraph (i) states that the instruction to pay is a payment order only if it "does not state a condition to payment to the beneficiary other than time of payment." An instruction to pay a beneficiary sometimes is subject to a requirement that the beneficiary perform some act such as delivery of documents.

~~For example,~~ **Example:** a New York bank may have issued a letter of credit in favor of X, a California seller of goods to be shipped to the New York bank's customer in New York. The terms of the letter of credit provide for payment to X if documents are presented to prove shipment of the goods. Instead of providing for presentment of the documents to the New York bank, the letter of credit states that they may be presented to a California bank that acts as an agent for payment. The New York bank sends an instruction to the California bank to pay X upon presentation of the required documents. The instruction is not covered by Article 4A because payment to the beneficiary is conditional upon receipt of shipping documents. The function of banks in a funds transfer under Article 4A is comparable to the role of banks in the collection and payment of checks in that it is essentially mechanical in nature. The low price and high speed that characterize funds transfers reflect this fact. Conditions to payment by the California bank other than time of payment impose responsibilities on that bank that go beyond those in Article 4A funds transfers. Although the payment by the New York bank to X under the letter of credit is not covered by Article 4A, if X is paid by the California bank, payment of the obligation of the New York bank to reimburse the California bank could be made by an Article 4A funds transfer. In such a case there is a distinction between the payment by the New York bank to X under the letter of credit and the payment by the New York bank to the California bank. For example, if the New York bank pays its reimbursement obligation to the California bank by a Fedwire naming the California bank as beneficiary (see Comment 1 to Section 4A-107), payment is made to the California bank rather than to X. That payment is governed by Article 4A and it could be made either before or after payment by the California bank to X. The payment by the New York bank to X under the letter of credit is not governed by Article 4A and it occurs when the California bank, as agent of the New York bank, pays X. No payment order was involved in that transaction. In this example, if the New York bank had erroneously sent an instruction to the California bank unconditionally instructing payment to X, the instruction would have been an Article 4A payment order. If the payment order was accepted (Section 4A-209(b)) by the California bank, a payment by the New York bank to X would have resulted (Section 4A-406(a)). But Article 4A would not prevent

1 recovery of funds from X on the basis that X was not entitled to retain the funds under the  
2 law of mistake and restitution, letter of credit law or other applicable law.

3  
4 An instruction to pay might be a component of a computer program or a transaction  
5 protocol intended to execute automatically under specified circumstances. The fact that the  
6 program or protocol itself is subject to a condition does not necessarily mean that an instruction  
7 to pay issued pursuant to that program or protocol “state[s] a condition to payment of the  
8 beneficiary” within the meaning of Section 4A-103(a)(1)(i). Whether the instruction does state  
9 such a condition depends on what the instruction says when it is received by the receiving bank.  
10 An instruction that neither grants discretion nor imposes a limitation on payment by the receiving  
11 bank does not state a condition to payment. What distinguishes the prior example is that the New  
12 York bank’s instruction to the California bank did state a condition when the California bank  
13 received it.

14  
15 Similarly, an instruction that is subject to a condition when received by Bank A, and  
16 which therefore does not constitute a payment order, does not become a payment order when the  
17 condition is satisfied. However, if, after the condition is satisfied, Bank A sends the instruction to  
18 Bank B without the stated condition, that second instruction could be a payment order if the  
19 instruction otherwise complies with Section 4A-103(a).

20 Reporter’s Note

21  
22 \* \* \*

23  
24 Reporter’s Note

25  
26 *No change.* No change is proposed to Section 4A-104, which is provided for  
27 convenience.

28  
29 \* \* \*

30 **Section 4A-201. Security Procedure.** “Security procedure” means a procedure  
31 established by agreement of a customer and a receiving bank for the purpose of (i) verifying that  
32 a payment order or communication amending or cancelling a payment order is that of the  
33 customer, or (ii) detecting error in the transmission or the content of the payment order or  
34 communication. A security procedure may impose an obligation on the receiving bank or the  
35 customer and may require the use of algorithms or other codes, identifying words, ~~or~~ numbers,  
36 symbols, sounds, biometrics, encryption, callback procedures, or similar security devices.  
37 Comparison of a signature on a payment order or communication with an authorized specimen



signature of the customer or requiring a payment order to be sent from a known email address, IP address, or phone number is not by itself a security procedure.

### Official Comment

A large percentage of payment orders and communications amending or cancelling payment orders are transmitted electronically and it is standard practice to use security procedures that are designed to assure the authenticity of the message through steps designed to assure the identity of the sender, the integrity of the message, or both. Security procedures can also be used to detect error in the content of messages or to detect payment orders that are transmitted by mistake as in the case of multiple transmission of the same payment order. Security procedures might also apply to communications that are transmitted by telephone or in writing a record. Section 4A-201 defines these security procedures. The second sentence of the definition provides several examples of a security procedure, but this list is not exhaustive. The inclusion of the phrase “or similar security devices” means that, as new technologies emerge, what can be a security procedure will change evolve. The definition of security procedure limits the term to a procedure “established by agreement of a customer and a receiving bank.” The term does not apply to procedures that the receiving bank may follow unilaterally in processing payment orders. The question of whether loss that may result from the transmission of a spurious or erroneous payment order will be borne by the receiving bank or the sender or purported sender is affected by whether a security procedure was or was not in effect and whether there was or was not compliance with the procedure. Security procedures are referred to in Sections 4A-202 and 4A-203, which deal with authorized and verified payment orders, and Section 4A-205, which deals with erroneous payment orders.

Requiring that a payment order be sent from a known email, IP address or phone number is not by itself a “security procedure” within the meaning of this section because it is possible to make a payment order with a different origin appear to have been sent from such an address or phone number. However, requiring that a payment order have such an apparent origin in combination with other security protocols might be a security procedure.

### Section 4A-202. Authorized and Verified Payment Orders.

(a) A payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency.

(b) If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the

customer, whether or not authorized, if (i) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (ii) the bank proves that it accepted the payment order in good faith and in compliance with the bank's obligations under the security procedure and any ~~written~~ agreement or instruction of the customer, evidenced ~~in~~by a record, restricting acceptance of payment orders issued in the name of the customer. The bank is not required to follow an instruction that violates ~~a written~~ an agreement evidenced by a record with the customer or notice of which is not received at a time and in a manner affording the bank a reasonable opportunity to act on it before the payment order is accepted.

(c) Commercial reasonableness of a security procedure is a question of law to be determined by considering the wishes of the customer expressed to the bank, the circumstances of the customer known to the bank, including the size, type, and frequency of payment orders normally issued by the customer to the bank, alternative security procedures offered to the customer, and security procedures in general use by customers and receiving banks similarly situated. A security procedure is deemed to be commercially reasonable if (i) the security procedure was chosen by the customer after the bank offered, and the customer refused, a security procedure that was commercially reasonable for that customer, and (ii) the customer expressly agreed in ~~writing~~ a record to be bound by any payment order, whether or not authorized, issued in its name and accepted by the bank in compliance with the bank's obligations under the security procedure chosen by the customer.

\* \* \*

#### Official Comment

1. This section is discussed in the Comment following Section 4A-203.

2. In furtherance of medium neutrality, references to "written" and "writing" have been changed to refer to a "record."

1  
2           **Section 4A-203. Unenforceability of Certain Verified Payment Orders.**

3           (a) If an accepted payment order is not, under Section 4A-202(a), an authorized order of a  
4 customer identified as sender, but is effective as an order of the customer pursuant to Section  
5 4A-202(b), the following rules apply:

6                   (1) By express ~~written~~ agreement evidenced by a record, the receiving bank may  
7 limit the extent to which it is entitled to enforce or retain payment of the payment order.

8                   (2) The receiving bank is not entitled to enforce or retain payment of the payment  
9 order if the customer proves that the order was not caused, directly or indirectly, by a person  
10 (i) entrusted at any time with duties to act for the customer with respect to payment orders or the  
11 security procedure, or (ii) who obtained access to transmitting facilities of the customer or who  
12 obtained, from a source controlled by the customer and without authority of the receiving bank,  
13 information facilitating breach of the security procedure, regardless of how the information was  
14 obtained or whether the customer was at fault. Information includes any access device, computer  
15 software, or the like.

16           (b) This section applies to amendments of payment orders to the same extent it applies to  
17 payment orders.

18                                   **Official Comment**

19  
20                   \* \* \*

21  
22           3.       Subsection (b) of Section 4A-202 is based on the assumption that losses due to  
23 fraudulent payment orders can best be avoided by the use of commercially reasonable security  
24 procedures, and that the use of such procedures should be encouraged. The subsection is  
25 designed to protect both the customer and the receiving bank. A receiving bank needs to be able  
26 to rely on objective criteria to determine whether it can safely act on a payment order.  
27 Employees of the bank can be trained to “test” a payment order according to the various steps  
28 specified in the security procedure. The bank is responsible for the acts of these employees.  
29 Subsection (b)(ii) requires the bank to prove that it accepted the payment order in good faith and  
30 “in compliance with the bank’s obligations under the security procedure.” If the fraud was not

1 detected because the bank's employee did not perform the acts required by the security  
2 procedure, the bank has not complied. Subsection (b)(ii) also requires the bank to prove that it  
3 complied with any agreement or instruction that restricts acceptance of payment orders issued in  
4 the name of the customer. If an agreement establishing a security procedure places obligations on  
5 both the sender and the receiving bank, the receiving bank need prove only that it complied with  
6 the obligations placed on the receiving bank. A customer may want to protect itself by imposing  
7 limitations on acceptance of payment orders by the bank. For example, the customer may  
8 prohibit the bank from accepting a payment order that is not payable from an authorized account,  
9 that exceeds the credit balance in specified accounts of the customer, or that exceeds some other  
10 amount. Another limitation may relate to the beneficiary. The customer may provide the bank  
11 with a list of authorized beneficiaries and prohibit acceptance of any payment order to a  
12 beneficiary not appearing on the list. Such limitations may be incorporated into the security  
13 procedure itself or they may be covered by a separate agreement or instruction. In either case, the  
14 bank must comply with the limitations if the conditions stated in subsection (b) are met.  
15 Normally limitations on acceptance would be incorporated into an agreement between the  
16 customer and the receiving bank, but in some cases the instruction might be unilaterally given by  
17 the customer. If standing instructions or an agreement state limitations on the ability of the  
18 receiving bank to act, provision must be made for later modification of the limitations. Normally  
19 this would be done by an agreement that specifies particular procedures to be followed. Thus,  
20 subsection (b) states that the receiving bank is not required to follow an instruction that violates a  
21 ~~written~~ an agreement evidenced by a record. The receiving bank is not bound by an instruction  
22 unless it has adequate notice of it. ~~Subsections (25), (26), and (27) of Section 1-201 apply~~  
23 Section 1-202 applies.

24  
25 Subsection (b)(i) assures that the interests of the customer will be protected by providing  
26 an incentive to a bank to make available to the customer a security procedure that is  
27 commercially reasonable. If a commercially reasonable security procedure is not made available  
28 to the customer, subsection (b) does not apply. The result is that subsection (a) applies and the  
29 bank acts at its peril in accepting a payment order that may be unauthorized. Prudent banking  
30 practice may require that security procedures be utilized in virtually all cases except for those in  
31 which personal contact between the customer and the bank eliminates the possibility of an  
32 unauthorized order. The burden of making available commercially reasonable security  
33 procedures is imposed on receiving banks because they generally determine what security  
34 procedures can be used and are in the best position to evaluate the efficacy of procedures offered  
35 to customers to combat fraud. The burden on the customer is to supervise its employees to assure  
36 compliance with the security procedure and to safeguard confidential security information and  
37 access to transmitting facilities so that the security procedure cannot be breached.

38  
39 4. The principal issue that is likely to arise in litigation involving subsection (b) is  
40 whether the security procedure in effect when a fraudulent payment order was accepted was  
41 commercially reasonable. In considering this issue, a court will need to consider the totality of  
42 the security procedure, including each party's obligations under the procedure. The concept of  
43 what is commercially reasonable in a given case is flexible. Verification entails labor and  
44 equipment costs that can vary greatly depending upon the degree of security that is sought. A  
45 customer that transmits very large numbers of payment orders in very large amounts may desire  
46 and may reasonably expect to be provided with state-of-the-art procedures that provide

1 maximum security. But the expense involved may make use of a state-of-the-art procedure  
2 infeasible for a customer that normally transmits payment orders infrequently or in relatively low  
3 amounts. Another variable is the type of receiving bank. It is reasonable to require large money  
4 center banks to make available state-of-the-art security procedures. On the other hand, the same  
5 requirement may not be reasonable for a small country bank. A receiving bank might have  
6 several security procedures that are designed to meet the varying needs of different customers.  
7 The type of payment order is another variable. For example, in a wholesale wire transfer, each  
8 payment order is normally transmitted electronically and individually. A testing procedure will  
9 be individually applied to each payment order. In funds transfers to be made by means of an  
10 automated clearing house many payment orders are incorporated into an electronic device such  
11 as a magnetic tape that is physically delivered. Testing of the individual payment orders is not  
12 feasible. Thus, a different kind of security procedure must be adopted to take into account the  
13 different mode of transmission.

14  
15 The issue of whether a particular security procedure is commercially reasonable is a  
16 question of law. Whether the receiving bank complied with the procedure is a question of fact. It  
17 is appropriate to make the finding concerning commercial reasonability a matter of law because  
18 security procedures are likely to be standardized in the banking industry and a question of law  
19 standard leads to more predictability concerning the level of security that a bank must offer to its  
20 customers. The purpose of subsection (b) is to encourage banks to institute reasonable safeguards  
21 against fraud but not to make them insurers against fraud. A security procedure is not  
22 commercially unreasonable simply because another procedure might have been better or because  
23 the judge deciding the question would have opted for a more stringent procedure. For example,  
24 the use of a computer program to detect fraud is not commercially unreasonable merely because  
25 it does not detect all fraud or because another system or approach might be more successful at  
26 detecting fraud. The standard is not whether the security procedure is the best available. Rather it  
27 is whether the procedure is reasonable for the particular customer and the particular bank, which  
28 is a lower standard. What is reasonable for a particular customer requires the court to consider  
29 the circumstances of the customer known to the bank, including the size, type, and frequency of  
30 payment orders normally issued by the customer to the bank. Article 4A does not create an  
31 affirmative obligation on the receiving bank to obtain information about its customer. However,  
32 whatever knowledge the bank does have about the customer is relevant in determining the  
33 commercial reasonableness of the security procedure. On the other hand, a A security procedure  
34 that fails to meet prevailing standards of good banking practice applicable to the particular bank  
35 and customer should not be held to be commercially reasonable. Subsection (c) states factors to  
36 be considered by the judge in making the determination of commercial reasonableness. The  
37 reasonableness of a security procedure is to be determined at the time that a payment order is  
38 processed, not at the time the customer and the bank agree to the security procedure.  
39 Accordingly, a security procedure that was reasonable when agreed to might become  
40 unreasonable as technologies emerge, prevailing practices change, or the bank acquires  
41 knowledge about the customer. Sometimes an informed customer refuses a security procedure  
42 that is commercially reasonable and suitable for that customer and insists on using a higher-risk  
43 procedure because it is more convenient or cheaper. In that case, under the last sentence of  
44 subsection (c), the customer has voluntarily assumed the risk of failure of the procedure and  
45 cannot shift the loss to the bank. But this result follows only if the customer expressly agrees in  
46 writing a record to assume that risk. It is implicit in the last sentence of subsection (c) that a bank

1 that accedes to the wishes of its customer in this regard is not acting in bad faith by so doing so  
2 long as the customer is made aware of the risk. In all cases, however, a receiving bank cannot get  
3 the benefit of subsection (b) unless it has made available to the customer a security procedure  
4 that is commercially reasonable and suitable for use by that customer. In most cases, the mutual  
5 interest of bank and customer to protect against fraud should lead to agreement to a security  
6 procedure which is commercially reasonable.

7  
8 5. Subsection (b) generally allows a receiving bank to treat a payment order as  
9 authorized by the customer if the bank accepts the payment order in good faith and in  
10 compliance with the bank's obligations under a commercially reasonable, agreed-upon security  
11 procedure. For this purpose, "good faith" requires the exercise of reasonable commercial  
12 standards of fair dealing, see Section 4A-105(a)(6), not the absence of negligence. Consequently,  
13 the bank has no duty, beyond that to which the bank has agreed, to investigate suspicious activity  
14 or to advise its customer of such activity. However, a bank that obtains knowledge that a  
15 customer's operations have been infiltrated or knowledge that the customer is the victim of  
16 identity fraud might not be acting in good faith if the bank, without receiving some assurance  
17 from the customer that the issue has been remediated, thereafter accepts a payment order.

18  
19 5.6. The effect of Section 4A-202(b) is to place the risk of loss on the customer if an  
20 unauthorized payment order is accepted by the receiving bank after verification by the bank in  
21 compliance with a commercially reasonable security procedure. An exception to this result is  
22 provided by Section 4A-203(a)(2). The customer may avoid the loss resulting from such a  
23 payment order if the customer can prove that the fraud was not committed by a person described  
24 in that subsection. Breach of a commercially reasonable security procedure requires that the  
25 person committing the fraud have knowledge of how the procedure works and knowledge of  
26 codes, identifying devices, and the like. That person may also need access to transmitting  
27 facilities through an access device or other software in order to breach the security procedure.  
28 This confidential information must be obtained either from a source controlled by the customer  
29 or from a source controlled by the receiving bank. If the customer can prove that the person  
30 committing the fraud did not obtain the confidential information from an agent or former agent  
31 of the customer or from a source controlled by the customer, the loss is shifted to the bank.  
32 "Prove" is defined in Section 4A-105(a)(7). Because of bank regulation requirements, in this  
33 kind of case there will always be a criminal investigation as well as an internal investigation of  
34 the bank to determine the probable explanation for the breach of security. Because a funds  
35 transfer fraud usually will involve a very large amount of money, both the criminal investigation  
36 and the internal investigation are likely to be thorough. In some cases, there may be an  
37 investigation by bank examiners as well. Frequently, these investigations will develop evidence  
38 of who is at fault and the cause of the loss. The customer will have access to evidence developed  
39 in these investigations and that evidence can be used by the customer in meeting its burden of  
40 proof.

41  
42 6.7. The effect of Section 4A-202(b) may also be changed by an agreement meeting  
43 the requirements of Section 4A-203(a)(1). Some customers may be unwilling to take all or part  
44 of the risk of loss with respect to unauthorized payment orders even if all of the requirements of  
45 Section 4A-202(b) are met. By virtue of Section 4A-203(a)(1), a receiving bank may assume all  
46 of the risk of loss with respect to unauthorized payment orders or the customer and bank may

1 agree that losses from unauthorized payment orders are to be divided as provided in the  
2 agreement.

3  
4 7.8. In a large majority of cases the sender of a payment order is a bank. In many cases  
5 in which there is a bank sender, both the sender and the receiving bank will be members of a  
6 funds transfer system over which the payment order is transmitted. Since Section 4A-202(f) does  
7 not prohibit a funds transfer system rule from varying rights and obligations under Section 4A-  
8 202, a rule of the funds transfer system can determine how loss due to an unauthorized payment  
9 order from a participating bank to another participating bank is to be allocated. A funds transfer  
10 system rule, however, cannot change the rights of a customer that is not a participating bank.  
11 Section 4A-501(b). Section 4A-202(f) also prevents variation by agreement except to the extent  
12 stated.

13  
14 9. In furtherance of medium neutrality, references to “written” and “writing” have  
15 been changed to refer to a “record.”

16  
17 \* \* \*

18  
19 **Section 4A-206. Transmission of Payment Order Through Funds-Transfer or**  
20 **Other Communication System.**

21 (a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer  
22 system or other third-party communication system for transmittal to the bank, the system is  
23 deemed to be an agent of the sender for the purpose of transmitting the payment order to the  
24 bank. If there is a discrepancy between the terms of the payment order transmitted to the system  
25 and the terms of the payment order transmitted by the system to the bank, the terms of the  
26 payment order of the sender are those transmitted by the system. This section does not apply to a  
27 funds-transfer system of the Federal Reserve Banks.

28 (b) This section applies to cancellations and amendments of payment orders to the same  
29 extent it applies to payment orders.

30 **Official Comment**

31  
32 1. A payment order may be issued to a receiving bank directly by delivery of a  
33 ~~writing or electronic device record~~ or by an oral or electronic communication. If an agent of the  
34 sender is employed to transmit orders on behalf of the sender, the sender is bound by the order  
35 transmitted by the agent on the basis of agency law. Section 4A-206 is an application of that

1 principle to cases in which a funds transfer or communication system acts as an intermediary in  
2 transmitting the sender's order to the receiving bank. The intermediary is deemed to be an agent  
3 of the sender for the purpose of transmitting payment orders and related messages for the sender.  
4 Section 4A-206 deals with error by the intermediary.

5  
6 \* \* \*

#### 7 **Reporter's Note**

8  
9 *No change.* No change is proposed to Section 4A-206, which is provided for  
10 convenience.

#### 11 **Section 4A-207. Misdescription of Beneficiary.**

12  
13 \* \* \*

14 (c) If (i) a payment order described in subsection (b) is accepted, (ii) the originator's  
15 payment order described the beneficiary inconsistently by name and number, and (iii) the  
16 beneficiary's bank pays the person identified by number as permitted by subsection (b)(1), the  
17 following rules apply:

18 (1) If the originator is a bank, the originator is obliged to pay its order.

19 (2) If the originator is not a bank and proves that the person identified by number  
20 was not entitled to receive payment from the originator, the originator is not obliged to pay its  
21 order unless the originator's bank proves that the originator, before acceptance of the originator's  
22 order, had notice that payment of a payment order issued by the originator might be made by the  
23 beneficiary's bank on the basis of an identifying or bank account number even if it identifies a  
24 person different from the named beneficiary. Proof of notice may be made by any admissible  
25 evidence. The originator's bank satisfies the burden of proof if it proves that the originator,  
26 before the payment order was accepted, signed a ~~writing~~ record stating the information to which  
27 the notice relates.

28 \* \* \*



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1                   \* \* \*

2                                   **Official Comment**

3                   In furtherance of medium neutrality, the reference to -a “writing” has been changed to  
4 refer to a “record.”

5                   \* \* \*

6                                   **Section 4A-210. Rejection of Payment Order.**

7                   (a) A payment order is rejected by the receiving bank by a notice of rejection transmitted  
8  
9 to the sender orally, ~~electronically~~, or in ~~writing~~ a record. A notice of rejection need not use any  
10 particular words and is sufficient if it indicates that the receiving bank is rejecting the order or  
11 will not execute or pay the order. Rejection is effective when the notice is given if transmission  
12 is by a means that is reasonable in the circumstances. If notice of rejection is given by a means  
13 that is not reasonable, rejection is effective when the notice is received. If an agreement of the  
14 sender and receiving bank establishes the means to be used to reject a payment order, (i) any  
15 means complying with the agreement is reasonable and (ii) any means not complying is not  
16 reasonable unless no significant delay in receipt of the notice resulted from the use of the  
17 noncomplying means.

18                   \* \* \*

19                                   **Official Comment**

20                   \* \* \*

21                   5. In furtherance of medium neutrality, the reference to a “writing” has been  
22 changed to refer to a “record.”

23                                   **Section 4A-211. Cancellation and Amendment of Payment Order.**

24                   (a) A communication of the sender of a payment order cancelling or amending the order  
25  
26 may be transmitted to the receiving bank orally, ~~electronically~~, or in ~~writing~~ a record. If a

1 security procedure is in effect between the sender and the receiving bank, the communication is  
2 not effective to cancel or amend the order unless the communication is verified pursuant to the  
3 security procedure or the bank agrees to the cancellation or amendment.

4 \* \* \*

#### 5 **Official Comment**

6 \* \* \*

7  
8  
9 2. Subsection (a) allows a cancellation or amendment of a payment order to be  
10 communicated to the receiving bank “orally, ~~electronically~~, or in writing a record.” The quoted  
11 phrase is consistent with the language of Section 4A-103(a) applicable to payment orders.  
12 Cancellations and amendments are normally subject to verification pursuant to security  
13 procedures to the same extent as payment orders. Subsection (a) recognizes this fact by  
14 providing that in cases in which there is a security procedure in effect between the sender and the  
15 receiving bank the bank is not bound by a communication cancelling or amending an order  
16 unless verification has been made. This is necessary to protect the bank because under subsection  
17 (b) a cancellation or amendment can be effective by unilateral action of the sender. Without  
18 verification the bank cannot be sure whether the communication was or was not effective to  
19 cancel or amend a previously verified payment order.

20  
21 \* \* \*

22 9. In furtherance of medium neutrality, the reference to a “writing” has been  
23 changed to refer to a “record.”

24 \* \* \*

#### 25 26 27 **Section 4A-305. -Liability for Late or Improper Execution or Failure to Execute** 28 **Payment Order.**

29 (a) If a funds transfer is completed but execution of a payment order by the receiving  
30 bank in breach of Section 4A-302 results in delay in payment to the beneficiary, the bank is  
31 obliged to pay interest to either the originator or the beneficiary of the funds transfer for the  
32 period of delay caused by the improper execution. Except as provided in subsection (c),  
33 additional damages are not recoverable.

34 (b) If execution of a payment order by a receiving bank in breach of Section 4A-302

1 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank  
2 designated by the originator, or (iii) issuance of a payment order that does not comply with the  
3 terms of the payment order of the originator, the bank is liable to the originator for its expenses  
4 in the funds transfer and for incidental expenses and interest losses, to the extent not covered by  
5 subsection (a), resulting from the improper execution. Except as provided in subsection (c),  
6 additional damages are not recoverable.

7 (c) In addition to the amounts payable under subsections (a) and (b), damages, including  
8 consequential damages, are recoverable to the extent provided in an express ~~written~~ agreement of  
9 the receiving bank, evidenced by a record.

10 (d) If a receiving bank fails to execute a payment order it was obliged by express  
11 agreement to execute, the receiving bank is liable to the sender for its expenses in the transaction  
12 and for incidental expenses and interest losses resulting from the failure to execute. Additional  
13 damages, including consequential damages, are recoverable to the extent provided in an express  
14 ~~written~~ agreement of the receiving bank, evidenced by a record, but are not otherwise  
15 recoverable.

16 (e) Reasonable attorney's fees are recoverable if demand for compensation under  
17 subsection (a) or (b) is made and refused before an action is brought on the claim. If a claim is  
18 made for breach of an agreement under subsection (d) and the agreement does not provide for  
19 damages, reasonable attorney's fees are recoverable if demand for compensation under  
20 subsection (d) is made and refused before an action is brought on the claim.

21 (f) Except as stated in this section, the liability of a receiving bank under subsections (a)  
22 and (b) may not be varied by agreement.

23 **Official Comment**

1           1.       Subsection (a) covers cases of delay in completion of a funds transfer resulting  
2 from an execution by a receiving bank in breach of Section 4A-302(a). The receiving bank is  
3 obliged to pay interest on the amount of the order for the period of the delay. The rate of interest  
4 is stated in Section 4A-506. With respect to wire transfers (other than ACH transactions) within  
5 the United States, the expectation is that the funds transfer will be completed the same day. In  
6 those cases, the originator can reasonably expect that the originator's account will be debited on  
7 the same day as the beneficiary's account is credited. If the funds transfer is delayed,  
8 compensation can be paid either to the originator or to the beneficiary. The normal practice is to  
9 compensate the beneficiary's bank to allow that bank to compensate the beneficiary by back-  
10 valuing the payment by the number of days of delay. Thus, the beneficiary is in the same  
11 position that it would have been in if the funds transfer had been completed on the same day.  
12 Assume on Day 1, Originator's Bank issues its payment order to Intermediary Bank which is  
13 received on that day. Intermediary Bank does not execute that order until Day 2 when it issues  
14 an order to Beneficiary's Bank which is accepted on that day. Intermediary Bank complies with  
15 subsection (a) by paying one day's interest to Beneficiary's Bank for the account of Beneficiary.

16  
17           2.       Subsection (b) applies to cases of breach of Section 4A-302 involving more than  
18 mere delay. In those cases the bank is liable for damages for improper execution but they are  
19 limited to compensation for interest losses and incidental expenses of the sender resulting from  
20 the breach, the expenses of the sender in the funds transfer and attorney's fees. This subsection  
21 reflects the judgment that imposition of consequential damages on a bank for commission of an  
22 error is not justified.

23  
24           \* \* \*

25  
26           Subsection (c) allows the measure of damages in subsection (b) to be increased by an  
27 express ~~written~~ agreement of the receiving bank, evidenced by a record. An originator's bank  
28 might be willing to assume additional responsibilities and incur additional liability in exchange  
29 for a higher fee.

30  
31           3.       Subsection (d) governs cases in which a receiving bank has obligated itself by  
32 express agreement to accept payment orders of a sender. In the absence of such an agreement  
33 there is no obligation by a receiving bank to accept a payment order. Section 4A-212. The  
34 measure of damages for breach of an agreement to accept a payment order is the same as that  
35 stated in subsection (b). As in the case of subsection (b), additional damages, including  
36 consequential damages, may be recovered to the extent stated in an express ~~written~~ agreement of  
37 the receiving bank, evidenced by a record.

38  
39           4.       Reasonable attorney's fees are recoverable only in cases in which damages are  
40 limited to statutory damages stated in subsection (a), (b) and (d). If additional damages are  
41 recoverable because provided for by an express ~~written~~ agreement, evidenced by a record,  
42 attorney's fees are not recoverable. The rationale is that there is no need for statutory attorney's  
43 fees in the latter case, because the parties have agreed to a measure of damages which may or  
44 may not provide for attorney's fees.

45  
46           5.       The effect of subsection (f) is to prevent reduction of a receiving bank's liability

1 under Section 4A-305.

2  
3 6. In furtherance of medium neutrality, references to a “written” agreement have  
4 been changed to refer to an agreement “evidenced by a record.”

5  
6 \* \* \*

## 7 8 **ARTICLE 5**

### 9 **LETTERS OF CREDIT**

10 \* \* \*

#### 11 **Section 5-104. Formal Requirements.**

12 A letter of credit, confirmation, advice, transfer, amendment, or cancellation may be  
13 issued in any form that is a record and is ~~authenticated (i) by a signature or (ii) in accordance~~  
14 ~~with the agreement of the parties or the standard practice referred to in Section 5-108(e)~~ signed.

#### 15 **Official Comment**

16  
17 1. Neither Section 5-104 nor the definition of letter of credit in Section 5-102(a)(10)  
18 requires inclusion of all the terms that are normally contained in a letter of credit in order for an  
19 undertaking to be recognized as a letter of credit under Article 5. For example, a letter of credit  
20 will typically specify the amount available, the expiration date, the place where presentation  
21 should be made, and the documents that must be presented to entitle a person to honor.  
22 Undertakings that have the formalities required by Section 5-104 and meet the conditions  
23 specified in Section 5-102(a)(10) will be recognized as letters of credit even though they omit  
24 one or more of the items usually contained in a letter of credit.

25  
26 2. The ~~authentication~~ requirement that a record be signed as specified in this section is  
27 authentication or adoption only of the identity of the issuer, confirmer, or adviser. The reference  
28 in the former ~~version~~ text of this section to authentication by agreement of the parties or standard  
29 practice referred to in Section 5-108(e) is no longer necessary because those forms of  
30 authentication are subsumed by the revised and expanded definition of “sign” in Section 1-  
31 201, (b)(37), which is broad and flexible.

32  
33 ~~An authentication agreement may be by system rule, by standard practice, or by direct~~  
34 ~~agreement between the parties. The reference to practice is intended to incorporate future~~  
35 ~~developments in the UCP and other practice rules as well as those that may arise spontaneously~~  
36 ~~in commercial practice.~~

37  
38 3. Many banking transactions, including the issuance of many letters of credit, are  
39 now conducted mostly by electronic means. For example, S.W.I.F.T. is currently used to

1 transmit letters of credit from issuing to advising banks. The letter of credit text so transmitted  
2 may be printed at the advising bank, stamped "original" and provided to the beneficiary in that  
3 form. The printed document may then be used as a way of controlling and recording payments  
4 and of recording and authorizing assignments of proceeds or transfers of rights under the letter of  
5 credit. Nothing in this section should be construed to conflict with that practice.  
6

7 To be a record sufficient to serve as a letter of credit or other undertaking under this  
8 section, data must have a durability consistent with that function. Because consideration is not  
9 required for a binding letter of credit or similar undertaking (Section 5-105) yet those  
10 undertakings are to be strictly construed (Section 5-108), parties to a letter of credit transaction  
11 are especially dependent on the continued availability of the terms and conditions of the letter of  
12 credit or other undertaking. By declining to specify any particular medium in which the letter of  
13 credit must be established or communicated, Section 5-104 leaves room for future developments.  
14

15 \* \* \*

## 16 **Section 5-116. Choice of Law and Forum.**

17 (a) The liability of an issuer, nominated person, or adviser for action or omission is  
18 governed by the law of the jurisdiction chosen by an agreement in the form of a record signed or  
19 otherwise authenticated by the affected parties in the manner provided in Section 5-104 or by a  
20 provision in the person's letter of credit, confirmation, or other undertaking. The jurisdiction  
21 whose law is chosen need not bear any relation to the transaction.

22 (b) Unless subsection (a) applies, the liability of an issuer, nominated person, or adviser  
23 for action or omission is governed by the law of the jurisdiction in which the person is located.  
24 The person is considered to be located at the address indicated in the person's undertaking. If  
25 more than one address is indicated, the person is considered to be located at the address from  
26 which the person's undertaking was issued.

27 (c) For the purpose of jurisdiction, choice of law, and recognition of interbranch letters of  
28 credit, but not enforcement of a judgment, all branches of a bank are considered separate  
29 juridical entities and a bank is considered to be located at the place where its relevant branch is  
30 considered to be located under this subsection (d).

(d) A branch of a bank is considered to be located at the address indicated in the branch's undertaking. If more than one address is indicated, the branch is considered to be located at the address from which the undertaking was issued.

~~(e)~~ (e) Except as otherwise provided in this subsection, the liability of an issuer, nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or other undertaking is expressly made subject. If (i) this article would govern the liability of an issuer, nominated person, or adviser under subsection (a) or (b), (ii) the relevant undertaking incorporates rules of custom or practice, and (iii) there is conflict between this article and those rules as applied to that undertaking, those rules govern except to the extent of any conflict with the nonvariable provisions specified in Section 5-103(c).

~~(d)~~ (f) If there is conflict between this article and Article 3, 4, 4A, or 9, this article governs.

(e) (g) The forum for settling disputes arising out of an undertaking within this article may be chosen in the manner and with the binding effect that governing law may be chosen in accordance with subsection (a).

## Official Comment

1. Subsection (a) refers to a record signed by the affected parties. The former reference to an authentication pursuant to an agreement of the parties or standard practice is no longer necessary in view of the revised definition of “sign” in Section 1-201. See Section 5-104, Comment 2.

4. 2. Although it would be possible for the parties to agree otherwise, the law normally chosen by agreement under subsection (a) and that provided in the absence of agreement under subsection (b) is the substantive law of a particular jurisdiction not including the choice of law principles of that jurisdiction. Thus, two parties, an issuer and an applicant, both located in Oklahoma might choose the law of New York. Unless they agree otherwise, the section anticipates that they wish the substantive law of New York to apply to their transaction and they do not intend that a New York choice of law principle might direct a court to Oklahoma law. By the same token, the liability of an issuer located in New York is governed by New York



1 substantive law -- in the absence of agreement -- even in circumstances in which choice of law  
2 principles found in the common law of New York might direct one to the law of another State.  
3 Subsection (b) states the relevant choice of law principles and it should not be subordinated to  
4 some other choice of law rule. Within the States of the United States *renvoi* will not be a  
5 problem once every jurisdiction has enacted Section 5-116 because every jurisdiction will then  
6 have the same choice of law rule and in a particular case all choice of law rules will point to the  
7 same substantive law.

8  
9 Subsection (b) does not state a choice of law rule for the “liability of an applicant.”  
10 However, subsection (b) does state a choice of law rule for the liability of an issuer, nominated  
11 person, or adviser, and since some of the issues in suits by applicants against those persons  
12 involve the “liability of an issuer, nominated person, or adviser,” subsection (b) states the  
13 choice of law rule for those issues. Because an issuer may have liability to a confirmer both as  
14 an issuer (Section 5-108(a), Comment 5 to Section 5-108) and as an applicant (Section 5-107(a),  
15 Comment 1 to Section 5-107, Section 5-108(i)), subsection (b) may state the choice of law rule  
16 for some but not all of the issuer's liability in a suit by a confirmer.

17  
18 3. The last sentence of former subsection (b) is now ~~placed~~ in a new subsection (c)  
19 and a new subsection (d) ~~is~~ has been added. These revisions ~~are~~ were necessary to eliminate a  
20 potential ambiguity arising from the first sentence of subsection (b). The first sentence has been  
21 construed incorrectly as meaning that the last sentence, which recognizes the separateness of  
22 bank branches for the specified purposes, is inapplicable when a governing law has been chosen  
23 pursuant to subsection (a). These amendments ~~would~~ reject that construction and ~~override~~  
24 ~~eases~~ reject decisions such as *Zeeco, Inc. v. JPMorgan Chase Bank*, Case No. 17 -CV-384-JED-  
25 FHM, 2018 WL 1414119 (N.D. Okla. Mar. 21, 2018), *amending opinion dated March 20, 2018*,  
26 *both opinions vacated*, 2019 WL 3543081, 2019 U.S. Dist. LEXIS 133756 (Feb. 8, 2019).

27  
28 4. Because the confirmer or other nominated person may choose different law from  
29 that chosen by the issuer or may be located in a different jurisdiction and fail to choose law, it is  
30 possible that a confirmer or nominated person may be obligated to pay (under their law) but will  
31 not be entitled to payment from the issuer (under its law). Similarly, the rights of an  
32 unreimbursed issuer, confirmer, or nominated person against a beneficiary under Section 5-109,  
33 5-110, or 5-117, will not necessarily be governed by the same law that applies to the issuer's or  
34 confirmer's obligation upon presentation. Because the UCP and other practice are incorporated  
35 in most international letters of credit, disputes arising from different legal obligations to honor  
36 have not been frequent. Since Section 5-108 incorporates standard practice, these problems  
37 should be further minimized -- at least to the extent that the same practice is and continues to be  
38 widely followed.

39  
40 5. This section does not permit what is now authorized by the nonuniform Section 5-  
41 102(4) in New York. Under the current law in New York a letter of credit that incorporates the  
42 UCP is not governed in any respect by Article 5. Under revised Section 5-116 letters of credit  
43 that incorporate the UCP or similar practice will still be subject to Article 5 in certain respects.  
44 First, incorporation of the UCP or other practice does not override the nonvariable terms of  
45 Article 5. Second, where there is no conflict between Article 5 and the relevant provision of the  
46 UCP or other practice, both apply. Third, practice provisions incorporated in a letter of credit

1 will not be effective if they fail to comply with Section 5-103(c). Assume, for example, that a  
2 practice provision purported to free a party from any liability unless it were “grossly negligent”  
3 or that the practice generally limited the remedies that one party might have against another.  
4 Depending upon the circumstances, that disclaimer or limitation of liability might be ineffective  
5 because of Section 5-103(c).

6  
7 Even though Article 5 is generally consistent with UCP 500, it is not necessarily  
8 consistent with other rules or with versions of the UCP that may be adopted after Article 5’s  
9 revision, or with other practices that may develop. The phrase in subsection 5-116(e), “rules of  
10 custom or practice, such as the Uniform Customs and Practice for Documentary Credits,”  
11 includes the International Standby Practices and the Uniform Rules for Demand Guarantees, as  
12 well as the Supplement to the Uniform Customs and Practice for Documentary Credits for  
13 Electronic Presentation. Rules of practice incorporated in the letter of credit or other undertaking  
14 are those in effect when the letter of credit or other undertaking is issued. Except in the unusual  
15 cases discussed in the immediately preceding paragraph, practice adopted in a letter of credit will  
16 override the rules of Article 5 and the parties to letter of credit transactions must be familiar with  
17 practice ~~(such as future versions of the UCP)~~ that is explicitly adopted in letters of credit.

18  
19 4. 6. In several ways Article 5 conflicts with and overrides similar matters governed by  
20 Articles 3 and 4. For example, “draft” is more broadly defined in letter of credit practice than  
21 under Section 3-104. The time allowed for honor and the required notification of reasons for  
22 dishonor are different in letter of credit practice than in the handling of documentary and other  
23 drafts under Articles 3 and 4.

24  
25 5. 7. Subsection ~~(e)~~ (g) must be read in conjunction with existing law governing  
26 subject matter jurisdiction. If the local law restricts a court to certain subject matter jurisdiction  
27 not including letter of credit disputes, subsection ~~(e)~~ (g) does not authorize parties to choose that  
28 forum. For example, the parties' agreement under Section ~~5-116(e)~~ 5-116(g) would not confer  
29 jurisdiction on a probate court to decide a letter of credit case.

30  
31 If the parties choose a forum under subsection ~~(e)~~ (g) and if ~~—because of other law—~~  
32 —that forum will not take jurisdiction, the parties’ agreement or undertaking should then be  
33 construed (for the purpose of forum selection) as though it did not contain a clause choosing a  
34 particular forum. That result is necessary to avoid sentencing the parties to eternal purgatory  
35 where neither the chosen State nor the State which would have jurisdiction but for the clause will  
36 take jurisdiction ~~—the former in disregard of the clause and the latter in honor of the clause.~~

37  
38 \* \* \*

## 39 ARTICLE 7

### 40 DOCUMENTS OF TITLE

#### 41 Section 7-102. Definitions and Index of Definitions.

42 (a) In this article, unless the context otherwise requires:

1

2

5

7

8

9

1

## 3

4

6

8

8

1  
2 \* \* \*

3  
4 5. ~~The definitions of “record” and “sign” are included to facilitate electronic~~  
5 ~~mediums. See comment 9 to Section 9-102 discussing “record” and the comment to amended~~  
6 ~~Section 2-103 discussing “sign.” Paragraphs (10) and (11) of subsection (a) have been deleted as~~  
7 ~~unnecessary. Equivalent definitions of “record” and “sign” are now included in Section 1-201.~~  
8

9 \* \* \*

10  
11 **Section 7-106. Control of Electronic Document of Title.<sup>1</sup>**

12 (a) **General rule.** A person has control of an electronic document of title if a system  
13 employed for evidencing the transfer of interests in the electronic document reliably establishes  
14 that person as the person to which the electronic document was issued or transferred.

15 (b) **Single authoritative copy.** A system satisfies subsection (a), and a person ~~is~~  
16 ~~deemed to have~~ has control of an electronic document of title, if the document is created, stored,  
17 and ~~assigned~~ transferred in such a manner that:

18 (1) a single authoritative copy of the document exists which is unique,  
19 identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

20 (2) the authoritative copy identifies the person asserting control as:  
21 (A) the person to which the document was issued; or  
22 (B) if the authoritative copy indicates that the document has been  
23 transferred, the person to which the document was most recently transferred;

24 (3) the authoritative copy is communicated to and maintained by the person  
25 asserting control or its designated custodian;

26 (4) copies or amendments that add or change an identified ~~assignee~~ transferee of

---

<sup>1</sup> Subsection captions are included ~~in this draft~~ [here](#) for convenience. They will be deleted in the final text because, unlike Articles 9 and 12, the UCC makes no provision for subsection captions in Article 7.

1 the authoritative copy can be made only with the consent of the person asserting control;

2 (5) each copy of the authoritative copy and any copy of a copy is readily  
3 identifiable as a copy that is not the authoritative copy; and

4 (6) any amendment of the authoritative copy is readily identifiable as authorized  
5 or unauthorized.

6 **(c) [One or more authoritative electronic copies.]** A system satisfies subsection (a),  
7 and a person has control of an electronic document of title, if an electronic copy of the document,  
8 a record attached to or logically associated with the electronic copy, or a system in which the  
9 electronic copy is recorded:

10 (1) enables the person readily to identify each electronic copy as an authoritative  
11 copy or nonauthoritative copy;

12 (2) enables the person readily to identify itself in any way, including by name,  
13 identifying number, cryptographic key, office, or account number, as the person to which each  
14 authoritative electronic copy was issued or transferred; and

15 (3) gives the person exclusive power, subject to subsection (h), to:

16 (A) prevent others from adding or changing the person to which each  
17 authoritative electronic copy has been issued or transferred; and

18 (B) transfer control of each authoritative electronic copy.

19 **(d) [Meaning of exclusive.]** ~~A~~ Subject to subsection (e), a power is exclusive under  
20 subsection (c)(3)(A) and (B), even if:

21 (1) the authoritative electronic copy, a record attached to or logically associated  
22 with the authoritative electronic copy, or a system in which the authoritative electronic copy is  
23 recorded limits the use of the document of title or has a protocol that is programmed to cause a

1 change, including a transfer or loss of control; or

2 (2) the power is shared with another person.

3 (e) ~~[When person does power is not share power.]~~ shared with another person.] A  
4 power of a person ~~does~~ is not ~~share a power~~ shared with another person under subsection (d)(2)  
5 and the person's power is not exclusive if:

6 (1) the person can exercise a power only if the power also is exercised by the  
7 other person; and

8 (2) the other person either:

9 (A) can exercise the power without exercise of the power by the person; or

10 (B) is the transferor to the person of an interest in the document of title.

11 (f) [Presumption of exclusivity of certain powers.] If a person has the powers specified  
12 in subsection (c)(3)(A) and (B), the powers are presumed to be exclusive.

13 (g) [Obtaining control through another person.] A person has control of an electronic  
14 document of title if another person, other than the transferor to the person of an interest in the  
15 document:

16 (1) has control of the document and acknowledges that it has control on behalf of  
17 the person; or

18 (2) obtains control of the document after having acknowledged that it will obtain  
19 control of the document on behalf of the person.

20 (h) [No requirement to acknowledge.] A person that has control under this section is  
21 not required to acknowledge that it has or will obtain control on behalf of another person.

22 (i) [No duties or confirmation.] If a person acknowledges that it has or will obtain  
23 control on behalf of another person, unless the person otherwise agrees or law other than this

1 article otherwise provides, the person does not owe any duty to the other person and is not  
2 required to confirm the acknowledgment to any other person.

### 3 **Official Comment**

4 **Prior Uniform Statutory Provision:** Uniform Electronic Transactions Act Section 16.

#### 5 **Purpose:**

6  
7  
8 1. The revision of this section on control of electronic documents of title  
9 ~~preserves~~preserved subsection (a), the general rule, and subsection (b), the “safe harbor” from  
10 the former section. The minor stylistic revisions are not substantive. The other revisions  
11 ~~add~~added an additional “safe harbor” in subsection (c), explanatory provisions relating to  
12 exclusivity of powers in subsections (d) and (e), a presumption of exclusivity of powers in  
13 subsection (f), and a new subsection (fg) on control through another person. The requirements  
14 for obtaining control under subsection (c) ~~are~~were inspired by Section 12-105 on control of  
15 controllable electronic records. See Section 12-105 and Comments.

16  
17 2. The This section defines “control” for electronic documents of title. Subsections  
18 (a) and (b) ~~and derives its rules~~ derive from the Uniform Electronic Transactions Act § Section  
19 16 on transferrable records. Unlike under UETA § Section 16, however, a document of title may  
20 be reissued in an alternative medium pursuant to Section 7-105. -At any point in time in which a  
21 document of title is in electronic form, the control concept of this section is relevant. As under  
22 UETA § Section 16, the control concept embodied in this section provides the legal framework  
23 for developing systems for electronic documents of title.

24  
25 ~~2. 3.~~ Control of an electronic document of title substitutes for the concept of  
26 indorsement (for negotiable documents) and possession in the tangible document of title context.  
27 (for tangible documents of title). See Section 7-501. A person with a tangible document of title  
28 delivers the document by voluntarily transferring possession and a person with an electronic  
29 document of title delivers the document by voluntarily transferring control. -(Delivery is defined  
30 in Section 1-201(b)(15)).

31  
32 ~~3. 4.~~ Subsection (a) sets forth the general rule that the “system employed for  
33 evidencing the transfer of interests in the electronic document reliably establishes that person as  
34 the person to which the electronic document was issued or transferred.” -The key to having a  
35 system that satisfies this test is that identity of the person to which the document was issued or  
36 transferred must be reliably established. -Of great importance to the functioning of the control  
37 concept under subsection (a), as well as under the subsection (b) safe harbor, is to be able to  
38 demonstrate and identify, at any point in time, the person entitled under the electronic document.  
39 For example, a carrier may issue an electronic bill of lading by having the required information  
40 in a database that is encrypted and accessible by virtue of a password. -If the computer system in  
41 which the required information is maintained identifies the person as the person to which the  
42 electronic bill of lading was issued or transferred, that person has control of the electronic  
43 document of title. -That identification may be by virtue of passwords or other encryption



1 methods. -Registry systems may satisfy this test.- For example, see the electronic warehouse  
2 receipt system established pursuant to 7 C.F.R. Part 735. This Article leaves to the market place  
3 the development of sufficient technologies and business practices that will meet the test.  
4

5 An electronic document of title is evidenced by a record consisting of information stored  
6 in an electronic medium. -Section 1-201(b)(16A) (defining “electronic”), (31) (defining  
7 “record”).- For example, a record in a computer database could be an electronic document of title  
8 assuming that it otherwise meets the definition of document of title. -To the extent that third  
9 parties wish to deal in paper mediums, Section 7-105 provides a mechanism for exiting the  
10 electronic environment by having the issuer reissue the document of title in a tangible medium.  
11 Thus if a person entitled to enforce an electronic document of title causes the information in the  
12 record to be printed onto paper -without the issuer’s involvement in issuing the document of title  
13 pursuant to Section 7-105, that paper is not a document of title.  
14

15 4. 5. Subsection (a) sets forth the general test for control. ~~Subsection~~ Subsections (b)  
16 ~~and (c) sets set~~ forth a safe harbor test ~~tests~~ that, if satisfied, ~~results result~~ in control under the  
17 general test in subsection (a).- ~~The test in subsection (b) is also used in Section 9-105 although~~  
18 ~~Section 9-105 does not include the general test of subsection (a).~~ -Under subsection (b), at any  
19 point in time, a party should be able to identify the single authoritative copy which is unique and  
20 identifiable as the authoritative copy. -This does not mean that once created ~~that~~ the authoritative  
21 copy need be static and never moved or copied from its original location. -To the extent that  
22 backup systems exist which result in multiple copies, the key to this idea is that at any point in  
23 time, the one authoritative copy needs to be unique and identifiable.  
24

25 Parties may not by contract provide that control exists. -The test for control is a factual  
26 test that depends upon whether the general test in subsection (a) or the safe harbor in subsection  
27 (b) ~~or subsection (c)~~ is satisfied.  
28

29 5. 6. Article 7 has historically provided for rights under documents of title and rights of  
30 transferees of documents of title as those rights relate to the goods covered by the document.  
31 Third parties may possess or have control of documents of title.- While misfeasance or  
32 negligence in failure to transfer or misdelivery of the document by those third parties may create  
33 serious issues, this Article has never dealt with those issues as it relates to tangible documents of  
34 title, preferring to leave those issues to the law of contracts, agency and tort law. -In the  
35 electronic document of title regime, third party registry systems ~~are just beginning to develop.~~ It  
36 ~~is very difficult to write rules regulating those third parties without some definitive sense of how~~  
37 ~~the third party registry systems will be structured.~~ Systems that are evolving to date tend to be  
38 “closed” systems in which all participants must sign on to the master agreement which provides  
39 for rights as against the registry system as well as rights among the members. -In those closed  
40 systems, the document of title never leaves the system so the parties rely upon the master  
41 agreement as to rights against the registry for its failures in dealing with the document. This  
42 article contemplates that those “closed” systems will continue to evolve and that the control  
43 mechanism in this statute provides a method for the participants in the closed system to achieve  
44 the benefits of obtaining control allowed by this article. This article also contemplates that  
45 parties will evolve open systems where parties need not be subject to a master agreement. -In an  
46 open system a party that is expecting to obtain rights through an electronic document may not be



1 ~~a party to the master agreement.~~ continue to evolve. To the extent that ~~open~~ these systems evolve  
2 by use of the control ~~concept~~ concepts contained in this section, the law of contracts, agency, and  
3 torts as it applies to the registry's misfeasance or negligence concerning the transfer of control of  
4 the electronic document will allocate the risks and liabilities of the parties as that other law now  
5 does so for third parties who hold tangible documents and fail to deliver the documents.

7 7. The subsection (c) "safe harbor" generally follows Section 12-105 for control of  
8 controllable electronic records as well as revised Section 9-105 on control of chattel paper  
9 evidenced by electronic records. See generally Sections 9-105 and 12-105 and Comments. It  
10 differs from subsection (b), which (as ~~explained~~noted above) is based on a "single authoritative  
11 copy" of an electronic document of title and so is unavailable when the relevant record is  
12 maintained on a blockchain or other distributed ledger. The utility of distributed ledger  
13 technology (including blockchain technology) depends on there being multiple authoritative  
14 copies of ~~an~~ an electronic record. It is important to note that compliance with the ~~new~~ conditions  
15 for control in subsection (c) also would satisfy the conditions provided in subsection (b).  
16 However, subsection (b) ~~has been~~was retained out of an abundance of caution and to provide  
17 assurances that existing systems for control of electronic documents of title ~~will~~ continue to be  
18 viable ~~after the revised Section 7-106 becomes effective.~~ The ~~new~~ conditions for "control" in  
19 subsection (c) ~~are meant to~~ reflect the functions that possession serves with respect to writings,  
20 but in a more accurate and technologically flexible way than ~~does~~do the ~~current~~  
21 ~~definition~~conditions in subsection (b).

22  
23 8. Under subsection (c), to obtain control of an electronic document of title a person  
24 must be able to identify each electronic copy as authoritative or nonauthoritative and identify  
25 itself as the person to which each authoritative electronic copy has been issued or transferred. In  
26 addition, the person must have the exclusive power to prevent others from adding or changing an  
27 identified person to which each authoritative electronic copy has been issued or transferred and  
28 to transfer control of each authoritative copy. However, once it is established that a person has  
29 received those powers, subsection (f) provides a presumption of exclusivity. Consequently, a  
30 person asserting control need not prove exclusivity in order to make out a *prima facie* case.  
31 Application of the presumption will be governed also by Section 1-206 (effects of a presumption  
32 under the UCC) and applicable non-UCC law (including rules of procedure and evidence). In  
33 addition, subsection (d) contains two qualifications of the term "exclusive" as used in subsection  
34 (~~a~~)(1)(B)(3). A power can be "exclusive" under subsection (~~a~~)(1)(B)(3) even if one or both of  
35 these qualifications apply.

36  
37 Subsection (e) provides that in certain circumstances a power is not shared within the  
38 meaning of subsection (d)(2) ~~and, consequently,~~ ), the relaxation of the exclusivity requirement  
39 provided by subsection (d)(2) does not apply, and, consequently, a person's power is not  
40 exclusive. Subsection (e) provides that a person does not share an exclusive power with another  
41 person if the person can exercise the power only with the other person's cooperation (subsection  
42 (e)(1)) but the other person either (i) can exercise of the power ~~unilaterally~~ without the person's  
43 cooperation (subsection (e)(2)(A)) or (ii) is the transferor to the person (transferee) of an interest  
44 in the ~~controllable electronic record, document of title~~ (subsection (e)(2)(B)). It follows that a  
45 person ~~in that situation~~ to which subsection (e) applies does not have control ~~because it does not~~  
46 ~~have the requisite~~ based on its exclusive power. Concerning the exclusivity of powers, including

(although it might have control through another person under subsection (g), discussed below, or if another person having control is acting as the person's agent). As to the rationale for disqualifying a transferee (which includes a secured party in a secured transaction) from a transferor to the transferee, as provided in subsection (e)(2)(B), from the benefit of shared control under subsection (d)(2), and ~~limitations on shared control and for~~ examples, see generally of the operation of subsection (e) (in the context of the similar provision in Section 12-105; Comment), see Section 12-105, Comments 5 and 9.

~~9. Control through another person.~~

~~a.~~

9. Subsection (g) provides for a person to obtain control through the control of another person. It follows ~~draft~~ revisions to the corresponding provisions for control of a security entitlement (Section 8-106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of authoritative electronic copies of records evidencing chattel paper (Section 9-105(fg)), control of electronic money (Section 9-105A(de)), and control of controllable electronic records (Section 12-105(e)). For a brief discussion and background, see Section 12-105, Comment 8. Under subsection (g) for an acknowledgement by another person to be effective to confer control on a person, the other person making the acknowledgment must be one "other than the transferor of an interest in the electronic record" to the person. The rationale for this limitation is discussed in Section 12-105, Comment 9.

~~b.~~ Subsections (h) and (i) derive from Section 9-313(f) and (g). Subsection (h) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, subsection (i) leaves to the agreement of the parties and to any other applicable law any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not required to confirm the acknowledgment to another person.

For example, subsection (g) would apply to give control to a person, Alpha, when another person, Beta, has control of ~~an~~each authoritative electronic document of title and acknowledges that it has control on behalf of Alpha. ~~However, under subsection (h), Beta is not required to so acknowledge. And under subsection (i), even if Beta does so acknowledge, Beta owes no duty to Alpha, unless Beta agrees or other law so provides, and Beta is not required to confirm its acknowledgment to any other person.~~

~~10. Negotiable and nonnegotiable electronic documents of title.~~ This section applies to both negotiable and nonnegotiable electronic documents of title. For negotiable electronic documents of title, "delivery" is a necessary condition for negotiation, and therefore for due negotiation, under Section 7-501(b). "Delivery" of an electronic document of title is defined in Section 1-201(b)(15) as the "voluntary transfer of control." The person in control of a negotiable document, other than pursuant to subsection (g), also is a "holder," as defined in Section 1-201(b)(21)(C). Of course, nonnegotiable documents cannot be negotiated.

A security interest in an electronic document of title, whether negotiable or

1 nonnegotiable, may be perfected by control. Section 9-314(a). But perfection of a security  
2 interest by control in a nonnegotiable document does not perfect a security interest in goods  
3 covered by the document and does not confer on a secured party or other purchaser the status of  
4 a person entitled under the document. See Section 7-102(a)(9) (defining “person entitled under  
5 the document”) and Comment 6. (On perfection of security interests in negotiable documents of  
6 title and goods covered by negotiable and nonnegotiable documents of title, see generally  
7 Section 9-312(a), (c), and (g) and Comment 7.) However, a system for control of electronic  
8 documents in which bailees participate could be designed to provide that a transfer of control to a  
9 purchaser constitutes a reissuance of the document in the name of a secured party under Section  
10 9-312(d)(1) or a notice to the bailee of a security interest under Section 9-312(d)(2). A system  
11 also could provide that a transfer of control constitutes an instruction under the document that  
12 would make the transferee a person entitled [under the document](#).

13  
14 \* \* \*

### 15 **Section 7-403. Obligation of Bailee to Deliver; Excuse.**

16 (a) A bailee shall deliver the goods to a person entitled under a document of title if the  
17 person complies with subsections (b) and (c), unless and to the extent that the bailee establishes  
18 any of the following:

19 (1) delivery of the goods to a person whose receipt was rightful as against the  
20 claimant;

21 (2) damage to or delay, loss, or destruction of the goods for which the bailee is not  
22 liable;

23 (3) previous sale or other disposition of the goods in lawful enforcement of a lien  
24 or on a warehouse’s lawful termination of storage;

25 (4) the exercise by a seller of its right to stop delivery pursuant to Section 2-705  
26 or by a lessor of its right to stop delivery pursuant to Section 2A-526;

27 (5) a diversion, reconsignment, or other disposition pursuant to Section 7-303;

28 (6) release, satisfaction, or any other personal defense against the claimant; or

29 (7) any other lawful excuse.

30 (b) A person claiming goods covered by a document of title shall satisfy the bailee’s lien

1 if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the  
2 charges are paid.

3 (c) Unless a person claiming the goods is a person against which the document of title  
4 does not confer a right under Section 7-503(a):

5 (1) the person claiming under a document shall surrender possession or control of  
6 any outstanding negotiable document covering the goods for cancellation or indication of partial  
7 deliveries; and

8 (2) the bailee shall cancel the document or conspicuously indicate in the  
9 document the partial delivery or the bailee is liable to any person to which the document is duly  
10 negotiated.

### 11 Official Comment

12 \* \* \*

13  
14 5. In addition to compliance with subsection (b), ~~Subsection~~ subsection (c)  
15 conditions the bailee's duty to deliver the goods to a person entitled under a negotiable document  
16 on the surrender of possession or control of the document for cancellation or indication of partial  
17 deliveries. It also states the obvious duty of a bailee to take up a negotiable document or note  
18 partial deliveries conspicuously thereon, and the result of failure in that duty. It is subject to only  
19 one exception, that stated in subsection (a)(1) of this section and in Section 7-503(a). Subsection  
20 (c) is limited to cases of delivery to a claimant; it has no application, for example, where goods  
21 held under a negotiable document are lawfully sold to enforce the bailee's lien.

22  
23 Subsection (c) does not specify any conditions on the duty of the bailee to deliver the  
24 goods covered by a nonnegotiable document to a person entitled, other than the conditions  
25 inherent in the definition of "person entitled under the document." See Section 7-102(a)(9)  
26 (defining "person entitled under the document") and Comment 6.

27  
28 6. When courts are considering subsection (a)(7), "any other lawful excuse," among  
29 others, refers to compliance with court orders under Sections 7-601, 7-602 and 7-603.

### 30 Reporter's Note

31  
32  
33 *No change.* No change is proposed to Section 7-403, which is provided for convenience.

34 \* \* \*



1 right to receive delivery of the goods from the bailee under Section 7-403(a). See Section 7-  
2 102(a)(9) (defining “person entitled under the document”) and Comment 6.

3  
4 Subsection (b)(2) & and (3) require delivery of the goods. Delivery of the goods means  
5 the voluntary transfer of physical possession of the goods. See amended Section 2-103.

6  
7 \* \* \*

## 8 9 **Reporter’s Note**

10 *No change.* No change is proposed to Section 7-504, which is provided for convenience.

11 \* \* \*

## 12 **ARTICLE 8**

### 13 **INVESTMENT SECURITIES**

#### 14 **Prefatory Note to 2022 Article 8 Amendments**

15 ~~Proposed amendments~~Amendments to the official comments to Section 8-102 primarily  
16 serve to make clear that a digital assets such as controllable electronic ~~record~~records,  
17 controllable accounts, and controllable payment intangibles may be ~~a~~ financial ~~asset~~assets  
18 credited to a securities account under Article 8. Revised Section 8-103(h) provides that these  
19 assets may be financial assets only if Section 8-102(a)(9)(iii) applies. See also Section 12-102,  
20 Comment 2. The ~~proposed~~ amendment to Section 8-106(d) on control through another person  
21 conforms that provision to ~~proposed~~ amendments to Sections 7-106 (control of electronic  
22 documents of title), 9-104 (control of deposit accounts~~;~~), and Section 9-105 (control of  
23 authoritative electronic copies of records evidencing chattel paper) and to Sections 9-105A  
24 (control of electronic money) and 12-105 (control of controllable electronic records). The  
25 ~~proposed~~ amendment to Section 8-303 conforms the text on the rights of a protected purchaser  
26 to the corresponding provision for a qualifying purchaser under Article 12. The ~~proposed~~  
27 revision of the official comment to Section 8-501 addresses certain ~~financial assets as~~  
28 ~~to~~circumstances in which both ~~a securities~~an intermediary and its customer have ~~control.~~  
29 ~~These~~powers over financial assets. Under some circumstances such financial assets could be  
30 treated as being held directly by the customer and would not be included in a security  
31 entitlement. Comment 4 to Section 8-505 addresses distributions made with respect to financial  
32 assets as to which there is no issuer.

#### 33 34 **Section 8-102. Definitions and Index of Definitions.**

35 \* \* \*

36 (a) In this ~~article~~Article:

37 \* \* \*

1  
2 (4) “Certificated security” means a security that is represented by a certificate.

3  
4 \* \* \*

5 (6) “Communicate” means to:

6 (i) send a signed ~~writing~~ record; or

7 (ii) transmit information by any mechanism agreed upon by the persons  
8 transmitting and receiving the information.

9 \* \* \*

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

11 (i) a security;

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

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

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

22 \* \* \*

23 (14) “Securities intermediary” means:

24 (i) a clearing corporation; or

25 (ii) a person, including a bank or broker, that in the ordinary course of its

business maintains securities accounts for others and is acting in that capacity.

\* \* \*

(16) “Security certificate” means a certificate representing a security.

\* \* \*

(18) ~~“Uncertificated security”~~ means a security that is not represented by a certificate.

\* \* \*

(b.1) The following definitions in other Articles apply to this Article:

“Controllable account”. Section 9-102.

“Controllable electronic record”. Section 12-102.

“Controllable payment intangible”. Section 9-102.

\* \* \*

### Official Comment

\* \* \*

4. “Certificated security.” The term “certificated security” means a security that is represented by a security certificate.

\* \* \*

6. “Communicate.” The term “communicate” assures that the Article 8 rules will be sufficiently flexible to adapt to changes in information technology. Sending a signed writing always suffices as a communication, but the parties can agree that a different means of transmitting information is to be used. Agreement is defined in Section 1-201(b)(3) as “the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance.” Thus, use of an information transmission method might be found to be authorized by agreement, even though the parties have not explicitly so specified in a formal agreement. The term communicate is used in Sections 8-102(a)(7) (definition of entitlement order), 8-102(a)(11) (definition of instruction), and 8-403 (demand that issuer not register transfer). Also in furtherance of medium neutrality, the reference in paragraph (6)(i) to a “signed writing” has been changed to refer to a “signed record.”



1           9.       “Financial asset.” The definition of “financial asset,” in conjunction with the  
2 definition of “securities account” in Section 8-501, sets the scope of the indirect holding system  
3 rules of Part 5 of Revised Article 8. The Part 5 rules apply not only to securities held through  
4 intermediaries, but also to other financial assets held through intermediaries. The term financial  
5 asset is defined to include not only securities but also a broader category of obligations, shares,  
6 participations, and interests.  
7

8           Having separate definitions of security and financial asset makes it possible to separate  
9 the question of the proper scope of the traditional Article 8 rules from the question of the proper  
10 scope of the ~~new~~ indirect holding system- rules. Some forms of financial assets should be  
11 covered by the indirect holding system rules of Part 5, but not by the rules of Parts 2, 3, and 4.  
12 The term financial asset is used to cover such property. Because the term security entitlement is  
13 defined in terms of financial assets rather than securities, the rules concerning security  
14 entitlements set out in Part 5 of Article 8 and in Revised Article 9 apply to the broader class of  
15 financial assets.  
16

17           The fact that something does or could fall within the definition of financial asset does not,  
18 without more, trigger Article 8 coverage. The indirect holding system rules of Revised Article 8  
19 apply only if the financial asset is in fact held in a securities account, so that the interest of the  
20 person who holds the financial asset through the securities account is a security entitlement.  
21 Thus, questions of the scope of the indirect holding system rules cannot be framed as “Is such-  
22 and-such a ‘financial asset’ under Article 8?” Rather, one must analyze whether the relationship  
23 between an ~~institution~~ intermediary and a person on whose behalf the ~~institution~~ intermediary  
24 holds an asset falls within the scope of the term securities account as defined in Section 8-501.  
25 That question turns in large measure on whether it makes sense to apply the Part 5 rules to the  
26 relationship.  
27

28           It is not necessary for all of the Part 5 rules to be relevant to a particular financial asset  
29 for the relevant property to qualify as a “financial asset” credited to a securities account. Many of  
30 the duties set forth in Part 5 will often be relevant to a digital asset such as a “controllable  
31 electronic record—“ (Section 12-102)), or a “controllable account” or “controllable payment  
32 intangible” (Section 9-102) evidenced by a controllable electronic record, treated as a financial  
33 asset credited to a securities account, including. These duties include the duty to exercise rights  
34 as directed by the entitlement holder, comply with the entitlement holder’s entitlement orders,  
35 and change the position to another form of holding.  
36

37           If the parties agree to treat a digital asset as a financial asset under Article 8 and the  
38 digital asset is in fact held in a securities account for an entitlement holder, the rules applicable to  
39 controllable electronic records under Article 12 would not apply to the entitlement holder’s  
40 security entitlement related to the financial asset. If the financial asset itself is a controllable  
41 electronic record, however, then the rules in Article 12 could apply to the securities  
42 intermediary’s rights with respect to the controllable electronic record if the intermediary holds  
43 the asset directly.  
44

45           The term financial asset is used to refer both to the underlying asset and the particular  
46 means by which ownership of that asset is evidenced. Thus, with respect to a certificated

1 security, the term financial asset may, as context requires, refer either to the interest or obligation  
2 of the issuer or to the security certificate representing that interest or obligation. Similarly, if a  
3 person holds a security or other financial asset through a securities account, the term financial  
4 asset may, as context requires, refer either to the underlying asset or to the person's security  
5 entitlement.

6  
7 \* \* \*

8 14. "Securities intermediary." A "securities intermediary" is a person that in the  
9 ordinary course of its business maintains securities accounts for others and is acting in that  
10 capacity. The most common examples of securities intermediaries would be clearing  
11 corporations holding securities for their participants, banks acting as securities custodians, and  
12 brokers holding securities on behalf of their customers. However, a person need not be such an  
13 entity in order to be a securities intermediary. Because a "securities account" is an account to  
14 which a financial asset is or may be credited under Section 8-501(a) and the definition of  
15 "financial asset" is not limited to securities, a person may be a "securities intermediary" even if  
16 that person does not credit "securities" (as defined in Article 8) to the account. Rather, the  
17 securities accounts that a securities intermediary maintains may consist exclusively of financial  
18 assets described in Section 8-102(a)(9)(ii) and (iii). For example, a cryptocurrency exchange that  
19 holds only cryptocurrencies (and not securities) for customers might be a securities intermediary.  
20 Clearing corporations are listed separately as a category of securities intermediary in  
21 subparagraph (i) even though in most circumstances they would fall within the general definition  
22 in subparagraph (ii). The reason is to simplify the analysis of arrangements such as the NSCC-  
23 DTC system in which NSCC performs the comparison, clearance, and netting function, while  
24 DTC acts as the depository. Because NSCC is a registered clearing agency under the federal  
25 securities laws, it is a clearing corporation and hence a securities intermediary under Article 8,  
26 regardless of whether it is at any particular time or in any particular aspect of its operations  
27 holding securities on behalf of its participants.

28  
29 The terms securities intermediary and broker have different meanings. Broker means a  
30 person engaged in the business of buying and selling securities, as agent for others or as  
31 principal. Securities intermediary means a person maintaining securities accounts for others. A  
32 stockbroker, in the colloquial sense, may or may not be acting as a securities intermediary.

33  
34 The definition of securities intermediary includes the requirement that the person in  
35 question is "acting in the capacity" of maintaining securities accounts for others. This is to take  
36 account of the fact that a particular entity, such as a bank, may act in many different capacities in  
37 securities transactions. A bank may act as a transfer agent for issuers, as a securities custodian  
38 for institutional investors and private investors, as a dealer in government securities, as a lender  
39 taking securities as collateral, and as a provider of general payment and collection services that  
40 might be used in connection with securities transactions. A bank that maintains securities  
41 accounts for its customers would be a securities intermediary with respect to those accounts; but  
42 if it takes a pledge of securities from a borrower to secure a loan, it is not thereby acting as a  
43 securities intermediary with respect to the pledged securities, since it holds them for its own  
44 account rather than for a customer. In other circumstances, those two functions might be  
45 combined. For example, if the bank is a government securities dealer it may maintain securities

1 accounts for customers and also provide the customers with margin credit to purchase or carry  
2 the securities, in much the same way that brokers provide margin loans to their customers.

3  
4 The definition of securities intermediary includes the requirement that the person in  
5 question “in the ordinary course of its business maintain securities accounts for others”. This  
6 “ordinary course” requirement does not have a fixed quantitative requirement and is determined  
7 by the facts of each case ~~and law other than the UCC may determine who may legally engage in~~  
8 ~~such business.~~ Thus, a person need not necessarily satisfy a specified threshold of activity or  
9 necessarily have a minimum number of customers. Law other than the UCC may determine who  
10 may legally engage in such a business.

11  
12 \* \* \*

13  
14 16. “Security certificate.” The term “security~~”~~” refers to the underlying asset, e.g.,  
15 1000 shares of common stock of Acme, Inc. The term ~~”~~“security certificate~~”~~” refers to- the paper  
16 certificates that have traditionally been used to embody -the underlying intangible interest.

17  
18 \* \* \*

19  
20 18. “Uncertificated security.” The term ~~”~~“uncertificated security” means a security  
21 that is not represented by a security certificate—i.e., a paper certificate. This is so even if, for  
22 example, the organic documents relating to the security refer to it as being “certificated” or refer  
23 to the electronic record evidencing the security as an “electronic certificate.” For uncertificated  
24 securities, there is no need to draw any distinction between the underlying asset and the means  
25 by which a direct holder's interest in that asset is evidenced. Compare “certificated security” and  
26 “security certificate.” For a discussion of the roles that controllable electronic records (Section  
27 12-102(a)(1)) may play in transactions involving uncertificated securities, see Section 12-102,  
28 Comment 2.

## 30 Reporter’s Note

31  
32 1. *No change.* No ~~change is~~changes are proposed to the definitions of “certificated  
33 security,” “financial asset,” “securities intermediary,” “security certificate,” or “uncertificated  
34 security,” which are provided for convenience

35  
36 2. *Relationship between Articles 8 and 12.* These ~~draft~~ amendments to the official  
37 comments to Article 8 are intended primarily to make clear that a controllable electronic record,  
38 a controllable account, or a controllable account may be a financial asset credited to a securities  
39 account under Article 8 and to identify several significant aspects of the relationship between  
40 Articles 8 and 12. See also Section 12-102, Comment 2 ~~(second paragraph).~~

41  
42 \* \* \*

43 Section 8-103. Rules for Determining Whether Certain Obligations and Interests  
44 are Securities or Financial Assets.

1       \* \* \*

2       (h) A controllable account, controllable electronic record, or controllable payment  
3 intangible is not a financial asset unless Section 8-102(a)(9)(iii) applies.

4                                   **Official Comment**

5       \* \* \*

6       8.       Subsection Subsections (g) allows and (h) allow a document of title or a  
7 controllable account, controllable electronic record, or controllable payment intangible to be a  
8 financial asset and thus subject to the indirect holding system rules of Part 5 only to the extent  
9 that the intermediary and the person entitled under the document agree to do so pursuant to  
10 Section 8-102(a)(9)(iii). This is to prevent the inadvertent application of the Part 5 rules to  
11 intermediaries who may hold either electronic or tangible documents of title or controllable  
12 accounts, controllable electronic records, or controllable payment intangibles.

14       \* \* \*

15       **Section 8-106. Control**

16       \* \* \*

17       (d) A purchaser has “control” of a security entitlement if:

18                   \* \* \*

19               (3) ~~another person has control of the security entitlement on behalf of the~~  
20 ~~purchaser or, having previously acquired control of the security entitlement, acknowledges that it~~  
21 ~~has control on behalf of the purchaser.~~ person, other than the transferor to the purchaser of an  
22 interest in the security entitlement:

23                               (A) has control of the security entitlement and acknowledges that it has  
24 control on behalf of the purchaser; or

25                               (B) obtains control of the security entitlement after having acknowledged  
26 that it will obtain control of the security entitlement on behalf of the purchaser.

27       \* \* \*

(h) **[No requirement to acknowledge.]** A person that has control under this section is not required to acknowledge that it has control on behalf of a purchaser.

(i) [No duties or confirmation.] If a person acknowledges that it has or will obtain control on behalf of a purchaser, unless the person otherwise agrees or law other than this ~~article~~Article otherwise provides, the person does not owe any duty to the purchaser and is not required to confirm the acknowledgment to any other person.

### Official Comment

1. The concept of “control” plays a key role in various provisions dealing with the rights of purchasers, including secured parties. See Sections 8-303 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510 (purchasers of security entitlements from entitlement holders); 9-203(b)(3)(D) (attachment of security interests); 9-314 (perfection of security interests); 9-328 (priorities among conflicting security interests).

Obtaining “control” means that the purchaser has taken whatever steps are necessary, given the manner in which the securities or other financial assets are held, to place itself in a position where it can have the securities or other financial assets sold, without further action by the owner, registered owner, entitlement holder, transferor, or other person with an interest in the securities or other financial assets.

\* \* \*

4. Subsection (d) specifies the means by which a purchaser can obtain control of a security entitlement. Three mechanisms are possible, analogous to those provided in subsection (c) for uncertificated securities. Under subsection (d)(1), a purchaser has control if it is the entitlement holder. This subsection would apply whether the purchaser holds through the same intermediary that the debtor used, or has the securities position transferred to its own intermediary. Subsection (d)(2) provides that a purchaser has control if the securities intermediary has agreed to act on entitlement orders originated by the purchaser if no further consent by the entitlement holder is required. Under subsection (d)(2), control may be achieved even though the original entitlement holder remains as the entitlement holder. Finally, a purchaser may obtain control under subsection (d)(3) if another person has control and the person acknowledges that it has control on the purchaser's behalf. In general, control under subsection (d)(3) parallels the delivery of certificated securities and uncertificated securities under Section 8-301. Of course, the acknowledging person cannot be the debtor. See the discussion of subsection (d)(3) in Comment 4A, below.

This section Subsection (d) specifies only the minimum requirements that such an arrangement must meet to confer “control”<sup>2</sup>; of a security entitlement; the details of the arrangement can be specified by agreement. The arrangement might cover all of the positions in

1 a particular account or subaccount, or only specified positions. There is no requirement that the  
2 control party's right to give entitlement orders be exclusive. The arrangement might provide that  
3 only the control party can give entitlement orders, or that either the entitlement holder or the  
4 control party can give entitlement orders. See subsection (f).

5  
6 The following examples illustrate the application of subsection (d):

7  
8 \* \* \*

9  
10 Example 9. Debtor grants Alpha Bank a security interest in a security entitlement that  
11 includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co.  
12 Beta Bank agrees with Alpha to act as Alpha's collateral agent with respect to the security  
13 entitlement. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to  
14 receive dividends and distributions, and will continue to have the right to direct dispositions, but  
15 Beta also has the right to direct dispositions. Because Able has agreed that it will comply with  
16 entitlement orders originated by Beta without further consent by Debtor, Beta has control of the  
17 security entitlement (see Example 3). Because Beta has acknowledged that it has control on  
18 behalf of Alpha, Alpha also has control under subsection (d)(3). It is not necessary for Able to  
19 enter into an agreement directly with Alpha or for Able to be aware of Beta's ~~agency~~ relationship  
20 with Alpha.

21  
22 \* \* \*

23  
24 ~~5A. The most recent revisions to subsection 4A.~~ Subsection (d)(3) was revised to  
25 conform that provision for control through another person to the corresponding provisions for  
26 control of other types of assets. See Section 12-105, Comment 8~~;~~; see also Sections 7-106(g)  
27 (control of electronic document of title); 9-104(a)(4) (control of deposit account); 9-105(g)  
28 (control of ~~an~~authoritative electronic copy of a record evidencing chattel paper); 9-105A(e)  
29 (control of electronic money). Under subsection (d)(3), for an acknowledgment to be effective to  
30 confer control, it must be made by a person "other than the transferor of an interest in the  
31 security entitlement." See Section 12-105, Comment 9 (discussing the rationale for this  
32 requirement). Subsections (h) and (i) derive from Section 9-313(f) and (g). Subsection (h) makes  
33 clear that a person that has control under this section has no duty to acknowledge that it has or  
34 will obtain control on behalf of a purchaser. Arrangements for a person to acknowledge that it  
35 has or will obtain control on behalf of another person are not standardized. Accordingly,  
36 subsection (i) leaves to the agreement of the parties and to any other applicable law any duties of  
37 a person that does acknowledge that it has or will obtain control on behalf of ~~another person a~~  
38 purchaser and provides that a person making an acknowledgment is not required to confirm the  
39 acknowledgment to any other person.

40  
41 \* \* \*

## 42 Section 8-110. Applicability; Choice of Law.

43 (a) The local law of the issuer's jurisdiction, as specified in subsection (d), governs:

1 (1) the validity of a security;  
2 (2) the rights and duties of the issuer with respect to registration of transfer;  
3 (3) the effectiveness of registration of transfer by the issuer;  
4 (4) whether the issuer owes any duties to an adverse claimant to a security; and  
5 (5) whether an adverse claim can be asserted against a person to whom transfer of  
6 a certificated or uncertificated security is registered or a person who obtains control of an  
7 uncertificated security.

8 (b) The local law of the securities intermediary's jurisdiction, as specified in subsection  
9 (e), governs:

10 (1) acquisition of a security entitlement from the securities intermediary;  
11 (2) the rights and duties of the securities intermediary and entitlement holder  
12 arising out of a security entitlement;  
13 (3) whether the securities intermediary owes any duties to an adverse claimant to  
14 a security entitlement; and  
15 (4) whether an adverse claim can be asserted against a person who acquires a  
16 security entitlement from the securities intermediary or a person who purchases a security  
17 entitlement or interest therein from an entitlement holder.

18 (c) The local law of the jurisdiction in which a security certificate is located at the time of  
19 delivery governs whether an adverse claim can be asserted against a person to whom the security  
20 certificate is delivered.

21 (d) "Issuer's jurisdiction" means the jurisdiction under which the issuer of the security  
22 is organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction  
23 specified by the issuer. An issuer organized under the law of this State may specify the law of

1 another jurisdiction as the law governing the matters specified 'in subsection (a)(2) through (5).

2 (e) The following rules determine a “securities intermediary's jurisdiction” for purposes  
3 of this section:

4 (1) If an agreement between the securities intermediary and its entitlement holder  
5 governing the securities account expressly provides that a particular jurisdiction is the securities  
6 intermediary's jurisdiction for purposes of this part, this article, or this [Act], that jurisdiction is  
7 the securities intermediary's jurisdiction.

8 (2) If paragraph (1) does not apply and an agreement between the securities  
9 intermediary and its entitlement holder governing the securities account expressly provides that  
10 the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities  
11 intermediary's jurisdiction.

12 (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between  
13 the securities intermediary and its entitlement holder governing the securities account expressly  
14 provides that the securities account is maintained at an office in a particular jurisdiction, that  
15 jurisdiction is the securities intermediary's jurisdiction.

16 (4) If none of the preceding paragraphs applies, the securities intermediary's  
17 jurisdiction is the jurisdiction in which the office identified in an account statement as the office  
18 serving the entitlement holder's account is located.

19 (5) If none of the preceding paragraphs applies, the securities intermediary's  
20 jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is  
21 located.

22 (f) A securities intermediary's jurisdiction is not determined by the physical location of  
23 certificates representing financial assets, or by the jurisdiction in which is organized the issuer of



1 the financial asset with respect to which an entitlement holder has a security entitlement, or by  
2 the location of facilities for data processing or other record keeping concerning the account.

3 (g) The local law of the issuer’s jurisdiction or the securities intermediary’s jurisdiction  
4 governs the matters specified in subsections (a) and (b) even if a matter or transaction does not  
5 bear any relation to that jurisdiction.

## 6 Official Comment

7  
8 \* \* \*

9  
10 ~~5A.~~ ~~New~~3. \* \* \*

11  
12 Where the Hague Securities Convention applies, the foregoing provisions of an account  
13 agreement effectively determine the applicable law only if the intermediary, at the time of the  
14 agreement, had an office in the designated jurisdiction (which may be anywhere in the United  
15 States if the account agreement specifies a state of the United States) that is engaged in a regular  
16 activity of maintaining securities accounts (a “Qualifying Office”). However, because the policy  
17 of this section and the Convention is to enable parties to determine, in advance and with  
18 certainty, what law will apply to transactions governed by this Article, the validation of the  
19 parties’ selection of governing law by agreement is not conditioned upon a determination that the  
20 jurisdiction whose law is chosen bear a “reasonable relation” to a matter or the transaction. See  
21 Section 4A-507; compare Section 1-105(1) (Revised Section 1-301(a)). That is also true, with  
22 respect to the similar provisions in subsection (d) of this section and in Section 9-305. Subsection  
23 (g) makes this explicit. See Comment 5A, below. The remaining paragraphs in subsection (e)  
24 and Convention article 5 contain additional default rules for determining the applicable law.

25  
26 \* \* \*

27  
28 5A. Subsection (g) reflects what is stated in ~~former~~ Comment 3—that the local law of  
29 the issuer’s jurisdiction or securities intermediary’s jurisdiction governs even if a matter or  
30 transaction bears no relation to that jurisdiction. This also is implicit in Section 1-301(c), which  
31 provides that the applicable law provided in this section (and other similar provisions) governs.

32  
33 \* \* \*

## 34 Section 8-303. Protected Purchaser.

35  
36 (a) “Protected purchaser” means a purchaser of a certificated or uncertificated security, or  
37 of an interest therein, who:

38 (1) gives value;

1 (2) does not have notice of any adverse claim to the security; and

2 (3) obtains control of the certificated or uncertificated security.

3 (b) ~~In addition to acquiring the rights of a purchaser, a~~ A protected purchaser acquires its  
4 interest in the security free of any adverse claim.

### 5 **Official Comment**

6 2. To qualify as a protected purchaser under subsection (a), a purchaser must give  
7 value, take without notice of any adverse claim, and obtain control. Value is used in the broad  
8 sense defined in Section ~~1-201(44)~~ 1-204. See also Section 8-116 (securities intermediary as  
9 purchaser for value). Adverse claim is defined in Section 8-102(a)(1). Section 8-105 specifies  
10 whether a purchaser has notice of an adverse claim. Control is defined in Section 8-106. To  
11 qualify as a protected purchaser under subsection (b), there must be a time at which all of the  
12 requirements are satisfied. Thus if a purchaser obtains notice of an adverse claim before giving  
13 value or satisfying the requirements for control, the purchaser cannot be a protected purchaser.  
14 See also Section 8-304(d). The requirement that a protected purchaser obtain control expresses  
15 the point that to qualify for the adverse claim cut-off rule a purchaser must take through a  
16 transaction that is implemented by the appropriate mechanism. By contrast, the rules in Part 2  
17 provide that any purchaser for value of a security without notice of a defense may take free of the  
18 issuer's defense based on that defense. See Section 8-202.

19  
20 The ~~most recent revision of subsection (b) deleted the~~ reference to the acquisition of the  
21 rights of a purchaser in the previous text of subsection (b) has been deleted. However, because a  
22 protected purchaser acquires the rights of a purchaser under Section 8-302, the revised text does  
23 not diminish a protected purchaser's rights. ~~The~~That revision ~~aligns~~aligned the text more closely  
24 to that of Section 12-104(e) on the rights of a qualifying purchaser of a controllable electronic  
25 record, controllable account, or controllable payment intangible.

26 \* \* \*

### 27 28 **Section 8-501. Securities Account; Acquisition of Security Entitlement from** 29 **Securities Intermediary.**

30 \* \* \*

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

respect to the financial asset.

\* \* \*

### Official Comment

\* \* \* 1. Part 5 rules apply to security entitlements, and Section 8-501(b) provides that a person has a security entitlement when a financial asset has been credited to a “securities account.” Thus, the term “securities account” specifies the type of arrangements between institutions and their customers that are covered by Part 5. A securities account is a consensual arrangement in which the intermediary undertakes to treat the customer as entitled to exercise the rights that comprise the financial asset. The consensual aspect is covered by the requirement that the account be established pursuant to agreement. The term agreement is used in the broad sense defined in Section 1-201(b)(3). There is no requirement that a formal or written agreement be signed.

As the securities business is presently conducted, several significant relationships clearly fall within the definition of a securities account, including the relationship between a clearing corporation and its participants, a broker and customers who leave securities with the broker, and a bank acting as securities custodian and its custodial customers. Given the enormous variety of arrangements concerning securities that exist today, and the certainty that new arrangements will evolve in the future, it is not possible to specify all of the arrangements to which the term does and does not apply.

Whether an arrangement between a firm an intermediary 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 (through an entitlement order) 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.

The effect of concluding that an arrangement is a securities account is that the rules of Part 5 apply. Accordingly, the definition of “securities account” must be interpreted in light of the substantive provisions in Part 5, which describe the core features of the type of relationship for which the commercial law rules of Revised Article 8 concerning security entitlements were designed. There are many arrangements between institutions intermediaries and other persons concerning securities or other financial assets which do not fall within the definition of “securities account” because the institutions intermediaries have not undertaken to treat the other persons as entitled to exercise the ordinary rights of an entitlement holder specified in the Part 5 rules. For example, the term securities account does not cover the relationship between a bank and its depositors or the relationship between a trustee and the beneficiary of an ordinary trust, because those are not relationships in which the holder of a financial asset has undertaken to treat the other as entitled to exercise the rights that comprise the financial asset in the fashion

1 contemplated by the Part 5 rules. The interpretation of the term “securities account” does not  
2 depend on the type of security or other financial asset that might be involved.

3  
4 In short, the primary factor in deciding whether an arrangement is a securities account is  
5 whether application of the Part 5 rules is consistent with the expectations of the parties to the  
6 relationship. Relationships not governed by Part 5 may be governed by other parts of Article 8 if  
7 the relationship gives rise to a new security or may be governed by other law entirely.

8  
9 \* \* \*

10  
11 4. Part 5 of Article 8 sets out a carefully designed system of rules for the indirect  
12 holding system. Persons who hold securities through brokers or custodians have security  
13 entitlements that are governed by Part 5, rather than being treated as the direct holders of  
14 securities. Subsection (d) specifies the limited circumstance in which a customer who leaves a  
15 financial asset with a broker or other securities intermediary has a direct interest in the financial  
16 asset, rather than a security entitlement. The customer can be a direct holder only if the security  
17 certificate, or other financial asset, is registered in the name of, payable to the order of, or  
18 specially indorsed to the customer, and has not been indorsed by the customer to the securities  
19 intermediary or in blank. The distinction between those circumstances where the customer can be  
20 treated as direct owner and those where the customer has a security entitlement is essentially the  
21 same as the distinction drawn under the federal bankruptcy code between customer name  
22 securities and customer property. The distinction does not turn on any form of physical  
23 identification or segregation. A customer who delivers certificates to a broker with blank  
24 indorsements or stock powers is not a direct holder but has a security entitlement, even though  
25 the broker holds those certificates in some form of separate safe-keeping arrangement for that  
26 particular customer. The customer remains the direct holder only if there is no indorsement or  
27 stock power so that further action by the customer is required to place the certificates in a form  
28 where they can be transferred by the broker.

29  
30 The rule of subsection (d) corresponds to the rule set out in Section 8-301(a)(3)  
31 specifying when acquisition of possession of a certificate by a securities intermediary  
32 counts as “delivery” to the customer.

33  
34 Subsection (d) uses terminology applicable to conventional certificated securities (e.g.,  
35 “indorsed”) and contemplates the limited circumstances in which a securities intermediary  
36 (defined in Section 8-102(a)(14) to include only a clearing corporation or another person that in  
37 the ordinary course of its business maintains securities accounts for others and that is acting in  
38 that capacity) may hold a financial asset for a customer under a direct holding arrangement rather  
39 than as a security entitlement. However, assets such as controllable electronic records,  
40 controllable accounts, and controllable payment intangibles also might be ~~controlled by a~~  
41 ~~securities~~ associated with an intermediary ~~for the benefit of a~~ as well as with its customer under a  
42 similar direct holding arrangement. For example, the ~~securities~~ intermediary and the customer  
43 might share control of the financial asset under an arrangement whereby the ~~intermediary could~~  
44 exercise ~~of~~ powers, such as the power to transfer control, ~~requires only with~~ the concurrent  
45 exercise of the ~~power by both the intermediary and~~ powers by the customer. As with  
46 conventional certificated securities, whether ~~a securities~~ an intermediary has created a security

entitlement in favor of an entitlement holder or its customer is holding a financial asset directly ~~for a customer~~ depends on the nature of the relationship and the nature of the rights of the securities intermediary and the customer ~~in~~ with respect to the financial asset. Moreover, ~~the~~ a person holding such an asset for the benefit of another may not be acting in the capacity of a securities intermediary at all, even if the person also regularly acts in that capacity. In such a case, subsection (d) would not apply and the relationship would be governed by the agreement of the parties and the application of law other than this ~~article~~ Article.

\* \* \*

### Reporter's Note

*No change.* No change is proposed to Section 8-501, which is provided for convenience.

\* \* \*

### **Section 8-505. Duty of Securities Intermediary with Respect to Payments and Distributions.**

(a) A securities intermediary shall take action to obtain a payment or distribution made by the issuer of a financial asset. A securities intermediary satisfies the duty if:

(1) the securities intermediary acts with respect to the duty as agreed upon by the entitlement holder and the securities intermediary; or

(2) in the absence of agreement, the securities intermediary exercises due care in accordance with reasonable commercial standards to attempt to obtain the payment or distribution.

(b) A securities intermediary is obligated to its entitlement holder for a payment or distribution made by the issuer of a financial asset if the payment or distribution is received by the securities intermediary.

### Official Comment

1. One of the core elements of the securities account relationships for which the Part 5 rules were designed is that the securities intermediary passes through to the entitlement holders the economic benefit of ownership of the financial asset, such as payments and distributions made by the issuer of the financial asset. Subsection (a) expresses the ordinary understanding

1 that a securities intermediary will take appropriate action to see to it that any payments or  
2 distributions made by the issuer are received. One of the main reasons that investors make use of  
3 securities intermediaries is to obtain the services of a professional in performing the record-  
4 keeping and other functions necessary to ensure that payments and other distributions are  
5 received.

6  
7 2. Subsection (a) incorporates the same "agreement/due care" formula as the other  
8 provisions of Part 5 dealing with the duties of a securities intermediary. See Comment 4 to  
9 Section 8-504. This formulation permits the parties to specify by agreement what action, if any,  
10 the intermediary is to take with respect to the duty to obtain payments and distributions. In the  
11 absence of specification by agreement, the intermediary satisfies the duty if the intermediary  
12 exercises due care in accordance with reasonable commercial standards. The provisions of  
13 Section 8-509 also apply to the Section 8-505 duty, so that compliance with applicable  
14 regulatory requirements constitutes compliance with the Section 8-505 duty.

15  
16 3. Subsection (b) provides that a securities intermediary is obligated to its  
17 entitlement holder for those payments or distributions made by the issuer that are in fact received  
18 by the intermediary. It does not deal with the details of the time and manner of payment.  
19 Moreover, as with any other monetary obligation, the obligation to pay may be subject to other  
20 rights of the obligor, by way of set-off counterclaim or the like. Section 8-509(c) makes this  
21 point explicit.

22  
23 4. This section applies to payments and distributions made by an issuer of a financial  
24 asset credited to a securities account. If a distribution is made to, or made available to, a  
25 securities intermediary on account of a financial asset as to which there is no issuer, the duties, if  
26 any, of the securities intermediary with respect to the distribution are subject to the agreement of  
27 the intermediary and the entitlement holder. However, in the absence of an agreement, this  
28 section may be applied by analogy in an appropriate case. If the securities intermediary is a  
29 secured party, Section 9-207(c) applies.

### 30 31 **Reporter's Note**

32  
33 *No change.* No change is proposed to Section 8-505, which is provided for convenience.

34  
35 \* \* \*

## 36 37 **ARTICLE 9**

### 38 **SECURED TRANSACTIONS**

#### 39 **Prefatory Note to 2022 Article 9 Amendments**

40 ~~1. General.~~ For a brief summary of the more significant revisions of Article 9 that are  
41 included in the 2022 Revisions, see Section 9-101, Comment 5.  
42

**Section 9-101. Short Title.** This article may be cited as Uniform Commercial Code—  
Secured Transactions.

### **Official Comment**

**1. Source.** This Article supersedes former Uniform Commercial Code (UCC) Article 9. As did its predecessor, it provides a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this Article follows the general approach and retains much of the terminology of former Article 9. In addition to describing many aspects of the operation and interpretation of this Article, these Comments explain the material changes that this Article makes to former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.

Citations to “Bankruptcy Code Section” in these Comments are to Title 11 of the United States Code as in effect on July 1, 2010.

**2. 1. Source, Background, and History.** In 1990, the Permanent Editorial Board for the UCC with the support of its sponsors, The American Law Institute and the National Conference of Commissioners on Uniform State Laws, established a committee to study Uniform Commercial Code (UCC) Article 9 of the UCC. The study committee issued its report as of December 1, 1992, recommending the creation of a drafting committee for the revision of Article 9 and also recommending numerous specific changes to Article 9. Organized in 1993, a drafting committee met fifteen times from 1993 to 1998. This Extensive revisions of this Article was were approved by its sponsors in 1998 (1998 Revisions).

The 1998 Revisions superseded former Article 9 and, as did their predecessor, provided a comprehensive scheme for the regulation of security interests in personal property and fixtures. For the most part this Article follows the general approach and retains much of the terminology of former Article 9. Comment 4 describes the material changes that the 1998 Revisions made to former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments to former Article 9 will remain of substantial historical value and interest. They also will remain useful in understanding the background and general conceptual approach of this Article.

\* \* \*

**3A. Further Amendments and 2022 Revisions.** This Article was conformed to revised Article 1 in 2001 and to amendments to Article 7 in 2003. The sponsors approved amendments to selected sections of this Article in 2010. Article 9 was again extensively revised in 2022 in connection with a substantial revision of the UCC relating primarily to emerging technologies (2022 Revisions). In particular, the 2022 Revisions conform and adapt Article 9 to



Article 12, covering controllable electronic records and rights to payment that are tethered to controllable electronic records—controllable accounts and controllable payment intangibles. For a brief summary of the 2022 Revisions that relate to Article 9, see Comment 5, below.

Note also that citations to “Bankruptcy Code Section” in these Comments are to Title 11 of the United States Code as in effect on July 1, 2022.

**4. Summary of 1998 Revisions.** Following is a brief summary of some of the more significant revisions features of the 1998 Revisions of Article 9 that are included in the 1998 revision of this Article.

\* \* \*

*Electronic chattel paper.* Section 9-102 includes of the 1998 Revisions included a new defined term: “electronic chattel paper.” Electronic chattel paper is a record or records consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (*sui generis* definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314 (perfection by control). The 2022 Revisions deleted that term and substantially modified the rules for chattel paper evidenced by electronic records, as discussed in Comment 5.

\* \* \*

~~m. Conforming and Related Amendments to Other UCC Articles.~~ Appendix I contains several revisions to the provisions and Comments of other UCC articles. For the most part the revisions are explained in the Comments to the proposed revisions. Cross-references in other UCC articles to sections of Article 9 also have been revised.

\* \* \*

**5. Summary of 2022 Revisions.** Following is a brief summary of some of the more significant revisions of Article 9 that are included in the 2022 Revisions. The amendments to Article 9 are extensive. Many of the amendments are necessary to conform Article 9 to new Article 12, which (along with its Comments) should be read along with the Article 9 amendments and Comments. Other material amendments include those relating to chattel paper and money, among other matters.

~~2.~~ **a. Article 12-Related Revisions.** Article 12-related *conforming amendments.* ~~Article 12-related conforming~~ amendments to Article 9 include the addition of two new types of collateral: controllable ~~accounts~~ *account* (a subset of ~~accounts~~ *account*) and controllable payment ~~intangibles~~ *intangible* (a subset of payment ~~intangibles~~ *intangible*, which is a subset of general ~~intangibles~~ *intangible*). Perfection of a security interest in a controllable electronic record, (defined in Section 12-102(a)(1), and a subset of general *intangible*), controllable account, or controllable payment intangible may be by control or by filing a financing statement. Control of a controllable electronic record is determined under Section 12-105. Control of a controllable account or controllable payment intangible is achieved by



obtaining control of the controllable electronic record that evidences the account or payment intangible. Section 9-107A-(b). The rights of a secured party that takes free of competing property interests under Section 12-104(e) or that is protected from certain actions under Section 12-104(g), as a qualifying purchaser of a controllable account, controllable electronic record, or controllable payment intangible, are respected under Article 9. Section 9-331.

The law of the controllable electronic record's jurisdiction under Section 12-107 governs perfection by control and priority of a security interest in a controllable account, controllable electronic record, or controllable payment intangible. Section 9-306B-(a). The law of the jurisdiction in which a debtor is located governs perfection by filing (but not priority) for such collateral. Section 9-306B-(b).

The ~~draft~~2022 Revisions also contains several other Article 12-related conforming amendments to Article 9.

~~3-~~ b. Chattel ~~paper-related amendments~~ Paper-Related Amendments. These amendments primarily address two issues that have arisen under the pre-2022 Article 9 with respect to transactions in chattel paper.

First, the definition of "chattel paper" ~~creates~~created uncertainty in "bundled" or "hybrid" transactions in which monetary obligations exist not only under a lease of goods but also with respect to other property and services relating to the leased goods. Frequently, the value of the non-goods aspect of a transaction is substantially greater than the value of the lessee's rights under the lease of goods. Those who finance chattel paper and other rights to payment have become uncertain as to whether these transactions give rise to chattel paper. The ~~draft~~ resolvesrevisions resolve this issue by treating only those transactions whose predominant purpose was to give the obligor (lessee) the right to possession and use of the goods as giving rise to "chattel paper."

Second, the statutory distinction between "tangible chattel paper" and "electronic chattel paper" ~~causes~~caused practical problems. As to tangible chattel paper (i.e., evidenced by writings), problems arose in the case of multiple originals of writings and situations in which separate writings covered different components of chattel paper. Official comments issued in connection with the ~~1999 amendments to Article 9~~1998 Revisions addressed, but did not entirely resolve, these issues. As to electronic chattel paper, the safe harbor for control ~~is~~was based on a "single authoritative copy" of the chattel paper. Moreover, in some situations tangible chattel paper is converted to electronic form and electronic chattel paper is converted to tangible form. Additional uncertainty ~~exists~~existed when one or more records ~~referred to in the current definition comprise~~comprised one or more ~~tangible~~authoritative tangible copies of the records that ~~evidence~~evidenced the right to payment and rights in related property and one or more authoritative electronic copies of those records also ~~exist~~existed.

The ~~draft provides~~2022 Revisions provide a single rule, under which a security interest in chattel paper can be perfected by taking possession of the ~~tangible~~authoritative tangible copies, if any, and obtaining control of the electronic authoritative copies, if any. This single rule ~~would address~~addresses cases where some records evidencing chattel paper are electronic and some are

1 tangible or where a record in one medium is replaced by a record in another.

2  
3 The ~~draft~~2022 Revisions also ~~defines~~define chattel paper more accurately, as the right to  
4 payment of a monetary obligation that is secured by a security interest in specific goods or owed  
5 under a lease of specific goods, if the right to payment and interest in the goods are evidenced by  
6 a record.  
7

8 Finally, the ~~draft provides~~2022 Revisions provide a new choice-of-law rule for perfection  
9 and priority of security interests in chattel paper that is evidenced by authoritative electronic  
10 copies of records or by such electronic copies and authoritative tangible copies. For such chattel  
11 paper, Section 9-306A provides that perfection by control and possession of authoritative copies  
12 and priority are governed by the law of the “electronic chattel paper’s jurisdiction,” based  
13 loosely on Sections 8-110 and 9-305. For chattel paper evidenced only by authoritative tangible  
14 copies, Section 9-306A(d) provides that perfection by possession and priority are governed by  
15 the law of the location of the authoritative tangible copies. Perfection by filing continues to be  
16 governed by the law of the location of the debtor for all chattel paper.  
17

18 ~~4. c. Money-related amendments~~Related Amendments.  
19

20 Section 1-201(b)(24) defines “money” as including “a medium of exchange currently  
21 authorized or adopted by a domestic or foreign government . . . .” There is no way of knowing  
22 how money in an intangible form might develop, but there are indications that some countries  
23 might authorize or adopt intangible tokens as a medium of exchange and others might authorize  
24 or adopt deposit accounts with a central bank as money.<sup>2</sup> For many purposes, there is no need for  
25 the UCC to distinguish among types of money. For Article 9 purposes, however, distinctions  
26 must be drawn. Only tangible money is susceptible of perfection by possession. And the steps  
27 needed for perfection by control with respect to intangible tokens, such as controllable electronic  
28 records, will not work for deposit accounts with a central bank, and vice versa. For this reason,  
29 the ~~draft provides a new~~revisions provide an Article 9 definition of “money” ~~for purposes of~~  
30 ~~Article 9~~that is narrower than the Article 1 definition. The Article 9 definition expressly  
31 excludes deposit accounts. Thus, “electronic money,” defined in Section 9-102 as “money in an  
32 electronic form,” would not include deposit accounts. The ~~new~~ Article 9 definition of “money”  
33 also excludes money in an electronic form that cannot be subjected to control under Section 9-  
34 105A.  
35

36 The ~~existing~~ Article 9 provisions governing “deposit accounts” would remain suitable for  
37 accounts with a central bank, even if a government has adopted these accounts as money. The  
38 ~~draft makes~~revisions make no changes with respect to Article 9’s treatment of deposit accounts,  
39 aside from distinguishing them from “money” and therefore from “electronic money.” Under the  
40 ~~draft~~revisions, a security interest in electronic money as original collateral can be perfected only  
41 by control. The requirements for obtaining control of electronic money under Section 9-105A are  
42 essentially the same as those for obtaining control of a controllable electronic record under  
43 Article 12.  
44

---

<sup>2</sup> These tokens or accounts sometimes are referred to as central bank digital currency or CBDC.

1       The ~~draft~~revisions also ~~makes~~make changes to Section 9-332, the take-free rules for  
2       transferees of money, including the addition of a new rule applicable to electronic money, and  
3       transferees of funds from deposit accounts.  
4

5       -       **Section 9-102. Definitions and Index of Definitions.**

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

7               \* \* \*

8               (2) “Account”, except as used in “account for”, “account to”, “account  
9       statement”, “customer’s account”, “on account of”, “statement of account”, and paragraphs (14)  
10       (“commodity account”) and (29) (“deposit account”), means a right to payment of a monetary  
11       obligation, whether or not earned by performance, (i) for property that has been or is to be sold,  
12       leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered,  
13       (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to  
14       be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a  
15       charter or other contract, (vii) arising out of the use of a credit or charge card or information  
16       contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance  
17       operated or sponsored by a State, governmental unit of a State, or person licensed or authorized  
18       to operate the game by a State or governmental unit of a State. The term includes controllable  
19       accounts and health-care-insurance receivables. The term does not include (i) ~~rights to payment~~  
20       ~~evidenced by chattel paper or an instrument~~ chattel paper, (ii) commercial tort claims, (iii)  
21       deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, ~~or~~ (vi)  
22       rights to payment for money or funds advanced or sold, other than rights arising out of the use of  
23       a credit or charge card or information contained on or for use with the ~~card~~ card, or (vii) rights to  
24       payment evidenced by an instrument.

25       \_\_\_\_\_ \* \* \*

1 (3) “Account debtor” means a person obligated on an account, chattel paper, or  
2 general intangible. The term does not include persons obligated to pay a negotiable instrument,  
3 even if the negotiable instrument constitutes part of evidences chattel paper.

4 (4) “Accounting”, except as used in “accounting for”, means a record:

5 (A) authenticated signed by a secured party;

6 (B) indicating the aggregate unpaid secured obligations as of a date not more  
7 than 35 days earlier or 35 days later than the date of the record; and

8 (C) identifying the components of the obligations in reasonable detail.

9 \* \* \*

10 (7A) “Assignee”, except as used in “assignee for benefit of creditors”, means a  
11 person (i) in whose favor a security interest that secures an obligation is created or provided for  
12 under a security agreement, whether or not the obligation is outstanding or (ii) to which an  
13 account, chattel paper, payment intangible, or promissory note has been sold. The term includes  
14 a person to which a security interest has been transferred by a secured party.

15 (7B) “Assignor” means a person that (i) under a security agreement creates or  
16 provides for a security interest that secures an obligation or (ii) sells an account, chattel paper,  
17 payment intangible, or promissory note. The term includes a secured party that has transferred a  
18 security interest to another person.

19 (7) “Authenticate” means:

20 (A) to sign; or

21 (B) with present intent to adopt or accept a record, to attach to or logically  
22 associate with the record an electronic sound, symbol, or process. [Reserved].]

23 ~~(7A) “Assignee” means a person:~~

1 ~~\_\_\_\_\_ (A) in whose favor a security interest that secures an obligation is created~~  
2 ~~or provided for under a security agreement, whether or not the obligation is outstanding; or~~

3 ~~\_\_\_\_\_ (B) to which an account, chattel paper, payment intangible, or promissory~~  
4 ~~note has been sold.~~

5 ~~\_\_\_\_\_ (7B) “Assignor” means a person that:~~

6 ~~\_\_\_\_\_ (A) under a security agreement creates or provides for a security interest~~  
7 ~~that secures an obligation; or~~

8 ~~\_\_\_\_\_ (B) sells an account, chattel paper, payment intangible, or promissory~~  
9 ~~note.~~

10 \* \* \*

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

22 ~~(A) a right to payment of a monetary obligation secured by specific goods,~~  
23 ~~if the right to payment and security agreement are evidenced by a record; or~~

1                   (B) a right to payment of a monetary obligation owed by a lessee under a  
2 lease agreement with respect to specific goods and a monetary obligation owed by the lessee in  
3 connection with the transaction giving rise to the lease, if:

4                   (i) the right to payment and lease agreement are evidenced by a  
5 record; and

6                   (ii) the predominant purpose of the transaction giving rise to the  
7 lease was to give the lessee the right to possession and use of the goods.

8 The term does not include a right to payment arising out of a charter or other contract involving  
9 the use or hire of a vessel or a right to payment arising out of the use of a credit or charge card or  
10 information contained on or for use with the card.

11                   \* \* \*

12                   (27A) “Controllable account” means an account evidenced by a controllable  
13 electronic record that provides that the account debtor undertakes to pay the person that under  
14 Section 12-105 has control of the controllable electronic record.

15                   (27B) “Controllable payment intangible” means a payment intangible evidenced  
16 by a controllable electronic record that provides that the account debtor undertakes to pay the  
17 person that under Section 12-105 has control of the controllable electronic record.

18                   \* \* \*

19                   (29) “Deposit account” means a demand, time, savings, passbook, or similar  
20 account maintained with a bank. The term does not include investment property or accounts  
21 evidenced by an instrument.

22                   \* \* \*

1 (31) “Electronic chattel paper” means chattel paper evidenced by a record or  
2 records consisting of information stored in an electronic medium. [Reserved.]

3 (31A) “Electronic money” means money in an electronic form.

4 \* \* \*

5 (42) “General intangible” means any personal property, including things in action,  
6 other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods,  
7 instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or  
8 other minerals before extraction. The term includes controllable electronic records, payment  
9 intangibles, and software.

10 \* \* \*

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

18 \* \* \*

19 (54A) “Money” has the meaning in Section 1-201(b)(24), but does not include (i)  
20 a deposit account or (ii) money in an electronic form that cannot be subjected to control under  
21 Section 9-105A.

22 \* \* \*

23 (61) “Payment intangible” means a general intangible under which the account

debtor's principal obligation is a monetary obligation. The term includes a controllable payment intangible.

\* \* \*

(64) "Proceeds", except as used in Section 9-609(b), means the following property:

(A) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(B) whatever is collected on, or distributed on account of, collateral;

(C) rights arising out of collateral;

(D) to the extent of the value of collateral, claims arising out of the loss, nonconformity, or interference with the use of, defects or infringement of rights in, or damage to, the collateral; or

(E) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects or infringement of rights in, or damage to, the collateral.

\* \* \*

(65) "Promissory note" means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

(66) "Proposal" means a record ~~authenticated~~ signed by a secured party which includes the terms on which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures pursuant to Sections 9-620, 9-621, and 9-622.

\* \* \*



(75) “Send”, in connection with a record or notification, means:  
(A) to deposit in the mail, deliver for transmission, or transmit by any other  
usual means of communication, with postage or cost of transmission provided for, addressed to  
any address reasonable under the circumstances; or  
(B) to cause the record or notification to be received within the time that it  
would have been received if properly sent under subparagraph (A). [Reserved.]

\* \* \*

(79) “Tangible chattel paper” means chattel paper evidenced by a record or  
records consisting of information that is inscribed on a tangible medium. [Reserved.]

(79A) “Tangible money” means money in a tangible form.

**(b) [Definitions in other articles.]** ~~The~~ “Control” as provided in Section 7-106  
and Section 12-105 and the following definitions in other articles apply to this article:

\* \* \*

“Controllable electronic record”~~”~~. Section 12-102.

\* \* \*

“Negotiable instrument”. Section 3-104.

\* \* \*

“Qualifying purchaser”~~”~~. Section 12-102.

\* \* \*

**(c) [Article 1 definitions and principles.]** Article 1 contains general definitions  
and principles of construction and interpretation applicable throughout this article.

***Legislative Note:*** Replicate the formatting of the tabulated material in subsection (a)(11) exactly  
to ensure that the meaning of the material is preserved.

**Official Comment**

1           \* \* \*

2           2.       Parties to Secured Transactions.

3           \* \* \*

4           c.       Other Parties. A “consumer obligor” is defined as the obligor in a  
5           consumer transaction. Definitions of “new debtor” and “original debtor” are used in the special  
6           rules found in Sections 9-326 and 9-508.

7  
8           Instead of referring to a “debtor,” “secured party,” and “security interest,” all of which  
9           terms are defined in the UCC, several provisions of Article 9, including Part 4, refer to an  
10          “assignor,” “assignee,” and “assignment,” or sometimes an “assigned contract,” none of which  
11          terms have been defined in the UCC. Some courts read the undefined terms in an unduly narrow  
12          way. In 2020, the Permanent Editorial Board for the UCC issued a Commentary clarifying the  
13          meanings of these terms and amended the official comments accordingly. PEB Commentary No.  
14          21, Use of the Term “Assignment” in Article 9 of the Uniform Commercial Code (Mar. 11,  
15          2020). Paragraph 7A defines “assignee” as a person in whose favor a security interest securing  
16          an obligation is created or to which an account, chattel paper, or a payment intangible has been  
17          sold. Paragraph 7B defines “assignor” as creating a security interest securing an obligation or  
18          that sells an account, chattel paper, or a payment intangible. These definitions incorporate the  
19          essence of the Commentary into the statutory text. The definitions also specify that an “assignor”  
20          includes a secured party that transfers a security interest to another person and an “assignee”  
21          includes a person to which a security interest has been transferred by a secured party.

22  
23          Absent a contrary agreement, an assignee obtains the rights and powers of an assignor as  
24          against an account debtor on assigned collateral (e.g., under Section 9-406) and as between the  
25          assignee and the assignor (debtor) (e.g., under Section 9-607). See also Restatement (Second) of  
26          Contracts § 317(1) (1981) (emphasis added):

27          -  
28               An assignment of a right is a manifestation of the assignor's intention to transfer  
29               it by virtue of which the assignor's right to performance by the obligor is  
30               extinguished in whole or in part and the assignee acquires a right to such  
31               performance.

32           \* \* \*

33           4.       Goods-Related Definitions.

34           \* \* \*

35           c.       As-Extracted Collateral.” \* \* \*

36           \* \* \*

**Example 5:** Debtor owns an interest in oil that is to be extracted. To secure Debtor's obligations to Lender, Debtor enters into an authenticated a signed agreement granting Lender an interest in the oil. Although Lender may acquire an interest in the oil under real-property law, Lender does not acquire a security interest under this Article until the oil becomes personal property, i.e., until is extracted and becomes "goods" to which this Article applies. Because Debtor had an interest in the oil before extraction and Lender's security interest attached to the oil as extracted, the oil is "as-extracted collateral."

**Example 6:** Debtor owns an interest in oil that is to be extracted and contracts to sell the oil to Buyer at the wellhead. In an authenticated a signed agreement, Debtor agrees to sell to Lender the right to payment from Buyer. This right to payment is an account that constitutes "as-extracted collateral." If Lender then resells the account to Financer, Financer acquires a security interest. However, inasmuch as the debtor-seller in that transaction, Lender, had no interest in the oil before extraction, Financer's collateral (the account it owns) is not "as-extracted collateral."

\* \* \*

## **5. Receivables-related Definitions.**

\* \* \*

**b. "Account"; "Health-Care-Insurance Receivable"; "As-Extracted Collateral."** The definition of "account" has been expanded and reformulated. \* \* \*

\* \* \*

The amendments to the definition of "account" reflect the revised definition of "chattel paper," discussed in Comment 5.b. The revised definition also includes some additional exceptions that accommodate the use of the term in other provisions.

**b. "Chattel Paper"; "Electronic Chattel Paper"; "Tangible Chattel Paper."** "Chattel paper" consists of a monetary obligation together with a security interest in or a lease of specific goods if the obligation and security interest or lease are evidenced by "a record or records." The definition has been expanded from that found in former Article 9 to include records that evidence a monetary obligation and a security interest in specific goods and software used in the goods, a security interest in specific goods and license of software used in the goods, or a lease of specific goods and license of software used in the goods. The expanded definition covers transactions in which the debtor's or lessee's monetary obligation includes amounts owed with respect to software used in the goods. The monetary obligation with respect to the software need not be owed under a license from the secured party or lessor, and the secured party or lessor need not be a party to the license transaction itself. Among the types of monetary obligations that are included in "chattel paper" are amounts that have been advanced by the secured party or lessor to enable the debtor or lessee to acquire or obtain financing for a license of the software used in the goods. The definition also makes clear that rights to payment arising out of credit-card transactions are not chattel paper. "Chattel paper" consists of a monetary obligation that is

1 either secured by specific goods or arises in connection with a lease of specific goods, in each  
2 case if the obligation and security interest or lease is evidenced by a record. The monetary  
3 obligation itself need not relate to the goods. For example, a loan secured by specific goods and  
4 evidenced by one or more records creates chattel paper regardless of the purpose of the loan.  
5

6 Rights to payment arising out of Charters charters of vessels or the use of credit or charge  
7 cards are expressly excluded from the definition of chattel paper; they are accounts. The term  
8 “charter” as used in this section includes bareboat charters, time charters, successive voyage  
9 charters, contracts of affreightment, contracts of carriage, and all other arrangements for the use  
10 of vessels.  
11

12 Under former Section 9-105, only if the evidence of an obligation consisted of “a writing  
13 or writings” could an obligation qualify as chattel paper. In this Article, traditional, written  
14 chattel paper is included in the definition of “tangible chattel paper.” “Electronic chattel paper”  
15 is chattel paper that is stored in an electronic medium instead of in tangible form.  
16

17 The concept of an electronic medium should be construed liberally to include electrical,  
18 digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.  
19

20 What distinguishes chattel paper from other rights to payment is the fact that creditor has  
21 an interest in specific goods to enforce the right to payment. For example, the fact that a secured  
22 party also has an interest in other property does not prevent the right to payment from being  
23 chattel paper, provided that the creditor relies on the specific goods as the primary collateral.  
24

25 **Example 8.** To secure a loan, Borrower grants Lender a security interest in a specified  
26 item of equipment and a deposit account. The loan and the security interest are evidenced  
27 by one or more records. The right to payment is chattel paper, assuming the equipment is  
28 the primary collateral.  
29

30 In Example 8, the inclusion of some incidental collateral, such as a deposit account, does not  
31 prevent characterization of the right to payment as chattel paper. Another typical example would  
32 be the inclusion of after-acquired replacement parts to be installed on the specific goods. On the  
33 other hand, to be chattel paper, a right to payment must be accompanied by a security interest in  
34 specific goods or a lease of specific goods. A right to payment secured by a security interest in  
35 rotating collateral is not chattel paper.  
36

37 **Example 9.** To secure a loan, Borrower grants Lender a security interest in all of  
38 Borrower’s existing and after-acquired inventory. The loan and the security interest are  
39 evidenced by one or more records. The right to payment is not chattel paper.  
40

41 **Example 10.** To secure a loan, Borrower grants Lender a security interest in a  
42 specifically described item of equipment and also in all of Borrower’s existing and after-  
43 acquired equipment. The loan and the security interest are evidenced by one or more  
44 records. The right to payment is not chattel paper.  
45

46 Example 9 is the easy case because no “specific goods” are identified. As to Example 10, it is

1 true that the monetary obligation is secured by “specific goods” and the definition of chattel  
2 paper does not specify that the obligation must be secured *only* by specific goods. However, if  
3 the right to payment in Example 10 were to be characterized as chattel paper, it would be  
4 possible to convert virtually any monetary obligation evidenced by records and secured by any  
5 collateral into chattel paper merely by including as collateral a specific item of goods (whether  
6 inventory, equipment, consumer goods, or farm products). The special rules for chattel paper  
7 contemplate reliance on specific goods as the primary collateral, even if some incidental property  
8 also might be included. If the inclusion of additional goods or other property indicate that  
9 primary reliance is not on the specific goods, then classification as chattel paper would not be  
10 appropriate. Of course, there may be close cases. In those situations, parties should take  
11 appropriate precautions.

12  
13 A right to payment arising from a lease of specific goods gives rise to chattel paper only  
14 if the predominant purpose of the transaction is to provide the lessee the right to possession and  
15 use of the goods. Therefore, under paragraph (11)(B)(ii), when a lease of specific goods is  
16 combined with an obligation to provide or right to receive other property or services, the  
17 resulting right to payment will be chattel paper only if the goods aspect of the transaction  
18 predominates.

19  
20 **Example 11.** ~~In one or more signed records,~~ Customer and Car Dealer enter into a  
21 transaction, evidenced by one or more records, pursuant to which, in exchange for a  
22 payment of \$2,000 per month: (i) Customer is entitled to possession of a specific vehicle  
23 for 36 months; (ii) Car Dealer will provide round-the-clock monitoring of the vehicle’s  
24 location and condition, and alert authorities to provide road-side assistance in the event of  
25 a malfunction or accident; and (iii) Car Dealer will, from time to time, remotely update  
26 the vehicle’s ~~automobile’s~~ operating system. The value of the right to possess and use the  
27 vehicle is significantly greater than the value of the monitoring service and updates.  
28 Because the goods aspect of the transaction predominates, under paragraph (11)(B)(ii)  
29 Customer’s monetary obligation, including the portion attributable to Car Dealer’s  
30 obligation to provide monitoring and updates, constitutes chattel paper.

31  
32 **Example 12.** ~~In one or more signed records,~~ Customer and Cableco enter into a  
33 transaction, evidenced by one or more records, pursuant to which, in exchange for a  
34 payment of \$200 per month, Cableco will provide Customer with specified television  
35 programming and a device needed to access the programming (a “lease” of the device). If  
36 the components of the transaction were priced separately, the price for the programming  
37 would be substantially more than the price for possession and use of the device. Because  
38 the goods aspect of this transaction does not predominate, under paragraph (11)(B)(ii)  
39 Customer’s monetary obligation does not constitute chattel paper.

40  
41 The latest revision to the definition of chattel paper omits the references to a “license of  
42 software used in the goods” as superfluous, inasmuch as there is no reason to single out software.  
43 Other types of property may secure an obligation or be included in a transaction involving a  
44 lease, as discussed above. See also Sections 2-102 (scope of Article 2); 2-106(5) (defining  
45 “hybrid transaction”); 2A-102 (scope of Article 2A); 2A-103(aa) (definition of “hybrid lease”).

1       The latest revision to the definition of “chattel paper” also changed the language from “a  
2 record or records that evidence a monetary obligation” to “a right to payment of a monetary  
3 obligation . . . evidenced by a record.” This semantic change was for clarification purposes only;  
4 it does not imply a change in meaning. Chattel paper is and has always been a right to payment  
5 of a monetary obligation. Because the revised definition is based on the obligation, rather than  
6 the record, the definition no longer includes the following statement, which was ~~previously part~~  
7 ~~of~~ included in the previous definition: “If a transaction is evidenced by records that include an  
8 instrument or series of instruments, the group of records taken together constitutes chattel  
9 paper.” The omission of that statement also does not imply a change in meaning, except that  
10 ~~records (writings)~~ evidencing chattel paper are excluded from the definition of “instrument”  
11 under Section 9-102(a)(47). Although the definition refers to “a record,” chattel paper can be  
12 evidenced by one or more records because, under Section 1-106, unless the statutory context  
13 otherwise requires, words in the singular number include the plural.

### 14 15 **Reporter’s Note**

16  
17 ——— 1. ~~“Account.” “Chattel paper” has been redefined to mean a right to payment rather than~~  
18 ~~a record evidencing a right to payment. The amendments to the definition of “account” reflect~~  
19 ~~the redefinition. The definition also includes some additional exceptions that accommodate the~~  
20 ~~use of the term in other provisions.~~

21  
22 ——— 2. ~~“Assignor”; “assignee”. Instead of referring to a “debtor,” “secured party,” and~~  
23 ~~“security interest,” all of which terms are defined in the UCC, several provisions of Article 9,~~  
24 ~~including Part 4, refer to an “assignor,” “assignee,” and “assignment,” or sometimes an~~  
25 ~~“assigned contract,” none of which terms are defined in the UCC. Some courts read the~~  
26 ~~undefined terms in an unduly narrow way. In 2020, the Permanent Editorial Board for the UCC~~  
27 ~~issued a Commentary clarifying the meanings of these terms and amended the official comments~~  
28 ~~accordingly. PEB Commentary No. 21, Use of the Term “Assignment” in Article 9 of the~~  
29 ~~Uniform Commercial Code (Mar. 11, 2020). New paragraphs (7A) and (7B) incorporate the~~  
30 ~~essence of the Commentary into the statutory text. Of course, absent a contrary agreement, an~~  
31 ~~assignee obtains the rights and powers of an assignor as to an account debtor on assigned~~  
32 ~~collateral (e.g., under Section 9-406) and as to an assignor (debtor) (e.g., under Section 9-607).~~

33  
34 ——— 2A. ~~“Authenticate.” This definition is deleted because the new definition of “sign” in~~  
35 ~~Section 1-201(b)(37) makes the term unnecessary. The term will be replaced with “signed” in~~  
36 ~~this Section and in other Sections of Article 9 and the official comments.~~

37  
38 ——— 3. ~~“Chattel paper.” Under~~ Finally, ~~the revised definition, of “chattel paper” is a right~~  
39 ~~to payment rather than a record evidencing a right to payment. Records evidencing chattel paper~~  
40 ~~remain relevant~~ and the approach ~~to perfection of a security interest in chattel paper. See Section~~  
41 ~~9-314A.~~

42  
43 ——— The right to payment that constitutes “chattel paper” under subsection (a)(11)(B) may  
44 include the right to payment of a variety of “bundled” or “hybrid” monetary obligations owed by  
45 a lessee of specific goods. These obligations may include obligations arising in connection with  
46 the transaction giving rise to the lease, such as obligations relating to other property or services.

1 However, to constitute “chattel paper,” these obligations must include the right to payment of a  
2 ~~monetary obligation owed by the lessee under the lease agreement.~~ possession and control under  
3 Section 9-314A have eliminated the need to have separate definitions of “electronic chattel  
4 paper” and “tangible chattel paper” in Section 9-102. Consequently, those definitions have been  
5 deleted.

6  
7 A \* \* \*

8 c. **“Instrument”; “Promissory Note.”** The definition of “instrument”  
9 includes a negotiable instrument. As under former Section 9-105, it also includes any other right  
10 to payment of a monetary obligation that is ~~not~~ “evidenced by a writing of a type that in ordinary  
11 course of business is transferred by delivery (and, if necessary, an indorsement or assignment).  
12 The revised definition now explicitly excludes a writing that evidences a right to payment that is  
13 chattel paper” ~~under subsection (a)(1)(B) unless.~~ This revision clarifies and makes explicit the  
14 ~~predominant purpose of understanding before the transaction giving rise to~~ revision that an  
15 obligation on an instrument that evidences chattel paper is to be treated (e.g., under Section 9-  
16 330) as an obligation on chattel paper and not on an instrument. ~~Except in the lease was to~~  
17 ~~give ease of chattel paper~~ With that exception, the ~~lessee~~ fact that an instrument is secured by a  
18 security interest or encumbrance on property does not change the ~~right to possession and~~  
19 ~~use~~ character of the goods. ~~The draft official comment explains~~ instrument as such or convert the  
20 ~~predominant purpose test in combination of the context of instrument and collateral into a~~  
21 separate classification of personal property. The definition also makes clear that rights to  
22 payment arising out of credit-card transactions are not instruments. The definition of  
23 “promissory note” is ~~new~~, necessitated by the ~~definition and gives examples of its application.~~  
24 inclusion of sales of promissory notes within the scope of Article 9. It explicitly excludes  
25 obligations arising out of “orders” to pay (e.g., checks) as opposed to “promises” to pay. See  
26 Section 3-104. Section 9-406(d.1) adopts a modified meaning of “promissory note” as that term  
27 is used in Section 9-406(d). See Section 9-406, Comment 5.

28  
29 4. \* \* \*

30  
31 d.1. **“Controllable ~~account~~”; “~~controllable payment intangible.~~”** ~~The~~  
32 **Account”; Controllable Payment Intangible.”** Article 9 affords special treatment to  
33 security interests in controllable accounts and controllable payment intangibles, i.e., those  
34 accounts and payment intangibles that are evidenced by a controllable electronic record that  
35 provides that the account debtor (obligor) undertakes to pay the person having control of the  
36 controllable electronic record. (Of course, a person would be an account debtor only if it were  
37 actually obligated on the underlying account or payment intangible.) An undertaking to pay the  
38 “person that has control” means an undertaking to pay the person that has control at the time  
39 payment is made. An undertaking to pay Smith, who happens to have control of the relevant  
40 controllable electronic record at the time the undertaking was made, is not an undertaking to pay  
41 the person that has control.

42  
43 This special treatment includes the following:

- 44  
45 • Perfection of a security interest in a controllable account or controllable payment  
46 intangible can be achieved by filing a financing statement or by obtaining control of



1       the controllable electronic record that evidences the controllable account or  
2       controllable payment intangible. Sections 9-312(a); 9-314(a); 9-107A(b).

3       •

- 4       • A security interest in a controllable electronic record, controllable account, or  
5       controllable payment intangible that is perfected by control has priority over a  
6       conflicting security interest that is perfected by another method. Section 9-326A.  
7
- 8       • The benefit of the take-free and no-action rules for qualifying purchasers (including  
9       secured parties) of controllable electronic records also extends to qualifying  
10       purchasers of controllable accounts and controllable payment intangibles, whether or  
11       not the qualifying purchaser also purchases the related controllable electronic record.  
12       See Section 12-104(a) and Comments 7 and 8.

13  
14       5. ~~“Deposit”~~ \* \* \*

15  
16       h. **“Account Debtor.”** An “account.” ~~This~~ debtor” is a person obligated on an  
17       account, chattel paper, or general intangible. The account debtor’s obligation often is a monetary  
18       obligation; however, this is not always the case. For example, if a franchisee uses its rights  
19       under a franchise agreement (a general intangible) as collateral, then the franchisor is an  
20       “account debtor.” As a general matter, Article 3, and not Article 9, governs obligations on  
21       negotiable instruments. Accordingly, the definition ~~is not changed and is provided hereof~~  
22       “account debtor” excludes obligors on negotiable instruments constituting part of chattel paper.  
23       The principal effect of this change from the definition in former Article 9 is that the rules in  
24       Sections 9-403, 9-404, 9-405, and 9-406, dealing with the rights of an assignee and duties of an  
25       account debtor, do not apply to an assignment of chattel paper in which the obligation to pay is  
26       evidenced by a negotiable instrument. (Section 9-406(d), however, does apply to promissory  
27       notes, including negotiable promissory notes a negotiable instrument that is a promissory note, as  
28       that term is modified by subsection (d.1) of that section, discussed below.) Rather, the  
29       assignee’s rights of an assignee of a negotiable instrument are governed by Article 3. Similarly,  
30       the duties of an obligor on a nonnegotiable instrument are governed by non-Article 9 law unless  
31       the nonnegotiable instrument is a part of chattel paper, in which case the obligor is an account  
32       debtor.

33  
34       The second reference to “instrument” in the definition of “account debtor” has been  
35       amended to add the modifier “negotiable,” making it clear that an obligor on a negotiable  
36       instrument is not an account debtor. This amendment (which is intended to clarify and not to  
37       change the meaning of the definition) is useful because the definition of “instrument” has been  
38       revised to exclude writings that evidence chattel paper although the definition of “negotiable  
39       instrument” in Section 1-201 continues to apply under Article 9. See Section 9-102(a)(47) and  
40       (b); Comment 5.c.

41       \* \* \*

## 42       9. Definitions Relating to Medium Neutrality.

43  
44  
45



1           a.       **“Record.”** In many, but not all, instances, the term “record” replaces the  
2       term “writing” and “written.” \* \* \*

3  
4                       \* \* \* A record may be authenticated signed. See Comment 9.b. \* \* \*

5  
6                       \* \* \*

7  
8           b.       **“Authenticate”; “Communicate”; “Send.”** The terms defined term  
9       “authenticate” has been deleted. That term and “authenticated” were generally replace used in  
10      Article 9 instead of “sign” and “signed.” “Authenticated” replaces and broadens the definition of  
11      “signed.” However, the revised definition of “sign” in Section 1-201, to encompass encompasses  
12      authentication of all records, not just writings. Accordingly, “sign” and “signed” are now used in  
13      Article 9. (References to authentication signing of, e.g., an agreement, demand, or notification  
14      mean, of course, authentication signing of a record containing an agreement, demand, or  
15      notification.) The terms “communicate” and “send” also contemplate the possibility of  
16      communication by nonwritten media. These definitions include the act of transmitting both  
17      tangible and intangible records. The definition of “send” replaces, for convenience of  
18      reference purposes of this Article, the corresponding term in Section 1-201. The reference to  
19      “usual means of communication” in that definition contemplates an inquiry into the  
20      appropriateness of the method of transmission used in the particular circumstances involved has  
21      been deleted from this Section and added to Section 1-201.

22  
23      ——— 6. *“Electronic money” and “tangible money.”* As the Prefatory Note to Article 9  
24      Amendments observes, some countries may authorize or adopt intangible tokens as a medium of  
25      exchange that would be “money” as defined (and as proposed to be defined) in both Article 1  
26      and Article 9. Such intangible tokens would be “electronic money” as defined in Section 9-  
27      102(a)(31A). Under the draft, a security interest in electronic money as original collateral can be  
28      perfected only by control. Sections 9-105A; 9-312(b)(4). The requirements for obtaining control  
29      of electronic money are essentially the same as those for obtaining control of a controllable  
30      electronic record under Article 12. The \* \* \*

31  
32      12A. **Money-Related Definitions: “Money”; “Electronic Money”; “Tangible**  
33      **Money.”** One purpose of the Article 9 definition of “tangible money” uses the word “tangible”  
34      with its normal meaning (as something is to ensure that does have physical or corporeal  
35      existence, such as goods).

36  
37      ——— 7. *“Instrument.”* The change to the definition of “instrument” makes it clear that the  
38      definition excludes an instrument that is a record included in the definition of “chattel paper.”  
39      Note that while in many places in the UCC the term “writing” has been and is proposed to be  
40      replaced by the technology neutral term, “record,” instruments (under both Articles 3 and 9)  
41      must be “written” and in “writing.”

42  
43      ——— 8. *Money, even if some deposit accounts, and electronic were to become “money under*  
44      *Article 9. As observed in the Prefatory Note to”* as defined in Article 9 Amendments, some 1, the  
45      provisions relating to perfection and priority for security interests in deposit accounts, and not  
46      those for money, will apply to such collateral. Some countries may authorize or adopt deposit

accounts with a central bank as a form of “money,” as defined in Section 1-201(b)(24) ~~(as that definition is proposed to be revised in the draft).~~ See Section 9-101, Comment 5.c. However, the ~~existing~~ Article 9 provisions governing “deposit accounts” would remain suitable for such accounts with a central bank, even if a government has adopted these accounts as money. The ~~draft makes~~ revisions make no changes with respect to Article 9’s treatment of deposit accounts. However, for purposes of Article 9 and in the interest of clarity, the definition of “money” in Section 9-102(a)(31A) excludes deposit accounts. Under this definition, deposit accounts would not be money for Article 9 purposes even if they were to become money under the Article 1 definition. ~~In similar fashion, A second purpose of the Article 9 definition of “money” for purposes of Article 9 excludes~~ is to exclude from that definition money (as defined in Section 1-201(b)(24)) in an electronic form that cannot be subjected to control under Section 9-105A, ~~which.~~ Such property would be a general intangible under Article 9, governed by the perfection and priority rules for that type of collateral.

Some countries may authorize or adopt intangible tokens as a medium of exchange that would be “money” as defined in both Article 1 and Article 9. See Section 9-101, Comment 5.c. Such intangible tokens would be “electronic money,” as defined in Section 9-102(a)(31A). A security interest in electronic money as original collateral can be perfected only by control. Sections 9-312(b)(4); 9-314; 9-105A. The requirements for obtaining control of electronic money are essentially the same as those for obtaining control of a controllable electronic record under Article 12. ~~— The principal function of the new Article 9 definition of “money” is to ensure that (i) even if some deposit accounts were to become “money” as defined in Article 1, the provisions relating to perfection and priority for security interests in deposit accounts, and not those for money, will apply, and (ii) money, as defined in Article 1, in an electronic form that cannot be subjected to control will be subject to the perfection and priority rules for general intangibles. It will be necessary to ensure that this definitional strategy does not cause any difficulties for other provisions of Article 9, such as references to the cognate term “monetary.” The current thinking is that this will not be problematic.~~

#### ~~9. Proceeds.~~

~~a. No change to definition of proceeds.~~ No change to the definition of “proceeds” is proposed and the definition is provided here Sections 9-105A; 12-105. The definition of “tangible money” in Section 9-102(a)(79A) uses the word “tangible” with its normal meaning (as something that has physical or corporeal existence, such as goods).

**13. Proceeds-Related Definitions: “Cash Proceeds”; “Noncash Proceeds”; “Proceeds.”** The revised definition of “proceeds” expands the definition beyond that contained in former Section 9-306 and resolves ambiguities in the former section.

\* \* \*

**f. Forks and Airdrops for Controllable Electronic Records.** ~~for convenience.~~

~~b. “Fork” involving controllable electronic record.~~ Sometimes there occurs a change in

1 the software (code) of a system (sometimes referred to as a “protocol” or “platform”) in which a  
2 controllable electronic record is recorded. When such a change occurs in a blockchain platform,  
3 the blockchain may remain intact, no new blockchain may result, and the change sometimes is  
4 colloquially referred to as a “soft fork.” If, instead, such a change results in a new, separate  
5 blockchain that exists alongside the original blockchain and a new controllable electronic record  
6 is created, the change is sometimes referred to as a “hard fork.” But the terms “fork,” “soft fork,”  
7 and “hard fork” are ambiguous and not used consistently. Even in a hard fork situation the pre-  
8 fork controllable electronic record typically would remain intact (although its value might be  
9 affected). A person in control of the original record may not automatically obtain control of a  
10 new record. Additional steps may be required for the person in control of the original record to  
11 obtain control of the new record.

12  
13 ~~—— c. New controllable electronic record as proceeds.——~~ Depending on the nature and  
14 structure of the fork, a new controllable electronic record arising under a hard fork may be  
15 property “distributed on account of” the original record or “rights arising out of” the original  
16 record, thereby constituting proceeds of the original record under subparagraph (B) or (C), or  
17 both, of the definition of “proceeds.” If the new record is identifiable “proceeds,” then the rules  
18 on attachment, perfection, priority under Sections 9-203(f), 9-315, and 9-322 would apply. If a  
19 security interest in the original record is perfected by control, the creation of the new record in  
20 connection with a hard fork typically results in the secured party obtaining control (or having the  
21 opportunity to obtain control) of the new record. If that is not the case and perfection of the  
22 security interest in the original record is only by control, however, then perfection would  
23 continue in the new record only until the 21st day after the security interest attaches to the new  
24 record, unless one of the exceptions under subsection (d) applies. Section 9-315(c), (d). For this  
25 reason, a secured party may wish also to perfect its security interest by filing so that the  
26 perfection would continue thereafter in any proceeds under Section 9-315(d)(1). A secured party  
27 that does so may, to ensure the priority of its perfected security interest, also wish to consider  
28 obtaining a release or subordination from any earlier filed secured party whose financing  
29 statement covers the same type of property. Even if that is achieved, a security interest in the  
30 record that is perfected by control (even if control is later obtained) would have priority over a  
31 security interest perfected only by filing. Section 9-326A.

32  
33 ~~—— d. “Airdrops” of controllable electronic records.——~~ New controllable electronic records  
34 also may be provided to persons in control of existing records by way of an “airdrop” that does  
35 not involve a fork in an existing blockchain. Depending on the circumstances, these new records  
36 may or may not be proceeds of the existing, original record.

37  
38 ~~—— e. New controllable electronic record as financial asset credited to securities account.——~~

39 If the original record were a financial asset credited to a securities account, the new  
40 record might become proceeds of a security entitlement for the reasons described in Note  
41 9-e above. Concerning the duties, if any, of a securities intermediary with respect to such a  
42 distribution, see Section 8-505, Comment 4.

43 \* \* \*

44  
45 15. “Accounting.” This definition describes the record and information that a debtor

1 is entitled to request under Section 9-210. Consistent with the revised definition of “sign” in  
2 Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the  
3 previous text of this definition.

4 \* \* \*

5  
6 23. **“Proposal.”** This definition describes a record that is sufficient to propose to  
7 retain collateral in full or partial satisfaction of a secured obligation. See Sections 9-620, 9-621,  
8 9-622. Consistent with the revised definition of “sign” in Section 1-201, the cognate term  
9 “signed” replaces the reference to “authenticated” in the previous text of this definition.

#### 10 11 Reporter’s Note

12  
13 1. *No change to definitions of “deposit account,” “proceeds,” or “promissory*  
14 *note.”* No changes to the definitions of “deposit account,” “proceeds,” or “promissory note” are  
15 proposed and the definitions are provided for convenience.

16  
17 2. *Further updating of official comment to Section 9-102.* The revisions to the  
18 official comment to this section reflected above primarily address the more significant changes  
19 in the 2022 Revisions relating to Article 9 definitions. However, the entire official comment to  
20 this section will be updated in due course.

21  
22 \* \* \*

#### 23 **Section 9-104. Control of Deposit Account.**

24 (a) **[Requirements for control.]** A secured party has control of a deposit account if:

25 (1) the secured party is the bank with which the deposit account is maintained;

26 (2) the debtor, secured party, and bank have agreed in ~~an authenticated~~ a signed  
27 record that the bank will comply with instructions originated by the secured party directing  
28 disposition of the funds in the deposit account without further consent by the debtor; ~~or~~

29 (3) the secured party becomes the bank’s customer with respect to the deposit  
30 account; or

31 (4) another person, other than the debtor:

32 (A) has control of the deposit account and acknowledges that it has control  
33 on behalf of the secured party; or

34 (B) obtains control of the deposit account after having acknowledged that

1 it will obtain control of the deposit account on behalf of the secured party

2 (b) **[Debtor's right to direct disposition.]** A secured party that has satisfied subsection  
3 (a) has control, even if the debtor retains the right to direct the disposition of funds from the  
4 deposit account.

5 Official Comment  
6 Reporter's Note  
7

8 1.- **Source.** ~~New; derived~~ Derived from Section 8-106.

9  
10 2. **Why "Control" Matters.** This section explains the concept of "control" of a deposit  
11 account. "Control" under this section may serve two functions. First, "control . . . pursuant to  
12 the debtor's agreement" may substitute for ~~an authenticated~~ a signed security agreement as an  
13 element of attachment. See Section 9-203(b)(3)(D). Second, when a deposit account is taken as  
14 original collateral, the only method of perfection is obtaining control under this section. See  
15 Section 9-312(b)(1).

16  
17 3. **Requirements for "Control: In General."** This section derives from Section 8-106  
18 of Revised Article 8, which defines "control" of securities and certain other investment property.  
19 Under subsection (a)(1), the bank (if it is the secured party) with which the deposit account is  
20 maintained has control. The effect of this provision is to afford the bank automatic perfection.  
21 No other form of public notice is necessary; all actual and potential creditors of the debtor are  
22 always on notice that the bank with which the debtor's deposit account is maintained may assert  
23 a claim against the deposit account.

24  
25 **Example:** D maintains a deposit account with Bank A. To secure a loan from Banks X,  
26 Y, and Z, D creates a security interest in the deposit account in favor of Bank A, as agent  
27 for Banks X, Y, and Z. Because Bank A is a "secured party" as defined in Section 9-102,  
28 the security interest is perfected by control under subsection (a)(1).

29  
30 Under subsection (a)(2), a secured party may obtain control by obtaining the bank's  
31 ~~authenticated~~ signed agreement that it will comply with the secured party's instructions without  
32 further consent by the debtor. The analogous provision in Section 8-106 does not require that the  
33 agreement be ~~authenticated~~ signed. An agreement to comply with the secured party's  
34 instructions suffices for "control" of a deposit account under this section even if the bank's  
35 agreement is subject to specified conditions, e.g., that the secured party's instructions are  
36 accompanied by a certification that the debtor is in default. (Of course, if the condition is the  
37 debtor's further consent, the statute explicitly provides that the agreement would *not* confer  
38 control.) See revised Section 8-106, Comment 7.

39  
40 \* \* \*

41 4. **Control on behalf of another person.** ~~Draft subsection~~ Subsection (a)(4)

1 provides for a secured party to obtain control of a deposit account by virtue of the  
2 acknowledgment by another person, other than the debtor, in control of the deposit account.

3  
4 ~~—————~~ ~~a. Subsection (a)(4)~~ It generally follows ~~draft~~ revisions to the corresponding  
5 provisions for control of electronic documents of title (Section 7-106(g)), control of a security  
6 entitlement (8-106(d)), control of an electronic copy of a record evidencing chattel paper  
7 (Section 9-105(g)), control of electronic money (Section 9-105A(e)), and control of controllable  
8 electronic records (Section 12-105(e)). For a brief discussion, see Section 12-105,  
9 ~~Comment~~ Comments 8 and 9.

10  
11 ~~—————~~ ~~b.~~ An acknowledgment by a person in control under subsection (a)(4) would not  
12 impose any duties on the bank with which the deposit account is maintained ~~and the official~~  
13 ~~comments will make this clear.~~ Indeed, the bank may have no knowledge or involvement  
14 whatsoever with a control person's acknowledgment under that subsection.

15  
16 On the other hand, subsection ~~—————~~ ~~e. Subsection~~ (a)(4) should not be construed to  
17 permit the bank with which the deposit account is maintained to short-circuit subsection (a)(2),  
18 which provides for control through a control agreement between ~~among~~ the debtor, the bank, and  
19 the control person. However, it would be possible for the bank, acting in a capacity other than as  
20 the ~~depository~~ depository bank (for example, as a secured party) to acknowledge that it has  
21 control on behalf of another purchaser under subsection (a)(4).

22  
23 Section 9-107B(a) makes clear that a person that has control under this section has no  
24 duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements  
25 for a person to acknowledge that it has or will obtain control on behalf of another person are not  
26 standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the parties and to any  
27 other applicable law any duties of a person that does acknowledge that it has or will obtain  
28 control on behalf of another person and provides that a person making an acknowledgment is not  
29 required to confirm the acknowledgment to another person.

30  
31 ~~—————~~ ~~d. Section 9-107B(a) makes clear that a person that has control under this section~~  
32 ~~has no duty to acknowledge that it has or will obtain control on behalf of another person.~~  
33 ~~Arrangements for a person to acknowledge that it has or will obtain control on behalf of another~~  
34 ~~person are not standardized. Accordingly, draft Section 9-107B(b) leaves to the agreement of the~~  
35 ~~parties and to any other applicable law any duties of a person that does acknowledge that it has~~  
36 ~~or will obtain control on behalf of another person and provides that a person making an~~  
37 ~~acknowledgment is not required to confirm the acknowledgment to another person.~~

### 38 39 **Section 9-105. Control of Electronic Chattel Paper.**

40 (a) ~~[General rule: control of electronic chattel paper.]~~ A secured party has control of  
41 electronic chattel paper if a system employed for evidencing the transfer of interests in the  
42 chattel paper reliably establishes the secured party as the person to which the chattel paper was

1 assigned.

2 ~~(b) [Specific facts giving control.] A system satisfies subsection (a) if the record or~~  
3 ~~records comprising the chattel paper are created, stored, and assigned in such a manner that:~~

4 ~~(1) a single authoritative copy of the record or records exists which is unique,~~  
5 ~~identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;~~

6 ~~(2) the authoritative copy identifies the secured party as the assignee of the record~~  
7 ~~or records;~~

8 ~~(3) the authoritative copy is communicated to and maintained by the secured party~~  
9 ~~or its designated custodian;~~

10 ~~(4) copies or amendments that add or change an identified assignee of the~~  
11 ~~authoritative copy can be made only with the consent of the secured party;~~

12 ~~(5) each copy of the authoritative copy and any copy of a copy is readily~~  
13 ~~identifiable as a copy that is not the authoritative copy; and~~

14 ~~(6) any amendment of the authoritative copy is readily identifiable as authorized~~  
15 ~~or unauthorized.~~

16 **Section 9-105. Control of Electronic Copy of Record Evidencing Chattel Paper.**

17 **(a) [General rule: control of electronic copy of record evidencing chattel paper.] A**  
18 purchaser has control of ~~each~~<sup>an</sup> authoritative electronic copy of a record evidencing chattel paper  
19 if a system employed for evidencing the assignment of interests in the chattel paper reliably  
20 establishes the purchaser as the person to which the ~~chattel paper~~<sup>authoritative electronic copy</sup>  
21 was assigned.

22 ~~(b) [Specific facts giving control.]~~**[Single authoritative copy.] A system satisfies**  
23 subsection (a) if the record or records evidencing the chattel paper are created, stored, and



assigned in such a manner that:

(1) a single authoritative copy of the record or records exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the purchaser as the assignee of the record or records;

(3) the authoritative copy is communicated to and maintained by the purchaser or its designated custodian;

(4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the purchaser;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

**(c) [One or more authoritative copies.]** A system satisfies subsection (a), and a purchaser has control of an authoritative electronic copy of a record evidencing chattel paper, if the electronic copy, a record attached to or logically associated with the electronic copy, or a system in which the electronic copy is recorded:

(1) enables the purchaser readily to identify each electronic copy as an authoritative copy or nonauthoritative copy;

(2) enables the purchaser readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as the assignee of each the authoritative electronic copy; and

(3) gives the purchaser exclusive power, subject to subsection (d), to:



1                   (A) prevent others from adding or changing an identified assignee of  
2 ~~each~~the authoritative electronic copy; and

3                   (B) transfer control of ~~each~~the authoritative electronic copy.

4           **(d) [Meaning of exclusive.]** ~~A~~Subject to subsection (e), a power is exclusive under  
5 subsection ~~(b)~~(c)(3)(A) and (B), even if:

6                   (1) the authoritative electronic copy, a record attached to or logically associated  
7 with the authoritative electronic copy, or a system in which the authoritative electronic copy is  
8 recorded limits the use of the authoritative electronic copy or has a protocol programmed to  
9 cause a change, including a transfer or loss of control; or

10                  (2) the power is shared with another person.

11           **(e) [When** ~~purchaser does~~power is not ~~share power.]~~ ~~The purchaser does not share a~~  
12 ~~power~~shared with another person.] A power of a purchaser is not shared with another person  
13 under subsection (d)(2) and the purchaser's power is not exclusive if:

14                   (1) the purchaser can exercise a power only if the power also is exercised by the  
15 other person; and

16                   (2) the other person either:

17                           (A) can exercise the power without exercise of the power by the  
18 purchaser; or

19                           (B) is the transferor to the purchaser of an interest in the chattel paper.

20           **(f) [Presumption of exclusivity of certain powers.]** If a purchaser has the powers  
21 specified in subsection (c)(3)(A) and (B), the powers are presumed to be exclusive.

22           **(g) [Obtaining control through another person.]** A purchaser has control of ~~each~~an  
23 authoritative electronic copy of a record evidencing chattel paper if another person, other than

1 the ~~debtor~~ transferor to the purchaser of an interest in the chattel paper:

2 (1) has control of ~~each~~the authoritative electronic copy and acknowledges that it  
3 has control on behalf of the purchaser; or

4 (2) obtains control of ~~each~~the authoritative electronic copy after having  
5 acknowledged that it will obtain control of the electronic copy on behalf of the purchaser.

## 6 Official Comment

### 7 Reporter's Note

8  
9 1. ~~The function~~ \_\_\_\_\_ Source. New.

10  
11 2. \_\_\_\_\_ “Control” of Electronic Chattel Paper. This Article covers security  
12 interests in “electronic chattel paper,” a new term defined in Section 9-102. This section governs  
13 how “control. Under” of electronic chattel paper may be obtained. Subsection (a), which derives  
14 from Section 16 of the draft, as Uniform Electronic Transactions Act, sets forth the general test  
15 for control. Subsection (b) sets forth a safe harbor test that, if satisfied, establishes control under  
16 current law, at the general test in subsection (a).

17 A secured party’s control of electronic chattel paper (i) may substitute for an  
18 authenticated security agreement for purposes of attachment under Section 9-203, (ii) is a  
19 method of perfection under Section 9-314, and (iii) is a condition for obtaining special, non-  
20 temporal priority under Section 9-330. Because electronic chattel paper cannot be transferred,  
21 assigned, or possessed in the same manner as tangible chattel paper, a special definition of  
22 control is necessary. In descriptive terms, this section provides that control of electronic chattel  
23 paper is the functional equivalent of possession of “tangible chattel paper” (a term also defined  
24 in Section 9-102).

25  
26 3. \_\_\_\_\_ Development of Control Systems. This Article leaves to the marketplace the  
27 development of systems and procedures, through a combination of suitable technologies and  
28 business practices, for dealing with control of electronic chattel paper in a commercial context.  
29 Systems that evolve for control of electronic chattel paper may or may not involve a third party  
30 custodian of the relevant records. As under UETA, a system must be shown to reliably establish  
31 that the secured party is the assignee of the chattel paper. Reliability is a high standard and  
32 encompasses the general principles of uniqueness, identifiability, and unalterability found in  
33 subsection (b) without setting forth specific guidelines as to how these principles must be  
34 achieved. However, the standards applied to determine whether a party is in control of electronic  
35 chattel paper should not be more stringent than the standards now applied to determine whether a  
36 party is in possession of tangible chattel paper. For example, just as a secured party does not  
37 lose possession of tangible chattel paper merely by virtue of the possibility that a person acting  
38 on its behalf could wrongfully redeliver the chattel paper to the debtor, so control of electronic  
39 chattel paper would not be defeated by the possibility that the secured party’s interest could be  
40 subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

1        This section and the concept of control of electronic chattel paper are not based on the  
2 same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of  
3 investment property (Section 9-106), and letter-of-credit rights (Section 9-107). The rules for  
4 control of those types of collateral are based on existing market practices and legal and  
5 regulatory regimes for institutions such as banks and securities intermediaries. Analogous  
6 practices for electronic chattel paper are developing nonetheless. The flexible approach adopted  
7 by this section, moreover, should not impede the development of these practices and, eventually,  
8 legal and regulatory regimes, which may become analogous to those for, e.g., investment  
9 property.

10  
11        4. —“Authoritative Copy” of Electronic Chattel Paper. One requirement for  
12 establishing control under subsection (b) is that a particular copy be an “authoritative copy.  
13 “Although other copies may exist, they must be distinguished from the authoritative copy. This  
14 may be achieved, for example, through the methods of authentication that are used or by  
15 business practices involving the marking of any additional copies. When tangible chattel paper  
16 is converted to electronic chattel paper, in order to establish that a copy of the electronic chattel  
17 paper is the authoritative copy it may be necessary to show that the tangible chattel paper no  
18 longer exists or has been permanently marked to indicate that it is not the authoritative copy.

19  
20        1.        **The Functions of Control.** A secured party can perfect a security interest in  
21 chattel paper by filing. See Section 9-312(a). Alternatively, a secured party can perfect a security  
22 interest in chattel paper by taking possession of all authoritative tangible copies of the record  
23 evidencing the chattel paper and obtaining control of all authoritative electronic copies. See  
24 Section 9-314A. Perfection generally serves the function of enabling the public to determine that  
25 an asset (here, chattel paper) may be encumbered with a security interest. Possession and control  
26 also are conditions for achieving priority under Section 9-330(a), (b), and (c). A secured party’s  
27 possession or control of chattel paper also may substitute for a signed security agreement for  
28 purposes of attachment under Section 9-203

29  
30        2.-        **Conditions for obtaining control**Obtaining Control: In general. General. This  
31 section provides the requirements for obtaining control of chattel paper. As explained in the  
32 preceding Note, control relates comment to perfection of a security interest in chattel paper. One  
33 methodthe definition of perfecting a security interest in “chattel paper is to take possession of all  
34 tangible authoritative copies of the record evidencing the,” the definitions of “electronic chattel  
35 paper and to obtain control of all authoritative electronic records. Perfection generally serves the  
36 function of enabling the public to determine that the asset in question (here,” and “tangible  
37 chattel paper) may be encumbered with a security interest” have been deleted as unnecessary.  
38 See Section 9-102, Comment 5.b.

39  
40        Subsections (a) and (b) are substantially unchanged. Subsection (a), which derives from  
41 Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control.  
42 (The amendments to subsection (a) primarily reflect the changes to the definition of chattel paper  
43 in Section 9-102.) Subsections (b) and (c) set forth safe harbor tests that, if satisfied, establish  
44 control under the general test in subsection (a). It is important to note that compliance with the  
45 new conditions for control in subsection (c) would satisfy the conditions provided in subsection  
46 (b). However, subsection (b) has been retained out of an abundance of caution and to provide

1 assurances that existing systems for control of electronic chattel paper ~~under current law will~~  
2 continue to be viable ~~after~~.

3  
4 **3. Development of Control Systems and Application of Subsection (b).** This  
5 Article leaves to the ~~draft revisions become effective~~ marketplace the development of systems  
6 and procedures, through a combination of suitable technologies and business practices, for  
7 dealing with control of chattel paper in a commercial context. As under UETA, for control under  
8 subsection (b), a system must be shown to reliably establish that the secured party is the assignee  
9 of the chattel paper. Reliability is a high standard and encompasses the general principles of  
10 uniqueness, identifiability, and unalterability found in subsection (b), but without setting forth  
11 specific guidelines as to how these principles must be achieved. Under subsection (b), at any  
12 point in time, a party should be able to identify the single authoritative copy which is unique and  
13 identifiable as the authoritative copy. This does not mean that once created that the authoritative  
14 copy need be static and never moved or copied from its original location. To the extent that  
15 backup systems exist which result in multiple copies, the key to this idea is that at any point in  
16 time, the one authoritative copy needs to be unique and identifiable. However, the standards  
17 applied to determine whether a party is in control of chattel paper should not be more stringent  
18 than the standards now applied to determine whether a party is in possession of tangible chattel  
19 paper. For example, just as a secured party does not lose possession of tangible chattel paper  
20 merely by virtue of the possibility that a person acting on its behalf *could* wrongfully redeliver  
21 the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the  
22 possibility that the secured party's interest *could* be subverted by the wrongful conduct of a  
23 person (such as a custodian) acting on its behalf.

24  
25 **4. Subsection (c) Safe Harbor: In General.** The subsection (c) "safe harbor"  
26 generally follows Section 12-105 for control of controllable electronic records. See generally  
27 Section 12-105 and Comments. It differs from subsection (b), which (as explained above) is  
28 based on a "single authoritative copy" of an electronic record or records, so subsection (b) would  
29 be inapplicable when the relevant record is maintained on a blockchain or other distributed  
30 ledger. The utility of distributed ledger technology (including blockchain technology) depends  
31 on there being multiple authoritative copies of a record. ~~revised~~ The conditions for "control"  
32 ~~provided~~ in subsection (c) are meant to reflect the functions that possession serves with respect  
33 to writings, but in a more accurate and technologically flexible way than does the ~~current~~  
34 ~~definition. The requirements for obtaining control under subsection (c) are inspired by Section~~  
35 ~~12-105 on control of controllable electronic records. See generally Section 12-105,~~  
36 ~~Comments.~~ definition in subsection (b).

37  
38 ~~3. Control of electronic copy of record evidencing chattel paper.~~ Subsection (c), as  
39 supplemented by subsections (d) through (g), sets forth the requirements for a purchaser to have  
40 "control of an authoritative electronic copy of a record evidencing chattel paper." However, for  
41 purposes of perfection of a security interest in the chattel paper under Section 9-314A and  
42 qualification for non-temporal priority under Section 9-330, the purchaser must obtain control of  
43 *each* authoritative electronic copy (i.e., *all* of the copies) of a record evidencing the chattel paper  
44 and take possession of each tangible copy of the record evidencing the chattel paper.

45  
46 **5. Control of Electronic Copy of Record Evidencing Chattel Paper under**

**Subsection (c).** Under subsection (c), to obtain control of an electronic copy of a record evidencing chattel paper a purchaser must be able to identify each electronic copy as authoritative or nonauthoritative and identify itself as the assignee of ~~each~~the authoritative copy. In addition, the purchaser must have the exclusive power to prevent others from adding or changing an identified assignee and to transfer control of ~~each~~the authoritative copy. However, once it is established that a person has received those powers, subsection (f) provides a presumption of exclusivity. Consequently, a person asserting control need not prove exclusivity in order to make out a *prima facie* case. Application of the presumption will be governed also by Section 1-206 (effects of a presumption under the UCC) and applicable non-UCC law (including rules of procedure and evidence). See generally Section 12-105, Comment 5. ~~In addition, subsection~~ Subsection (d) contains two qualifications of the term “exclusive” as used in subsection ~~(a)(1)(B)(3)~~. A power can be “exclusive” under subsection ~~(a)(1)(B)(3)~~ even if one or both of these qualifications apply.

Subsection (e) provides that in certain circumstances a power is not shared within the meaning of subsection ~~(d)(2) and, consequently, .~~ as a result the relaxation of the exclusivity requirement provided by subsection (d)(2) does not apply. ~~and, consequently, a purchaser’s power is not exclusive.~~ Subsection (e) provides that a ~~person~~purchaser does not share an exclusive power with another person if the ~~person~~purchaser can exercise the power only with the other person’s cooperation (subsection (e)(1)) but the other person either (i) can exercise ~~of the~~ power ~~unilaterally~~ without the ~~person’s~~purchaser’s cooperation (subsection (e)(2)(A)) or (ii) is the transferor to the ~~person~~purchaser of an interest in the ~~controllable electronic record, chattel paper~~ (subsection (e)(2)(B)). It follows that a ~~person in that situation~~purchaser to which subsection (e) applies does not have control ~~because it does not have the requisite exclusive power. Concerning~~ based on its exclusive powers (although it might have control through another person under subsection (g), discussed below, or if another person having control is acting as the person’s agent). As to the ~~exclusivity of powers, including rationale for disqualifying a purchaser (which includes a secured party in a secured transaction) from sharing powers with a transferor to the purchaser, as provided in subsection (c)(2)(B), and from the benefit of shared control and limitations on shared control under subsection (d)(2), and for examples, see generally~~ of the operation of subsection (e) (in the context of the similar provision in Section 12-105, ~~Comment 5~~).

~~— The utility of distributed ledger technology (including blockchain technology) depends on there being multiple authoritative copies of a record. The safe harbor under existing ., see Section 912-105(b) contemplates a “single authoritative copy”, Comments 5 and so is unavailable when the relevant record is maintained on a blockchain or other distributed ledger. Subsection (c) allows a purchaser to obtain control when there are multiple authoritative copies9.~~

#### **4.6. Control on behalf of another person.**

~~—~~ **a. Through Another Person.** Subsection (g) provides for a purchaser to obtain control of an electronic copy by virtue of the acknowledgment by another person in control of the electronic copy. It follows ~~draft~~ revisions to the corresponding provisions for control of electronic documents of title (Section 7-106(g)), control of a security entitlement (Section 8-106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of electronic

1 money (Section 9-105A(e)), and control of controllable electronic records (Section 12-105(e)).  
2 ~~For a brief discussion, see Section 12-105, Comment 8~~For a brief discussion, see Section 12-105,  
3 Comment 8. Under subsection (g) for an acknowledgement by another person to be effective to  
4 confer control on a purchaser, the other person making the acknowledgment must be one “other  
5 than the transferor to the purchaser of an interest in the chattel paper.” The rationale for this  
6 limitation is discussed in Section 12-105, Comment 9.

7  
8 ~~b. Section 9-107B(a) makes clear that a person that has control under this section~~  
9 ~~has no duty to acknowledge that it has or will obtain control on behalf of another person.~~  
10 ~~Arrangements for a person to acknowledge that it has or will obtain control on behalf of another~~  
11 ~~person are not standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the~~  
12 ~~parties and to any other applicable law any duties of a person that does acknowledge that it has~~  
13 ~~or will obtain control on behalf of another person and provides that a person making an~~  
14 ~~acknowledgment is not required to confirm the acknowledgment to another person.~~

15  
16 Section 9-107B(a) makes clear that a person that has control under this section has no  
17 duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements  
18 for a person to acknowledge that it has or will obtain control on behalf of another person are not  
19 standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the parties and to any  
20 other applicable law any duties of a person that does acknowledge that it has or will obtain  
21 control on behalf of another person and provides that a person making an acknowledgment is not  
22 required to confirm the acknowledgment to another person. For example, subsection (g) would  
23 apply to give control to a person, Alpha, when another person, Beta, has control of ~~an~~each  
24 authoritative electronic copy of a record evidencing chattel paper and acknowledges that it has  
25 control on behalf of Alpha. However, under Section 107B(a), Beta is not required to so  
26 acknowledge. And under Section 107B(b), even if Beta does so acknowledge, Beta owes no  
27 duty to Alpha unless Beta agrees or other law so provides and Beta is not required to confirm its  
28 acknowledgment to any other person.

29  
30 ~~5-7. References to “secured party” changed~~Secured Party” Changed to  
31 “purchaserPurchaser.” References to a “secured party” in the previous text of this section have  
32 been changed to refer to a “purchaser.” This change aligns the text with the priority rules of  
33 Section 9-330(a), (b), and (c).

### 34 35 **Section 9-105A. Control of Electronic Money.**

36 **(a) [General rule: control of electronic money.]** A person has control of electronic  
37 money if:

38 (1) the electronic money, a record attached to or logically associated with the  
39 electronic money, or a system in which the electronic money is recorded gives the person:

40 (A) the power to avail itself of substantially all the benefit from the

electronic money; and

(B) exclusive power, subject to subsection (b), to:

(i) prevent others from availing themselves of substantially all the benefit from the electronic money; and

(ii) transfer control of the electronic money to another person or cause another person to obtain control of other electronic money as a result of the transfer of the electronic money; and

(2) the electronic money, a record attached to or logically associated with the electronic money, or a system in which the electronic money is recorded enables the person readily to identify itself in any way, including by name, identifying number, cryptographic key, office, or account number, as having the powers under paragraph (1).

(b) [Meaning of exclusive.] ~~A~~ Subject to subsection (c) a power is exclusive under subsection (a)(1)(B), even if:

(1) the electronic money, a record attached to or logically associated with the electronic money, or a system in which the electronic money is recorded limits the use of the electronic money or has a protocol programmed to cause a change, including a transfer or loss of control; or

(2) the power is shared with another person.

(c) [~~When purchaser does power is not share power.~~ A person does not share a power shared with another person.] A power of a person is not shared with another person under subsection (b)(2) and the person's power is not exclusive if:

(1) the person can exercise a power only if the power also is exercised by the other person; and



(2) the other person either:

(A) can exercise the power without exercise of the power by the person; or

(B) is the transferor to the person of an interest in the electronic money.

**(d) [Presumption of exclusivity of certain powers.]** If a person has the powers specified in subsection (a)(1)(B), the powers are presumed to be exclusive.

**(e) [Control through another person.]** A person has control of electronic money if another person, other than the transferor to the person of an interest in the electronic money:

(1) has control of the electronic money and acknowledges that it has control on behalf of the person, or

(2) obtains control of the electronic money after having acknowledged that it will obtain control of the electronic money on behalf of the person.

#### **Reporter's Note**

#### **Official Comment**

1.- **“Control.” of Electronic Money: In General.** A security interest in electronic money as original collateral may be perfected only by control ~~as provided in~~ pursuant to this section. See Section 9-312(b)(4). ~~The~~ These requirements for obtaining control generally track those in Section 12-105 for controllable electronic records. See generally Section 12-105, Comments.

2.- **Control on ~~behalf~~ Behalf of another person.**

~~a.~~ **Another Person.** Subsection (e) provides for a person to obtain control of electronic money by virtue of the acknowledgment by another person in control of the electronic ~~copy~~ money. It follows ~~draft~~ revisions to the corresponding provisions for control of electronic documents of title (Section 7-106(g)), control of a security entitlement (Section 8-106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of an electronic copy of a record evidencing chattel paper (Section 9-105(g)), and control of controllable electronic records (Section 12-105(e)). For a brief discussion, see Section 12-105, Comment 8.

~~b.~~ Section 9-107B(a) makes clear that a person that has control under this section has no duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements for a person to acknowledge that it has or will obtain control on behalf of another person are not standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the



parties and to any other applicable law any duties of a person that does acknowledge that it has or will obtain control on behalf of another person and provides that a person making an acknowledgment is not required to confirm the acknowledgment to another person.

\* \* \*

**Section 9-107A. Control of Controllable Electronic Record, Controllable Account, or Controllable Payment Intangible.**

(a) **[Control under Section 12-105.]** A secured party has control of a controllable electronic record as provided in Section 12-105.

(b) **[Control of controllable account and controllable payment intangible.]** A secured party has control of a controllable account or controllable payment intangible if the secured party has control of the controllable electronic record that evidences the controllable account or controllable payment intangible.

**Reporter's Note**

**Official Comment**

1.- **Perfection by Control** ~~of controllable electronic records. This draft provides or~~ **Filing and Priority for perfection Controllable Electronic Records.** Perfection by filing and perfection by control ~~are~~ alternative methods of perfection ~~with respect to~~ for a controllable electronic record. See Sections 9-312 ~~and~~, 9-314. Under ~~Section 9-107A(a), this section,~~ a secured party has control of a controllable electronic record as provided in Section 12-105. Under Section 9-326A, a security interest in a controllable electronic record that is perfected by control has priority over a security interest perfected by another method.

2.- **Perfection by Control** ~~of controllable account or controllable payment intangible. This draft provides~~ **Filing and Priority for perfection Controllable Account or Controllable Payment Intangible.** Perfection by filing and perfection by control ~~as also are~~ alternative methods of perfection with ~~respect to~~ for a controllable account or controllable payment intangible. See Sections 9-312, 9-314. Under ~~Section 9-107A(a), this section,~~ a secured party would obtain control of a controllable account or controllable payment intangible by obtaining control of the ~~related~~ controllable electronic record ~~that evidences the controllable account or controllable payment intangible.~~ Under Section 9-326A, a security interest in a controllable account or controllable payment intangible that is perfected by control would have priority over a security interest perfected by another method.

By definition, a controllable account would be an Article 9 “account,” and a controllable

1 payment intangible would be an Article 9 “payment intangible.” Section 9-102. The fact that an  
2 account or payment intangible is a controllable account or controllable payment intangible does  
3 not affect a secured party’s alternative ~~method~~ of perfection, ~~i.e.,~~ by filing. Moreover, that fact  
4 does not affect the applicability of other provisions of Article 9, including the provisions  
5 governing an account debtor’s agreement not to assert defenses (Section 9-403) and the statutory  
6 overrides of legal and contractual restrictions on the assignability of accounts and payment  
7 intangibles (Sections 9-406 and 9-408).

8  
9 **Section 9-107B. No Requirement to Acknowledge or Confirm; No Duties.**

10 (a) **[No requirement to acknowledge.]** A person that has control under Section 9-104, 9-  
11 105, or 9-105A is not required to acknowledge that it has or will obtain control on behalf of  
12 another person.

13 (b) **[No duties or confirmation.]** If a person acknowledges that it has or will obtain  
14 control on behalf of another person, unless the person otherwise agrees or law other than this  
15 article otherwise provides, the person does not owe any duty to the other person and is not  
16 required to confirm the acknowledgment to any other person.

17 **Reporter’s Note**

18 **Official Comment**

19  
20 1.- ~~Source of these provisions.~~ Section 9-107B derives from ~~Section~~ Sections 8-  
21 106(g) and 9-313(f) and (g).

22  
23 2.- **Purpose.** Subsection (a) makes clear that a person that has control under the  
24 specified sections has no duty to acknowledge that it has or will obtain control on behalf of  
25 another person. Arrangements for a person to acknowledge that it has control on behalf of  
26 another person are not standardized. Accordingly, subsection (b) leaves to the agreement of the  
27 parties and to any other applicable law any duties of a person that does acknowledge that it has  
28 or will obtain control on behalf of any other person.

29 \* \* \*

30  
31 **Section 9-108. Sufficiency of Description.**

32 \* \* \*

1 (e) [When description by type insufficient.] A description only by type of  
2 collateral defined in [the Uniform Commercial Code] is an insufficient description of:  
3 (1) a commercial tort claim; or  
4 (2) in a consumer transaction, consumer goods, a security entitlement, a  
5 securities account, or a commodity account.

### 6 Official Comment

7 \* \* \*  
8

9 5. Consumer Investment Property; Commercial Tort Claims. Subsection (e)  
10 requires greater specificity of description in order to prevent debtors from inadvertently  
11 encumbering certain property. Subsection (e) ~~requires~~ provides that a description by defined  
12 “type” of collateral alone of a commercial tort claim or, in a consumer transaction, of a security  
13 entitlement, securities account, or commodity account, is not sufficient. For example, “all  
14 existing and after-acquired investment property” or “all existing and after-acquired security  
15 entitlements,” without more, would be insufficient in a consumer transaction to describe a  
16 security entitlement, securities account, or commodity account. The reference to “only by type”  
17 in subsection (e) means that a description is sufficient if it satisfies subsection (a) and also  
18 contains a descriptive component beyond the “type” alone. For example, a description such as  
19 “all goods now or hereafter sold by secured party to debtor” would suffice. Moreover, if the  
20 collateral consists of a securities account or commodity account, a description of the account is  
21 sufficient to cover all existing and future security entitlements or commodity contracts carried in  
22 the account. See Section 9-203(h), (i).

23  
24 Under Section 9-204, an after-acquired collateral clause in a security agreement will not  
25 reach future commercial tort claims. It follows that when an effective security agreement (or  
26 amendment) covering a commercial tort claim as original collateral is entered into the claim  
27 already will exist. Subsection (e) does not require a description to be ~~specific~~ specific, so long  
28 as it extends beyond the “type.” For example, a description such as “all tort claims arising out of  
29 the explosion of debtor’s factory” would suffice, even if the exact amount of the claim, the  
30 theory on which it may be based, and the identity of the tortfeasor(s) are not described. (Indeed,  
31 those facts may not be known at the time.)

32  
33 The enhanced specificity (beyond the “type”) that subsection (e) requires does not apply  
34 to the attachment of security interests in commercial tort claims or collateral in consumer  
35 transactions that are identifiable proceeds of other collateral. A security interest automatically  
36 attaches to such property under Sections 9-203(f) and 9-315(a)(2). This point is confirmed by  
37 Section 9-204(c).

### 38 Reporter’s Note

39  
40

1 No change. No change is proposed to Section 9-108, which is provided for convenience.  
2

3 \* \* \*

4 **Section 9-109. Scope.**

5 \* \* \*

6 **Official Comment**

7 \* \* \*

8 **16. Deposit Accounts. \* \* \***  
9

10 \* \* \* To perfect a security interest in a deposit account as original collateral, a secured  
11 party (other than the bank with which the deposit account is maintained) must obtain “control” of  
12 the account either by obtaining the bank’s ~~authenticated~~ signed agreement or by becoming the  
13 bank’s customer with respect to the deposit account. See Sections 9-312(b)(1), 9-104. Either of  
14 these steps requires the debtor’s consent.  
15

16 \* \* \*  
17

18 **Section 9-203. Attachment and Enforceability of Security Interest; Proceeds;**

19 **Supporting Obligations; Formal Requisites.**

20 \* \* \*

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

24 (1) value has been given;

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

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

28 (A) the debtor has ~~authenticated~~ signed a security agreement that provides  
29 a description of the collateral and, if the security interest covers timber to be cut, a description of

1 the land concerned;

2 \* \* \*

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

6 (D) the collateral is controllable accounts, controllable electronic records,  
7 controllable payment intangibles, deposit accounts, ~~electronic chattel paper, electronic~~  
8 documents, electronic money, investment property, or letter-of-credit rights, ~~or electronic~~  
9 ~~documents~~, and the secured party has control under Section 7-106, 9-104, 9-105A, 9-106, ~~or~~ 9-  
10 107, or 9-107A pursuant to the debtor's security agreement; or

11 (E) the collateral is chattel paper and the secured party has possession and  
12 control under Section 9-314A pursuant to the debtor's security agreement.

13 \* \* \*

14 **Reporter's Note**

15 ~~—Substitute for signed security agreement. Under subsection (b)(3)(B) (f) [Proceeds~~  
16 ~~and (D), possession supporting obligations.] The attachment of tangible a security interest in~~  
17 collateral gives the secured party the rights to proceeds provided by Section 9-315 and control of  
18 ~~intangible~~ is also attachment of a security interest in a supporting obligation for the collateral  
19 ~~may substitute for a signed security agreement.~~

20 \* \* \*

21 **Official Comment**

22 \* \* \*

23  
24 3. Security Agreement; Signed. Under subsection (b)(3), enforceability requires the  
25 debtor's security agreement and compliance with an evidentiary requirement in the nature of a

1 Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives,  
2 under which the debtor must ~~authenticate~~ sign a security agreement that provides a description of  
3 the collateral. ~~With respect to chattel paper, some of the authoritative records~~ Under Section 9-  
4 102, a “security agreement” is “an agreement that creates or provides for a security interest.”  
5 Neither that definition nor the requirement of paragraph (3)(A) rejects the deeply rooted doctrine  
6 that a bill of sale, although absolute in form, may be shown in fact to have been given as  
7 security. Under this Article, as under prior law, a debtor may show by parol evidence ~~the right to~~  
8 ~~payment may be tangible and some electronic. Accordingly, new subparagraph (b)(3)(E) would~~  
9 ~~provide that possession of the tangible authoritative records,~~ that a transfer purporting to be  
10 absolute was in fact for security. Similarly, a self-styled “lease” may serve as a security  
11 agreement if ~~any,~~ the agreement creates a security interest. See Section 1-203 (distinguishing  
12 security interest from lease). Consistent with the revised definition of “sign” in Section 1-201,  
13 the cognate terms “signed” and ~~control~~ “signing” replace the references to “authenticated” and  
14 “authentication” in the previous text of ~~the electronic records, if any, under this Section 9-314A~~  
15 ~~may substitute.~~

16  
17 **4. Possession, Delivery, or Control Pursuant to Security Agreement.** The other  
18 alternatives in subsection (b)(3) dispense with the requirement of an ~~authenticated~~ signed  
19 security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the  
20 secured party’s possession substitutes for ~~a~~ the debtor’s ~~authentication~~ signed security agreement-  
21 under paragraph (3)(A) if the secured party’s possession is “pursuant to the debtor’s security  
22 agreement.” That phrase refers to the debtor’s agreement to the secured party’s possession for  
23 ~~the purpose of creating~~ in connection with the creation of a security interest. The phrase should  
24 not be confused with the phrase “debtor has ~~authenticated~~ signed a security agreement,” used in  
25 paragraph (3)(A), which contemplates the debtor’s ~~authentication~~ signing of a record. In the  
26 unlikely event that possession is obtained without the debtor’s agreement, possession would not  
27 suffice as a substitute for ~~an authenticated~~ a signed security agreement. However, once the  
28 security interest has become enforceable and has attached, it is not impaired by the fact that the  
29 secured party’s possession is maintained without the agreement of a subsequent debtor (e.g., a  
30 transferee). Possession as contemplated by Section 9-313 is possession for purposes of  
31 subsection (b)(3)(B), even though it may not constitute possession “pursuant to the debtor’s  
32 agreement” and consequently might not serve as a substitute for ~~an authenticated~~ a signed  
33 security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a  
34 certificated security to the secured party under Section 8-301 pursuant to the debtor’s security  
35 agreement is sufficient as a substitute for ~~an authenticated~~ a signed security agreement.  
36 Similarly, under subsection (b)(3)(D), control of controllable accounts, controllable electronic  
37 records, controllable payment intangibles, deposit accounts, electronic documents, electronic  
38 money, investment property, ~~a deposit account, electronic chattel paper,~~ or a letter-of-credit  
39 ~~right, or electronic documents~~ rights satisfies the evidentiary test if control is pursuant to the  
40 debtor’s security agreement, and under subsection (b)(3)(E), possession and control of chattel  
41 paper under Section 9-314A satisfies the evidentiary test if pursuant to the debtor’s security  
42 agreement.

43  
44 \* \* \*  
45

1 8. Proceeds and Supporting Obligations. Under subsection (f), attachment of a  
2 security interest in original collateral also is attachment of a security interest in identifiable  
3 proceeds as provided in Section 9-315(a)(2). It is not necessary for a security agreement to  
4 mention “proceeds” or otherwise to describe collateral consisting of proceeds. See also Section  
5 9-108, Comment 5. Also under subsection (f), a security interest in a “supporting obligation”  
6 (defined in Section 9-102) automatically follows from a security interest in the underlying,  
7 supported collateral. This result was implicit under former Article 9. Implicit in subsection (f) is  
8 the principle that the secured party’s interest in a supporting obligation extends to the supporting  
9 obligation only to the extent that it supports the collateral in which the secured party has a  
10 security interest. Complex issues may arise, however, if a supporting obligation supports many  
11 separate obligations of a particular account debtor and if the supported obligations are separately  
12 assigned as security to several secured parties. The problems may be exacerbated if a supporting  
13 obligation is limited to an aggregate amount that is less than the aggregate amount of the  
14 obligations it supports. This Article does not contain provisions dealing with competing claims  
15 to a limited supporting obligation. As under former Article 9, other law, including the law of  
16 suretyship, and the agreements of the parties will control.

17  
18 \* \* \*  
19

#### 20 **Section 9-204. After-Acquired Property; Future Advances.**

21 (a) **[After-acquired collateral.]** Except as otherwise provided in subsection (b), a  
22 security agreement may create or provide for a security interest in after-acquired collateral.

23 (b) **[When after-acquired property clause not effective.]** A Subject to subsection (c), a  
24 security interest does not attach under a term constituting an after-acquired property clause to:

25 (1) consumer goods, other than an accession when given as additional security,  
26 unless the debtor acquires rights in them within 10 days after the secured party gives value; or

27 (2) a commercial tort claim.

28 (c) **[Limitation on subsection (b).]** Subsection (b) does not prevent a security interest  
29 from attaching:

30 (1) to consumer goods as proceeds under Section 9-315(a) or commingled goods  
31 under Section 9-336(c);

32 (2) to a commercial tort claim as proceeds under Section 9-315(a); or

33 (3) under an after-acquired property clause to property that is proceeds of

1 consumer goods or a commercial tort claim.

2 (e) (d) [Future advances and other value.] A security agreement may provide that  
3 collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are  
4 sold in connection with, future advances or other value, whether or not the advances or value are  
5 given pursuant to commitment.

### 6 Official Comment

7  
8 \* \* \*

9  
10 3.- After-Acquired Consumer Goods. Subsection (b)(1) makes ineffective an after-  
11 acquired property clause covering consumer goods (defined in Section 9-109, 9-102(a)(23)),  
12 except as accessions (see Section 9-335), acquired more than 10 days after the secured party  
13 gives value. Subsection (b)(1) is unchanged in substance from the corresponding provision in  
14 former Section 9-204(2). However, a term granting a security interest in consumer goods that  
15 will be purchase-money collateral in the transaction is not “a term constituting an after-acquired  
16 property clause.” Consequently, subsection (b)(1) does not prevent the security interest from  
17 attaching to the purchase-money collateral even if the collateral is not an accession and the  
18 debtor acquires rights in the collateral more than 10 days after the secured party gives value.

19  
20 \* \* \*

### 21 Reporter's Note

22  
23 ~~—Acquisition~~ 4. Commercial Tort Claims. Subsection (b)(2) provides that an  
24 after-acquired property clause in a security agreement does not reach future commercial tort  
25 claims. In order for a security interest in a tort claim as original collateral to attach, the claim  
26 must be in existence when the security agreement is authenticated signed. In addition, the  
27 security agreement must describe the tort claim with greater specificity than simply “all tort  
28 claims.” See Section 9-108(e).

29  
30 4A. Proceeds and Commingled Goods. Subsection (c) clarifies and makes explicit  
31 what is implicit in the previous text of subsection (b). Subsection (b) does not prevent a security  
32 interest from attaching to consumer goods as proceeds ~~and~~ or as commingled goods. ~~The~~  
33 ~~proposed revision would clarify the appropriate result when a debtor acquires consumer goods or~~  
34 ~~a, to commercial tort claim claims as proceeds, or under an after-acquired property clause to~~  
35 ~~proceeds of collateral and when a consumer acquires an interest in commingled goods. or~~  
36 commercial tort claims. This clarification would override ~~corrects and rejects~~ the erroneous  
37 holdings of several cases addressing commercial tort claims that are proceeds. The official  
38 comment will be revised accordingly. The proposed addition to Comment 3, would provide  
39 additional clarification. As to proceeds, this result also follows from Section 9-203(f).  
40



1 \* \* \*

2  
3 **Section 9-207. Rights and Duties of Secured Party Having Possession or Control**  
4 **of Collateral.**

5 \* \* \*

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

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

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

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

14 \* \* \*

15 **Reporter's Note**

16  
17 ~~—New methods of control. Cross references have been added to reflect the new methods of~~  
18 ~~“control” for electronic money (Section 9-105A) and for controllable electronic records,~~  
19 ~~controllable accounts, and controllable payment intangibles (Section 9-107A).~~  
20

21 **Section 9-208. Additional Duties of Secured Party Having Control of Collateral.**

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

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

27 (1) a secured party having control of a deposit account under Section 9-104(a)(2)

1 shall send to the bank with which the deposit account is maintained ~~an authenticated~~ a signed  
2 statement that releases the bank from any further obligation to comply with instructions  
3 originated by the secured party;

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

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

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

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

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

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

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

21 (3) a secured party, other than a buyer, having control under Section 9-105 of an  
22 authoritative electronic copy of a record evidencing chattel paper shall transfer control of the  
23 electronic copy to the debtor or a person designated by the debtor;

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

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

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

11 ~~(A) give control of the electronic document to the debtor or its designated~~  
12 ~~custodian;~~

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

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

21 (6) a secured party having control under Section 7-106 of an authoritative  
22 electronic copy of an electronic document of title shall transfer control of the  
23 ~~authoritative~~electronic copy to the debtor or a person designated by the debtor;

(7) a secured party having control under Section 9-105A of electronic money shall transfer control of the electronic money to the debtor or a person designated by the debtor; and

(8) a secured party having control under Section 12-105 of a controllable electronic record, other than a buyer of a controllable account or controllable payment intangible evidenced by the controllable electronic record, shall transfer control of the controllable electronic record to the debtor or a person designated by the debtor.

#### **Reporter's Note**

~~1. *New methods of control.* Provisions have been modified or added to take account of the new methods of "control" for chattel paper, electronic documents, electronic money, and controllable electronic records.~~

#### ~~2.~~ **Official Comment**

\* \* \*

2. **Scope and Purpose.** This section imposes duties on a secured party who has control of a deposit account, an electronic copy of a record evidencing chattel paper, investment property, a letter-of-credit right, or an electronic documents document of title, electronic money, or a controllable electronic record. The duty to terminate the secured party's control is analogous to the duty to file a termination statement, imposed by Section 9-513. Under subsection (a), it applies only when there is no outstanding secured obligation and the secured party is not committed to give value. The requirements of this section can be varied by agreement under Section 1-102(3). For example, a debtor could by contract agree that the secured party may comply with subsection (b) by releasing control more than 10 days after demand. Also, duties under this section should not be read to conflict with the terms of the collateral itself. For example, if the collateral is a time deposit account, subsection (b)(2) should not require a secured party with control to make an early withdrawal of the funds (assuming that were possible) in order to pay them over to the debtor or put them in an account in the debtor's name.

\* \* \*

5. **"Signed."** Replaces **"Authenticated."** Consistent with the ~~new~~ revised definition of "sign" in Section 1-201, the cognate term "signed" replaces references to "authenticated" in the previous text of this section.

~~\* \* \*~~ **Section 9-209. Duties of Secured Party if Account Debtor Has Been Notified of Assignment.**

1 (a) [Applicability of section.] Except as otherwise provided in subsection (c), this  
2 section applies if:

3 (1) there is no outstanding secured obligation; and

4 (2) the secured party is not committed to make advances, incur obligations, or  
5 otherwise give value.

6 (b) [Duties of secured party after receiving demand from debtor.] Within 10 days  
7 after receiving ~~an authenticated~~ a signed demand by the debtor, a secured party shall send to an  
8 account debtor that has received notification, under Section 9-406(a) or 12-106(b), of an  
9 assignment to the secured party as assignee ~~under Section 9-406(a) an authenticated~~ a signed  
10 record that releases the account debtor from any further obligation to the secured party.

11 (c) [Inapplicability to sales.] This section does not apply to an assignment constituting  
12 the sale of an account, chattel paper, or payment intangible.

13 **Official Comment**

14 \* \* \*

15 3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of  
16 “sign” in Section 1-201, the cognate term “signed” replaces references to “authenticated” in the  
17 previous text of this section.

18  
19 **Section 9-210. Request for Accounting; Request Regarding List of Collateral or**  
20 **Statement of Account.**

21 (a) [Definitions.] In this section:

22 (1) “Request” means a record of a type described in paragraph (2), (3), or (4).

23 (2) “Request for an accounting” means a record ~~authenticated~~ signed by a debtor  
24 requesting that the recipient provide an accounting of the unpaid obligations secured by

1 collateral and reasonably identifying the transaction or relationship that is the subject of the  
2 request.

3 (3) “Request regarding a list of collateral” means a record ~~authenticated~~ signed  
4 by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be  
5 the collateral securing an obligation and reasonably identifying the transaction or relationship  
6 that is the subject of the request.

7 (4) “Request regarding a statement of account” means a record ~~authenticated~~  
8 signed by a debtor requesting that the recipient approve or correct a statement indicating what  
9 the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a  
10 specified date and reasonably identifying the transaction or relationship that is the subject of the  
11 request.

12 (b) **[Duty to respond to requests.]** Subject to subsections (c), (d), (e), and (f), a secured  
13 party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or  
14 a consignor, shall comply with a request within 14 days after receipt:

15 (1) in the case of a request for an accounting, by ~~authenticating~~ signing and  
16 sending to the debtor an accounting; and

17 (2) in the case of a request regarding a list of collateral or a request regarding a  
18 statement of account, by ~~authenticating~~ signing and sending to the debtor an approval or  
19 correction.

20 (c) **[Request regarding list of collateral; statement concerning type of collateral.]** A  
21 secured party that claims a security interest in all of a particular type of collateral owned by the  
22 debtor may comply with a request regarding a list of collateral by sending to the debtor an  
23 ~~authenticated~~ signed record including a statement to that effect within 14 days after receipt.

1 (d) [Request regarding list of collateral; no interest claimed.] A person that receives  
2 a request regarding a list of collateral, claims no interest in the collateral when it receives the  
3 request, and claimed an interest in the collateral at an earlier time shall comply with the request  
4 within 14 days after receipt by sending to the debtor an ~~authenticated~~ signed record:

5 (1) disclaiming any interest in the collateral; and

6 (2) if known to the recipient, providing the name and mailing address of any  
7 assignee of or successor to the recipient's interest in the collateral.

8 (e) [Request for accounting or regarding statement of account; no interest in  
9 obligation claimed.] A person that receives a request for an accounting or a request regarding a  
10 statement of account, claims no interest in the obligations when it receives the request, and  
11 claimed an interest in the obligations at an earlier time shall comply with the request within 14  
12 days after receipt by sending to the debtor an ~~authenticated~~ signed record:

13 (1) disclaiming any interest in the obligations; and

14 (2) if known to the recipient, providing the name and mailing address of any  
15 assignee of or successor to the recipient's interest in the obligations.

16 (f) [Charges for responses.] A debtor is entitled without charge to one response to a  
17 request under this section during any six-month period. The secured party may require payment  
18 of a charge not exceeding \$25 for each additional response.

19 **Official Comment**

20 \* \* \*

21  
22 8. "Signed" and "Signing" Replaces "Authenticated" and "Authenticating."  
23 Consistent with the revised definition of "sign" in Section 1-201, the cognate terms "signed" and  
24 "signing" replace references to "authenticated" and "authenticating" in the previous text of this  
25 section.

26 \* \* \*  
27

1  
2           **Section 9-301. Law Governing Perfection and Priority of Security Interests.**

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

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

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

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

- 15                           (A) perfection of a security interest in the goods by filing a fixture filing;  
16                           (B) perfection of a security interest in timber to be cut; and  
17                           (C) the effect of perfection or nonperfection and the priority of a  
18 nonpossessory security interest in the collateral.

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

22                                   **Reporter's Note**

23  
24 ~~——— *Negotiable tangible documents.* The revisions to Section 9-301(3) clarify its application~~  
25 ~~only to negotiable tangible (not electronic) documents and tangible (not electronic) money.~~



\*\*\*

~~Section 9-304.~~ Official Comment

\*\*\*

**5. Law Governing Perfection: Exceptions.** The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303), deposit accounts (see Section 9-304), investment property (see Section 9-305), ~~or~~ letter-of-credit rights (see Section 9-306), chattel paper (see Section 9-306A), or controllable accounts, controllable electronic records, or controllable payment intangibles (see Section 9-306B). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)). No exception is made for electronic money and the general rule applies (unless preempted by federal law).

**a. Possessory Security Interests.** Paragraph (2) applies to possessory security interests and provides that perfection and priority is governed by the local law of the jurisdiction in which the collateral is located. This is the rule of former Section 9-103(1)(b), except paragraph (2) eliminates the troublesome “last event” test of former law.

The distinction between nonpossessory and possessory security interests creates the potential for the same jurisdiction to apply two different choice-of-law rules to determine perfection in the same collateral. For example, were a secured party in possession of an instrument or a tangible document to relinquish possession in reliance on temporary perfection, the applicable law immediately would change from that of the location of the collateral to that of the location of the debtor. The applicability of two different choice-of-law rules for perfection is unlikely to lead to any material practical problems. The perfection rules of one Article 9 jurisdiction are likely to be identical to those of another. Moreover, under paragraph (3), the relative priority of competing security interests in tangible collateral is resolved by reference to the law of the jurisdiction in which the collateral is located, regardless of how the security interests are perfected. As to perfection by possession and priority for security interests in chattel paper that is evidenced by an authoritative tangible copy of a record and not evidenced by an authoritative electronic copy, see Section 9-306A(c).

\*\*\*

**Section 9-304. Law Governing Perfection and Priority of Security Interests in Deposit Accounts.**

(a) [Law of bank’s jurisdiction governs.] The local law of a bank’s jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security

1 interest in a deposit account maintained with that bank, even if a transaction does not bear any  
2 relation to the bank's jurisdiction.

3 (b) **[Bank's jurisdiction.]** The following rules determine a bank's jurisdiction for  
4 purposes of this part:

5 (1) If an agreement between the bank and its customer governing the deposit  
6 account expressly provides that a particular jurisdiction is the bank's jurisdiction for purposes of  
7 this part, this article, or [the Uniform Commercial Code], that jurisdiction is the bank's  
8 jurisdiction.

9 (2) If paragraph (1) does not apply and an agreement between the bank and its  
10 customer governing the deposit account expressly provides that the agreement is governed by the  
11 law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

12 (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between  
13 the bank and its customer governing the deposit account expressly provides that the deposit  
14 account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's  
15 jurisdiction.

16 (4) If none of the preceding paragraphs applies, the bank's jurisdiction is the  
17 jurisdiction in which the office identified in an account statement as the office serving the  
18 customer's account is located.

19 (5) If none of the preceding paragraphs applies, the bank's jurisdiction is the  
20 jurisdiction in which the chief executive office of the bank is located.

## 21 Official Comment

22 \* \* \*

23 4. ~~No relation~~ Relation to bank's jurisdiction required Bank's Jurisdiction  
24 Required. As to the final clause of subsection (a), see Section 8-110, Comment 5A.

1  
2           **Section 9-305. Law Governing Perfection and Priority of Security Interests in**  
3 **Investment Property.**

4           (a) **[Governing law: general rules.]** Except as otherwise provided in subsection (c), the  
5 following rules apply:

6                   (1) While a security certificate is located in a jurisdiction, the local law of that  
7 jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a  
8 security interest in the certificated security represented thereby.

9                   (2) The local law of the issuer's jurisdiction as specified in Section 8-110(d)  
10 governs perfection, the effect of perfection or nonperfection, and the priority of a security  
11 interest in an uncertificated security.

12                   (3) The local law of the securities intermediary's jurisdiction as specified in  
13 Section 8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of  
14 a security interest in a security entitlement or securities account.

15                   (4) The local law of the commodity intermediary's jurisdiction governs  
16 perfection, the effect of perfection or nonperfection, and the priority of a security interest in a  
17 commodity contract or commodity account.

18                   (5) The local law of the issuer's jurisdiction, the securities intermediary's  
19 jurisdiction, or the commodity intermediary's jurisdiction governs perfection, the effect of  
20 perfection or nonperfection, and the priority of a security interest, even if a transaction does not  
21 bear any relation to that jurisdiction.

22           (b) **[Commodity intermediary's jurisdiction.]** The following rules determine a  
23 commodity intermediary's jurisdiction for purposes of this part:

24                   (1) If an agreement between the commodity intermediary and commodity

customer governing the commodity account expressly provides that a particular jurisdiction is the commodity intermediary's jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the commodity intermediary's jurisdiction.

(2) If paragraph (1) does not apply and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(3) If neither paragraph (1) nor paragraph (2) applies and an agreement between the commodity intermediary and commodity customer governing the commodity account expressly provides that the commodity account is maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(4) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the office identified in an account statement as the office serving the commodity customer's account is located.

(5) If none of the preceding paragraphs applies, the commodity intermediary's jurisdiction is the jurisdiction in which the chief executive office of the commodity intermediary is located.

(c) **[When perfection governed by law of jurisdiction where debtor located.]** The local law of the jurisdiction in which the debtor is located governs:

(1) perfection of a security interest in investment property by filing;

(2) automatic perfection of a security interest in investment property created by a broker or securities intermediary; and

(3) automatic perfection of a security interest in a commodity contract or

commodity account created by a commodity intermediary.

## Official Comment

\* \* \*

6. ~~No relation of transaction to issuer's, securities issuer's, Securities intermediary's, or commodity intermediary jurisdiction required. Commodity Intermediary Jurisdiction Required.~~ As to ~~new~~ subsection (a)(5), see Section 8-110, Comment 5A.

\* \* \*

### **Section 9-306A. Law Governing Perfection and Priority of Security Interests in Chattel Paper.**

**(a) [Chattel paper evidenced by authoritative electronic copy.]** Except as provided in subsection (e), if chattel paper is evidenced only by an authoritative electronic copy of the chattel paper or is evidenced by an authoritative electronic copy and an authoritative tangible copy, the local law of the electronic chattel paper's jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the chattel paper, even if a transaction does not bear any relation to the electronic chattel paper's jurisdiction.

**(b) [Electronic chattel paper's jurisdiction.]** The following rules determine the electronic chattel paper's jurisdiction under this section:

(1) If the authoritative electronic copy of the record evidencing chattel paper, or a record attached to or logically associated with the electronic copy and readily available for review, expressly provides that a particular jurisdiction is the electronic chattel paper's jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that jurisdiction is the electronic chattel paper's jurisdiction.

(2) If paragraph (1) does not apply and the rules of the system in which the authoritative electronic copy is recorded are readily available for review and expressly provide

1 that a particular jurisdiction is the electronic chattel paper's jurisdiction for purposes of this part,  
2 this article, or [the Uniform Commercial Code], that jurisdiction is the electronic chattel paper's  
3 jurisdiction.

4 (3) If paragraphs (1) and (2) do not apply and the authoritative electronic copy, or  
5 a record attached to or logically associated with the electronic copy and readily available for  
6 review, expressly provides that the chattel paper is governed by the law of a particular  
7 jurisdiction, that jurisdiction is the electronic chattel paper's jurisdiction.

8 (4) If paragraphs (1) through (3) do not apply and the rules of the system in which  
9 the authoritative electronic copy is recorded are readily available for review and expressly  
10 provide that the chattel paper or the system is governed by the law of a particular jurisdiction,  
11 that jurisdiction is the electronic chattel paper's jurisdiction.

12 (5) If paragraphs (1) through (4) do not apply, the electronic chattel paper's  
13 jurisdiction is the jurisdiction in which the debtor is located.

14 **(c) [Chattel paper evidenced by authoritative tangible copy.]** If an authoritative  
15 tangible copy of a record evidences chattel paper and the chattel paper is not evidenced by an  
16 authoritative electronic copy, while the authoritative tangible copy of the record evidencing  
17 chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

18 (1) perfection of a security interest in the chattel paper by possession under  
19 Section 9-314A; and

20 (2) the effect of perfection or nonperfection and the priority of a security interest  
21 in the chattel paper.

22 **(d) [When perfection governed by law of jurisdiction where debtor is located.]** The  
23 local law of the jurisdiction in which the debtor is located governs perfection of a security

1 interest in chattel paper by filing.

## 2 **Reporter's Note**

### 3 **Official Comment**

4 1.- ~~Source of these provisions.~~ Section 9-306A(a) and (b) derive from Sections 8-  
5 110(e) and 9-305 on law governing perfection and priority of security interests in investment  
6 property (as do ~~Section~~ Sections 9-306B and 12-107).

7  
8 2.- **Applicability of this Section.** This section determines the law governing  
9 perfection and priority of security interests in chattel paper. Subsections (a) and (b) apply to  
10 chattel paper that is evidenced only by an authoritative electronic copy of the chattel paper;  
11 ~~whether or not it also is evidenced by~~ by an authoritative electronic copy and an authoritative  
12 tangible copy. Subsection (c) applies to chattel paper that is evidenced by an authoritative  
13 tangible copy but not evidenced by an authoritative electronic copy. Subsection (~~ed~~) applies to  
14 perfection by filing for all chattel paper.

15  
16 3.- **Authoritative ~~electronic copy: electronic chattel paper's jurisdiction~~ **Electronic****  
17 **Copy: Electronic Chattel Paper's Jurisdiction.** Subsection (a) specifies the law governing  
18 perfection and priority of security interests in chattel paper evidenced by an authoritative  
19 electronic copy of the chattel paper, even if it is also evidenced by an authoritative tangible copy.  
20 Subject to subsection (d) on perfection by filing, the law governing perfection and priority is the  
21 local law of the electronic chattel paper's jurisdiction. Drawing on Sections 8-110 and 9-305, it  
22 is the authoritative electronic copy itself, records attached thereto or associated therewith, or the  
23 system in which the authoritative electronic copy is recorded that determines the electronic  
24 chattel paper's jurisdiction and, therefore, the governing law. Subsection (b) provides a  
25 "waterfall" of rules based on provisions that identify a particular jurisdiction as the electronic  
26 chattel paper's jurisdiction or alternatively that provide the governing law of the chattel paper or  
27 of the system in which the electronic copy is recorded. When no such identification or provision  
28 is made, it is the debtor's location, determined under Section 9-307, that is the electronic chattel  
29 paper's jurisdiction. As to the final clause of subsection (a), see Section 8-110, Comment 5A.

30  
31 4.- **Rationale for ~~subsection~~ Subsection (a).** A ~~major~~ buyer of, or secured lender  
32 against, chattel paper may arrange for authoritative electronic copies of chattel paper that it  
33 wishes to have assigned to it to be originated in or submitted into a system for the control and  
34 assignment of the chattel paper. The secured parties and lessors that will be assigning the chattel  
35 paper may be located in many different jurisdictions. As to assignments of the chattel paper by  
36 these secured parties and lessors, (assignor-debtors), but for this section perfection and priority  
37 would be governed by the law of each assignor-debtor's location under Section 9-301(1). Under  
38 this section, however, the law of a single jurisdiction—the electronic chattel paper's  
39 jurisdiction—could govern perfection and priority with respect to all of the assignments. By  
40 avoiding the application of the laws of multiple jurisdictions to perfection and priority, this rule  
41 could substantially reduce transaction costs.

42  
43 5.- **Authoritative tangible copy.** Subsection (c) ties the choice-of-law rules to the

1 location of the authoritative tangible copy when no authoritative electronic copy exists. In that  
2 circumstance, the local law of the jurisdiction where the authoritative tangible copy is physically  
3 located governs perfection of a security interest in the chattel paper by possession, under Section  
4 9-314A, and priority. Like ~~existing law~~ its predecessor, subsection (c) assumes that all the  
5 authoritative tangible copies are located in the same jurisdiction. However, assuming the secured  
6 party is in possession of all the tangible copies, even if the copies are located in more than one  
7 jurisdiction the situation is unlikely to be problematic.

8  
9 6.- **Perfection by filing.** Subsection (d) provides that the local law of the jurisdiction  
10 where the debtor is located governs perfection by filing for all chattel paper.

11  
12 **Section 9-306B. Law Governing Perfection and Priority of Security Interests in**  
13 **Controllable Accounts, Controllable Electronic Records, and Controllable Payment**  
14 **Intangibles.**

15 (a) **[Governing law: general rules.]** Except as provided in subsection (b), the local law  
16 of the controllable electronic record's jurisdiction specified in Section 12-107(c) and (d) governs  
17 perfection, the effect of perfection or nonperfection, and the priority of a security interest in a  
18 controllable electronic record and a security interest in a controllable account or controllable  
19 payment intangible evidenced by the controllable electronic record.

20 (b) **[When perfection governed by law of jurisdiction where debtor is located.]** The  
21 local law of the jurisdiction in which the debtor is located governs:

22 (1) perfection of a security interest in a controllable account, controllable  
23 electronic record, or controllable payment intangible by filing; and

24 (2) automatic perfection of a security interest in a controllable payment intangible  
25 created by a sale of the controllable payment intangible.

26 **Reporter's Note**

27  
28 **Official Comment**

29  
30 1.- **Perfection by control and priority.** Subsection (a) deals with perfection of a  
31 security interest in a controllable account, controllable electronic record, or controllable payment  
32 intangible other than by filing—i.e., perfection by control under Section 12-105—and priority.



1 For these purposes the governing law is that of the controllable electronic record's jurisdiction  
2 under Section 12-107(c) and (d).

3  
4 **2. Perfection by filing.** Under subsection (b) the local law of the jurisdiction of the  
5 debtor's location governs perfection of a security interest in a controllable account, controllable  
6 electronic record, or controllable payment intangible by filing (but not priority, as to which  
7 subsection (a) would apply). Because controllable electronic records are general intangibles and  
8 controllable accounts and controllable payment intangibles are subsets of accounts and payment  
9 intangibles, this provision does not change prior law.'

10  
11 \* \* \*

12 **Section 9-310. When Filing Required to Perfect Security Interest or Agricultural**  
13 **Lien; Security Interests and Agricultural Liens to Which Filing Provisions Do Not**  
14 **Apply.**

15 \* \* \*

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

18 \* \* \*

19 (8) in controllable accounts, controllable electronic records, controllable payment  
20 intangibles, deposit accounts, ~~electronic chattel paper~~, electronic documents, investment  
21 property, or letter-of-credit rights which is perfected by control under Section 9-314;

22 (9) in chattel paper which is perfected by possession and control under Section 9-  
23 314A;

24 ~~(9)~~(10) in proceeds which is perfected under Section 9-315; or

25 ~~(10)~~(11) that is perfected under Section 9-316.

26 \* \* \*

27 **Reporter's Note**

28  
29 ~~— Exceptions to perfection by filing. Exceptions to perfection by filing have been added for~~  
30 ~~controllable accounts, controllable electronic records, and controllable payment intangibles~~

(perfection by control) and for chattel paper (perfection by possession and control).

**Official Comment**

\* \* \*

**3. Exemptions from Filing.** Subsection (b) lists the security interests for which filing is not required as a condition of perfection, because they are perfected automatically upon attachment (subsections (b)(2) and ~~(b)(9)~~ (b)(10)) or upon the occurrence of another event (subsections (b)(1), (b)(5), and ~~(b)(9)~~ (b)(10)), because they are perfected under the law of another jurisdiction (subsection ~~(b)(10)~~ (b)(11)), or because they are perfected by another method, such as by the secured party's taking possession or control (subsections (b)(3), (b)(4), (b)(5), (b)(6), (b)(7), ~~and~~ (b)(8), and (b)(9)).

\* \* \*

**Section 9-312. Perfection of Security Interests in Chattel Paper, Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Deposit Accounts, Negotiable 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, controllable accounts, controllable electronic records, controllable payment intangibles, negotiable documents, instruments, or investment property, or negotiable documents 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) 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 tangible money may be perfected only by the secured

1 party's taking possession under Section 9-313; and

2 (4) a security interest in electronic money may be perfected only by control under  
3 Section 9-314.

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

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

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

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

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

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

15 (3) filing as to the goods.

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

20 \* \* \*

21 **Official Comment**

22 \* \* \*

1        4A. Controllable Accounts, Controllable Electronic Records, and Controllable  
2        Payment Intangibles. Consistent with the treatment of chattel paper, instruments, investment  
3        property, and negotiable documents, under subsection (a) a security interest in controllable  
4        accounts, controllable electronic records, and controllable payment intangibles may be perfected  
5        by filing. A security interest in that collateral also may be perfected by control. Section 9-314.  
6

7        \*\*\*

8        6A. Money. Under subsection (b)(3), a security interest in tangible money may be  
9        perfected only by possession under Section 9-313. Similarly, a security interest in electronic  
10       money may be perfected only by control under Section 9-314.  
11

12       7.- Goods Covered by Document of Title. Subsection (c) applies to goods in the  
13       possession of a bailee who has issued a negotiable document covering the goods. Subsection (d)  
14       applies to goods in the possession of a bailee who has issued a nonnegotiable document of title,  
15       including a document of title that is “non-negotiable” under Section 7-104. Section 9-313  
16       governs perfection of a security interest in goods in the possession of a bailee who has not issued  
17       a document of title.  
18

19       Subsection (c) clarifies the perfection and priority rules in former Section 9-304(2).  
20       Consistently with the provisions of Article 7, subsection (c) takes the position that, as long as a  
21       negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in  
22       the document. Accordingly, a security interest in goods covered by a negotiable document may  
23       be perfected by perfecting a security interest in the document. The security interest also may be  
24       perfected by another method, e.g., by filing. The priority rule in subsection (c) governs only  
25       priority between (i) a security interest in goods which is perfected by perfecting in the document  
26       and (ii) a security interest in the goods which becomes perfected by another method while the  
27       goods are covered by the document.  
28

29       **Example 1:** While wheat is in a grain elevator and covered by a negotiable warehouse  
30       receipt, Debtor creates a security interest in the wheat in favor of SP-1 and SP-2. SP-1  
31       perfects by filing a financing statement covering “wheat.” Thereafter, SP-2 perfects by  
32       filing a financing statement describing the warehouse receipt. Subsection (c)(1) provides  
33       that SP-2’s security interest is perfected. Subsection (c)(2) provides that SP-2’s security  
34       interest is senior to SP-1’s.  
35

36       **Example 2:** The facts are as in Example 1, but SP-1’s security interest attached and was  
37       perfected before the goods were delivered to the grain elevator. Subsection (c)(2) does not  
38       apply, because SP-1’s security interest did not become perfected during the time that the  
39       wheat was in the possession of a bailee. Rather, the first-to-file-or-perfect priority rule  
40       applies. See Sections 9-322 and 7-503.  
41

42       A secured party may become “a holder to whom a negotiable document of title has been duly  
43       negotiated” under Section 7-501. If so, the secured party acquires the rights specified by Article  
44       7. Article 9 does not limit those rights, which may include the right to priority over an earlier-  
45       perfected security interest. See Section 9-331(a).

1  
2 Subsection (d) takes a different approach to the problem of goods covered by a  
3 nonnegotiable document. Here, title to the goods is not looked on as being locked up in the  
4 document. For example, a transferee that takes delivery of a nonnegotiable document receives,  
5 under Section 7-504(a), “the title and rights” of the transferor, but the transferee would not  
6 thereby become a “person entitled under the document” with a right to receive delivery of the  
7 goods from the bailee, and the The secured party may perfect its security interest directly in the  
8 goods by filing as to them. The subsection provides two other methods of perfection: issuance of  
9 the document in the secured party’s name (as consignee of a straight bill of lading or the person  
10 to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of  
11 notification of the secured party’s interest by the bailee. Issuance (or reissuance) of the  
12 nonnegotiable document in the secured party’s name would allow the secured party to become a  
13 “person entitled under the document.” However, the bailee’s receipt of notification would not  
14 confer on the secured party the status of a person entitled unless the notification resulted from an  
15 instruction under the document. See Section 7-102(a)(9) (defining “person entitled under the  
16 document”) and Comment 6. Perfection under subsection (d) occurs when the bailee receives  
17 notification of the secured party’s interest in the goods, regardless of who sends the notification.  
18 Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike  
19 former Section 9-304(3), from which it derives, subsection (d) does not apply to goods in the  
20 possession of a bailee who has not issued a document of title. Section 9-313(c) covers that case  
21 and provides that perfection by possession as to goods not covered by a document requires the  
22 bailee’s acknowledgment.

23  
24 Subsection (a) makes clear that a security interest in negotiable documents (and other  
25 collateral mentioned there) may be perfected by filing, but it makes no mention of nonnegotiable  
26 documents. However, under the general rule of Section 9-310, a security interest in a  
27 nonnegotiable document can be perfected by filing. A security interest in an electronic  
28 document, negotiable or nonnegotiable, can be perfected by control under Section 7-106. Section  
29 9-314(a). But a security interest in a nonnegotiable tangible document cannot be perfected by  
30 possession. Section 9-313(a). Although a perfected security interest in a nonnegotiable document  
31 might provide useful benefits for the secured party, it would not perfect a security interest in the  
32 goods. And by perfecting a security interest in the nonnegotiable document the secured party  
33 would not thereby become a “person entitled under the document.” Indeed, unless  
34 the secured party also took delivery of the document (i.e., possession or control under Section 1-  
35 201(b)(15)), it would not obtain the rights of a transferee under Section 7-504(a).

36  
37 \*\*\*

### 38 39 **Reporter’s Note**

40 1. Perfection for controllable accounts, controllable electronic records, controllable  
41 payment intangibles, tangible money, and electronic money. Perfection for controllable accounts,  
42 controllable electronic records, and controllable payment intangibles may be by filing, for  
43 tangible money may be only by possession, and for electronic money may be only by control.  
44

1 ~~2.~~ **8. Temporary Perfection Without Having First Otherwise Perfected.**  
2 Subsection (e) follows former Section 9-304(4) in giving perfected status to security interests in  
3 certificated securities, instruments, and negotiable documents for a short period (reduced from 21  
4 to 20 days, which is the time period generally applicable in this Article), although there has been  
5 no filing and the collateral is in the debtor's possession or control. The 20-day temporary  
6 perfection runs from the date of attachment. There is no limitation on the purpose for which the  
7 debtor is in possession, but the secured party must have given "new value" (defined in Section 9-  
8 102) under an ~~authenticated~~ a signed security agreement.

9  
10 \* \* \*

11  
12 **10. "Signed—" Replaces "Authenticated."** Consistent with the new revised  
13 definition of "sign" in Section 1-201, the cognate term "signed" replaces the reference to  
14 "authenticated" in the previous text of this section.

15  
16 **Section 9-313. When Possession by or Delivery to Secured Party Perfects**  
17 **Security Interest Without Filing.**

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

23 \* \* \*

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

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

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

benefit.

\* \* \*

### **Reporter's Note**

### **Official Comment**

\* \* \*

2. Perfection by Possession. As under the common law of pledge, no filing is required by this Article to perfect a security interest if the secured party takes possession of the collateral. See Section 9-310(b)(6).

This section permits a security interest to be perfected by the taking of possession only when the collateral is goods, instruments, ~~tangible negotiable~~ tangible documents, or tangible money, ~~or tangible chattel paper~~. Accounts, commercial tort claims, deposit accounts, investment property, letter-of-credit rights, letters of credit, and oil, gas, or other minerals before extraction are excluded. (But see Comment 6, below, regarding certificated securities.) A security interest in accounts and payment intangibles—property not ordinarily represented by any writing whose delivery operates to transfer the right to payment—may under this Article be perfected only by filing. This rule would not be affected by the fact that a security agreement or other record described the assignment of such collateral as a “pledge.” Section 9-309(2) exempts from filing certain assignments of accounts or payment intangibles which are out of the ordinary course of financing. These exempted assignments are perfected when they attach. Similarly, under Section 9-309(3), sales of payment intangibles are automatically perfected.

Perfection by possession of ~~tangible chattel paper~~ chattel paper evidenced by an authoritative tangible record (formerly defined as “tangible chattel paper”) has been ~~deleted~~ removed from this section. Instead, perfection by possession and control ~~would be of~~ chattel paper is governed by Section 9-314A.

\* \* \*

4. Goods in Possession of Third Party: Perfection. Former Section 9-305 permitted perfection of a security interest by notification to a bailee in possession of collateral. This Article distinguishes between goods in the possession of a bailee who has issued a document of title covering the goods and goods in the possession of a third party who has not issued a document. Section 9-312(c) or (d) applies to the former, depending on whether the document is negotiable. Section 9-313(c) applies to the latter. It provides a method of perfection by possession when the collateral is possessed by a third person who is not the secured party's agent.

Notification of a third person does not suffice to perfect under Section 9-313(c). Rather, perfection does not occur unless the third person authenticates signs an acknowledgment that it holds possession of the collateral for the secured party's benefit. Compare Section 9-312(d),

1 under which receipt of notification of the security party's interest by a bailee holding goods  
2 covered by a nonnegotiable document is sufficient to perfect, even if the bailee does not  
3 acknowledge receipt of the notification. A third person may acknowledge that it will hold for the  
4 secured party's benefit goods to be received in the future. Under these circumstances, perfection  
5 by possession occurs when the third person obtains possession of the goods.

6  
7 \* \* \*  
8

9 **9. Delivery to Third Party by Secured Party.** ~~New subsections~~ Subsections (h) and (i)  
10 address the practice of mortgage warehouse lenders. These lenders typically send mortgage  
11 notes to prospective purchasers under cover of letters advising the prospective purchasers that  
12 the lenders hold security interests in the notes. These lenders relied on notification to maintain  
13 perfection under former 9-305. Requiring them to obtain authenticated signed acknowledgments  
14 from each prospective purchaser under subsection (c) could be unduly burdensome and  
15 disruptive of established practices. Under subsection (h), when a secured party in possession  
16 itself delivers the collateral to a third party, instructions to the third party would be sufficient to  
17 maintain perfection by possession; an acknowledgment would not be necessary. Under  
18 subsection (i), the secured party does not relinquish possession by making a delivery under  
19 subsection (h), even if the delivery violates the rights of the debtor. That subsection also makes  
20 clear that a person to whom collateral is delivered under subsection (h) does not owe any duty to  
21 the secured party and is not required to confirm the delivery to another person unless the person  
22 otherwise agrees or law other than this Article provides otherwise.

23  
24 **10. "Signs" and "Signed" Replaces "Authenticates" and "Authenticated."**  
25 Consistent with the revised definition of "sign" in Section 1-201, the terms "signs" and "signed"  
26 replace the references to "authenticates" and "authenticated" in the previous text of this section.  
27

## 28 **Section 9-314. Perfection by Control.**

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

34 (b) **[Specified collateral: time of perfection by control; continuation of perfection.]** A  
35 security interest in ~~deposit accounts, electronic chattel paper, letter-of-credit rights, or electronic~~  
36 ~~documents,~~ controllable accounts, controllable electronic records, controllable payment  
37 intangibles, deposit accounts, electronic documents, electronic money, or letter-of-credit rights is



perfected by control under Section 7-106, 9-104, ~~9-105, 9-105A, or 9-107, or 9-107A~~ when no earlier than the time the secured party obtains control and remains perfected by control only while the secured party retains control.

\* \* \*

### Reporter's Note

~~1. Perfection by control. Perfection by control of~~ Official Comment

\* \* \*

2. Control. This section provides for perfection by control with respect to ~~investment property, deposit accounts,~~ controllable accounts, controllable electronic records, controllable payment intangibles, ~~and deposit accounts, electronic documents, electronic money has been added to this section. Perfection by control of,~~ and letter-of-credit rights, ~~electronic chattel paper has been deleted, and electronic documents.~~ Concerning how a secured party takes control of these types of collateral, see Sections 7-106, 9-104, 9-105A through ~~9-107~~ 9-107A, and Section ~~7-106~~ 12-105 and Comments. Subsection (b) explains when a security interest is perfected by control and how long a security interest remains perfected by control. Like Section 9-313(d) and for the same reasons, subsection (b) makes no reference to the doctrine of "relation back." See Section 9-313, Comment 5. As to an electronic document that is reissued in a tangible medium, (see Section 7-105), a secured party that is perfected by control in the electronic document should file as to the document before relinquishing control in order to maintain continuous perfection in the document. See Section 9-308.

Perfection by control of chattel paper evidenced by an authoritative electronic record (formerly defined as "electronic chattel paper") has been removed from this section. Instead, ~~Section 9-314A would govern perfection for chattel paper~~ by possession and control of chattel paper is governed by Section 9-314A.

~~2.2A. Shared control between debtor and secured party; and control through another person.~~ Sections 7-106 (control of electronic documents), 9-105 (control of authoritative electronic records evidencing chattel paper), 9-105A (control of electronic money), and 12-105 (control of controllable electronic records, on which control of controllable accounts and controllable payment intangibles under Section 9-107A depends) contemplate the possibility that both a debtor and a secured party may have control of the relevant collateral. by sharing an exclusive power. Such shared control between a debtor and secured party does not *necessarily* impair perfection of a security interest under this section or Section 9-314A. On shared ~~control~~ exclusive powers, see generally Section 12-105, Comment 5. However, if a secured party can exercise a power only if the power is exercised also by the debtor, ~~control~~ the power would not be shared and, consequently, the secured party would not have control ~~(and its security interest would not be perfected by control)~~ based on the exclusive power. This result follows from Section 12-105(c) and corresponding subsections in the other provisions on control cited

1 above.

2  
3 —— Under Section 12-105(c), because a debtor would be a “transferor of an interest” in a  
4 controllable electronic record or a controllable account or payment intangible evidenced by the  
5 record, the debtor’s “blocking power” with respect to the secured party’s exercise of the power  
6 would disqualify the secured party from sharing (and, consequently, enjoying) ~~control~~ the  
7 exclusive power and perfection by control, based on exclusive powers. Similarly, a purchaser in  
8 that situation would be disqualified from having control and thereby from enjoying the status and  
9 benefits of a qualifying purchaser ~~under Sections (Section 12-102(a)(2) and )~~ under Section 12-  
10 104(e) and (g) if the purchaser takes from a transferor of an interest having such a blocking  
11 power (whether or not the transferor is a debtor). ~~See Section 12-105, Comment 5 (discussing~~  
12 ~~the rationale for this limitation on shared control).~~

13  
14 Section 12-105(e) contains a similar limitation in connection with control through  
15 another person. An acknowledging person must be one “other than the transferor of an interest  
16 in the electronic record.” The same or a similar limitation is found in the other provisions  
17 relating to control through another person. See Sections 7-106(g) (control of electronic  
18 document of title); 8-106(d)(3) (control of a security entitlement); 9-104(a)(4) (control of deposit  
19 accounts); 9-105(g) (control of authoritative electronic copy of record evidencing chattel paper);  
20 9-105A)(e) (control of electronic money).

21  
22 For a discussion of the rationale for these limitations on sharing exclusive control and  
23 control through another person, see Section 12-105, Comment 9.

24  
25 \* \* \*

26  
27 **Section 9-314A. Perfection by Possession and Control of Chattel Paper.**

28 **(a) [Perfection by possession and control.]** A secured party may perfect a security  
29 interest in chattel paper by taking possession of each authoritative tangible copy of the record  
30 evidencing the chattel paper and obtaining control of each authoritative electronic copy of the  
31 electronic record evidencing the chattel paper.

32 **(b) [Time of perfection; continuation of perfection.]** A security interest is perfected  
33 under subsection (a) ~~when~~ no earlier than the time the secured party takes possession and obtains  
34 control and remains perfected under subsection (a) only while the secured party retains  
35 possession and control.

36 **(c) [Application of Section 9-313 to perfection by possession of chattel ~~Paper~~ paper.]**

Section 9-313(c) and (f) through (i) applies to perfection by possession of an authoritative tangible copy of a record evidencing chattel paper.

### Reporter's Note

### Official Comment

1.- **“Authoritative copy.”** ~~This section provides that to~~ To perfect a security interest in chattel paper other than by filing, ~~this section provides that~~ a secured party must obtain control of all authoritative electronic copies and take possession of all authoritative tangible copies.

~~Existing~~ Like the previous text, Section 9-105(b) distinguishes between authoritative and nonauthoritative copies of electronic chattel paper. ~~Like current law, the draft~~ and refers to copies that are “authoritative.” And, like ~~current law, the draft~~its predecessor, Section 9-105(b) does not define the term. However, ~~the draft would apply it also applies~~ this concept ~~also~~ to tangible records that evidence chattel paper.

To show that it has possession of all ~~tangible~~ authoritative tangible copies of a record evidencing chattel paper and all authoritative electronic copies of a record evidencing chattel paper, a purchaser can produce the tangible copies in its possession and prove control of the electronic copies and provide evidence that these are authoritative copies. The purchaser need not prove a negative—i.e., that no other tangible or electronic authoritative copies exist, ~~to~~ make a prima facie case. The purchaser’s possession of the ~~tangible~~ authoritative tangible copies and control of the authoritative electronic copies gives the purchaser the power to prevent others from taking possession or control of the copies and to transfer possession and control of the copies.

Perfection of a security interest in chattel paper by taking possession of the collateral generally has been understood to mean taking possession of the wet-ink “original.” Experience has shown that the concept of an original breaks down when one allows for the possibility of the same monetary obligation being evidenced ~~in~~by different media over time, such as where electronic records evidencing the chattel paper are “papered out” (replaced with tangible records evidencing the same chattel paper) or tangible records are “converted” to electronic records.

To accommodate current practices and future technology, ~~the draft would allow the~~ parties are allowed considerable flexibility in determining the method used to establish whether a particular copy is authoritative, provided that third parties are able to reasonably identify the authoritative copies that must be possessed or controlled to achieve perfection. For example, the parties could develop a system or protocol where each tangible or electronic copy is “watermarked” as authoritative or nonauthoritative or where the terms of the records themselves describe how to determine which copies are authoritative and which are not.

2.- **Time of perfection.** Subsection (b) is modeled on Sections 9-313(d) and 9-314(b).

1        3.- **Applicability of Section 9-313.** Subsection (c) makes specified subsections of  
2 Section 9-313 applicable to possession of ~~tangible~~ authoritative ~~tangible~~ copies of records  
3 evidencing chattel paper.

4  
5        4.- **Shared control.** As to the sharing of ~~control of~~ powers over an authoritative  
6 electronic copy of a record evidencing chattel paper (see Section 9-105(c)(2)) by a debtor and a  
7 secured party; and control through another person (see Section 9-105(g)), see Section 9-314,  
8 ~~Reporter's Note 2~~ Comment 2A.

9  
10        \* \* \*

11        **Section 9-316. Continued Perfection of Security Interest Following Change in**  
12 **Governing Law.**

13        (a) [General rule: effect on perfection of change in governing law.] A security interest  
14 perfected pursuant to the law of the jurisdiction designated in Section 9-301(1), ~~or~~ 9-305(c), 9-  
15 306A(d), or 9-306B(b) remains perfected until the earliest of:

16                (1) the time perfection would have ceased under the law of that jurisdiction;

17                (2) the expiration of four months after a change of the debtor's location to another  
18 jurisdiction; or

19                (3) the expiration of one year after a transfer of collateral to a person that thereby  
20 becomes a debtor and is located in another jurisdiction.

21        \* \* \*

22        (c) [Possessory security interest in collateral moved to new jurisdiction.] A  
23 possessory security interest in collateral, other than goods covered by a certificate of title and as-  
24 extracted collateral consisting of goods, remains continuously perfected if:

25                (1) the collateral is located in one jurisdiction and subject to a security  
26 interest perfected under the law of that jurisdiction;

27                (2) thereafter the collateral is brought into another jurisdiction; and

1 (3) upon entry into the other jurisdiction, the security interest is perfected  
2 under the law of the other jurisdiction.

3 \* \* \*

4 (f) [Change in jurisdiction of controllable electronic record, electronic chattel paper,  
5 bank, issuer, nominated person, securities intermediary, or commodity intermediary.] A  
6 security interest in controllable accounts, controllable electronic records, controllable payment  
7 intangibles, chattel paper, deposit accounts, letter-of-credit rights, or investment property which  
8 is perfected under the law of the controllable electronic record's jurisdiction, the electronic  
9 chattel paper's jurisdiction, the bank's jurisdiction, the issuer's jurisdiction, a nominated person's  
10 jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's  
11 jurisdiction, as applicable, remains perfected until the earlier of:

12 (1) the time the security interest would have become unperfected under the law of  
13 that jurisdiction; or

14 (2) the expiration of four months after a change of the applicable jurisdiction to  
15 another jurisdiction.

16 (g) [Subsection (f) security interest perfected or unperfected under law of new  
17 **jurisdiction.**] If a security interest described in subsection (f) becomes perfected under the law  
18 of the other jurisdiction before the earlier of the time or the end of the period described in that  
19 subsection, it remains perfected thereafter. If the security interest does not become perfected  
20 under the law of the other jurisdiction before the earlier of that time or the end of that period, it  
21 becomes unperfected and is deemed never to have been perfected as against a purchaser of the  
22 collateral for value.

23 \* \* \*

1 **Reporter's Note**

2 ~~—— 1. *Change in location of debtor.* Subsection (a) has been amended to refer to additional~~  
3 ~~provisions providing for perfection by filing to be governed by the law of the jurisdiction in~~  
4 ~~which the debtor is located, See Sections 9-306A and 9-306B.~~

5  
6 ~~—— 2. *Changes in controllable electronic record's jurisdiction and electronic chattel paper's*~~  
7 ~~*jurisdiction.* Changes in the controllable electronic record's jurisdiction and the electronic chattel~~  
8 ~~*paper's jurisdiction have been added to subsection (f) to conform to the treatment for other*~~  
9 ~~*collateral subject to similar rules on governing law. See Sections 9-306B and 12-107.*~~

10 **Official Comment**

11 \*\*\*

12  
13 4. **Possessory Security Interests.** Subsection (c) deals with continued perfection of  
14 possessory security interests. It applies not only to security interests perfected solely by the  
15 secured party's having taken possession of the collateral. It also applies to security interests  
16 perfected by a method that includes as an element of perfection the secured party's having taken  
17 possession, such as perfection by taking delivery of a certificated security in registered form, see  
18 Section 9-313(a), and perfection by obtaining control over a certificated security.—See, see  
19 Section 9-314(a), and perfection by taking possession of and control over authoritative copies of  
20 records evidencing chattel paper, see Section 9-314A(a).

21 \*\*\*

22  
23  
24 6. **Controllable Accounts, Controllable Electronic Records, Controllable**  
25 **Payment Intangibles, Chattel Paper, Deposit Accounts, Letter-of-Credit Rights, and**  
26 **Investment Property.** Subsections (f) and (g) address changes in the jurisdiction of a  
27 controllable electronic record, electronic chattel paper, bank, issuer of an uncertificated security,  
28 issuer of or nominated person under a letter of credit, securities intermediary, and commodity  
29 intermediary. The provisions are analogous to those of subsections (a) and (b).

30 \*\*\*

31  
32  
33 **Section 9-317. Interests That Take Priority Over or Take Free of Security**

34 **Interest or Agricultural Lien.**

35 \*\*\*

36 (b) **[Buyers that receive delivery.]** Except as otherwise provided in subsection (e), a  
37 buyer, other than a secured party, ~~of tangible chattel paper, tangible documents, of goods,~~  
38 instruments, tangible documents, or a security certificate takes free of a security interest or

1 agricultural lien if the buyer gives value and receives delivery of the collateral without  
2 knowledge of the security interest or agricultural lien and before it is perfected.

3 \*\*\*

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

8 (d) **[Licensees and buyers of certain collateral.]** A Subject to subsections (f) through  
9 (i), a licensee of a general intangible or a buyer, other than a secured party, of collateral other  
10 than tangible chattel paper, ~~electronic money~~, tangible documents, goods, instruments, or a  
11 certificated security takes free of a security interest if the licensee or buyer gives value without  
12 knowledge of the security interest and before it is perfected.

13 \*\*\*

14 (f) [Buyers of chattel paper.] A buyer, other than a secured party, of chattel paper takes  
15 free of a security interest if, without knowledge of the security interest and before it is perfected,  
16 the buyer gives value and:

17 (1) receives delivery of each authoritative tangible copy of the record evidencing  
18 the chattel paper; and

19 (2) if each authoritative electronic copy of the record evidencing the chattel paper  
20 can be subjected to control under Section 9-105, obtains control of each authoritative electronic  
21 copy.

22 (g) [Buyers of electronic documents.] A buyer of an electronic document takes free of a  
23 security interest if, without knowledge of the security interest and before it is perfected, the

1 buyer gives value and, if each authoritative electronic copy of the document can be subjected to  
2 control under Section 7-106, obtains control of each authoritative electronic copy.

3 (h) [Buyers of controllable electronic records.] A buyer of a controllable electronic  
4 record takes free of a security interest if, without knowledge of the security interest and before it  
5 is perfected, the buyer gives value and obtains control of the controllable electronic record.

6 (i) [Buyers of controllable accounts and controllable payment intangibles.] A buyer,  
7 other than a secured party, of a controllable account or a controllable payment intangible takes  
8 free of a security interest if, without knowledge of the security interest and before it is perfected,  
9 the buyer gives value and obtains control of the controllable account or controllable payment  
10 intangible.

11 **Reporter's Note**

12  
13 ~~1. New rule for buyers of chattel paper. The new~~ Official Comment

14 \* \* \*

15 6. Purchasers Other Than Secured Parties. Subsections (b), (c), and (d) afford  
16 priority over an unperfected security interest to certain purchasers (other than secured parties) of  
17 collateral. They derive from former (i.e., pre-1998) Sections 9-301(1)(c), 2A-307(2), and 9-  
18 301(d). Former Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are  
19 “subordinate” to the rights of certain purchasers. But, as former Comment 9 suggested, the  
20 practical effect of subordination in this context is that the purchaser takes free of the security  
21 interest. To avoid any possible misinterpretation, subsections (b) and (d) of this section use the  
22 phrase “takes free.”

23  
24 Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected  
25 by physical delivery of the representative piece of paper (~~tangible chattel paper~~, tangible  
26 documents, instruments, and security certificates). To obtain priority, a buyer must both give  
27 value and receive delivery of the collateral without knowledge of the existing security interest  
28 and before perfection. Even if the buyer gave value without knowledge and before perfection,  
29 the buyer would take subject to the security interest if perfection occurred before physical  
30 delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to  
31 lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all  
32 security interests created by the lessor, even if perfected. See Section 9-321.  
33



1 Normally, there will be no question when a buyer of tangible chattel paper, tangible  
2 documents, instruments, or security certificates “receives delivery” of the property. See Section  
3 1-201 (defining “delivery”). However, sometimes a buyer or lessee of goods, such as complex  
4 machinery, takes delivery of the goods in stages and completes assembly at its own location.  
5 Under those circumstances, the buyer or lessee “receives delivery” within the meaning of  
6 subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the  
7 seller or lessor, it would be apparent to a potential lender to the seller or lessor that another  
8 person might have an interest in the goods.

9  
10 Subsection (b) no longer applies to chattel paper. The take-free rule in subsection (f) for  
11 buyers of chattel paper reflects the corresponding changes in the definition of chattel paper and  
12 in the methods of perfection. See Sections 9-102(a)(11) (defining “chattel paper”); 9-314A  
13 (perfection by possession and control). Note that subsection (f) applies only to a buyer of chattel  
14 paper “other than a ~~Secured~~secured party,” and most buyers of chattel paper are secured parties.  
15 ~~See Sections~~See Sections 9-102(a)(73) (defining “secured party” as a person to which chattel  
16 paper has been sold); 9-109(a)(3) (Article 9 applies to a sale of chattel paper); 1-201(b)(35)  
17 (defining “security interest” to include the interest of a buyer of chattel paper). However, Article  
18 9 does not apply to “a sale of . . . chattel paper , . . as part of a sale of the business out of  
19 which , . . [the chattel paper] arose” and, accordingly, subsection (f) would apply to a buyer of  
20 chattel paper in a such a sale of business transaction.

21  
22 ——— Given the addition of new subsection (f) and the removal of chattel paper from subsection  
23 (a), the phrase “other than a secured party” has been deleted from subsection (a). Buyers of the  
24 remaining types of collateral covered by subsection (a) are not secured parties.

25  
26 ——— 2. *Control of electronic records evidencing chattel paper.* Some systems for electronic  
27 copies of records evidencing chattel paper do not provide for an assignee to obtain control of  
28 electronic copies under Section 9-105. For this reason, subsection (f) provides that a  
29 buyer must obtain control of authoritative electronic copies of records evidencing such a buyer of  
30 chattel paper as a condition for taking free only if the electronic copies takes free of a security  
31 interest if, without knowledge of the security interest and before it is perfected, the buyer gives  
32 value and receives delivery of each authoritative tangible copy of the record evidencing the  
33 chattel paper and, if the chattel paper can be subjected to control.

34  
35 ——— 3. *Control of electronic documents.* As mentioned in Note 2 for chattel paper, a system  
36 for electronic documents also may not provide for a transferee to obtain control of, the buyer  
37 obtains control of each authoritative electronic copies of an electronic document. Subsection (g)  
38 provides that a buyer must obtain copy.

39  
40 Although chattel paper has been removed from subsection (b), the phrase “other than a  
41 secured party” has been retained because buyers of instruments that are promissory notes, but not  
42 buyers of other instruments, are secured parties. See Sections 9-109(a)(3) (Article 9 applies to a  
43 sale of a promissory note); 1-201(b)(35) (defining “security interest” to include the interest of a  
44 buyer of a promissory note).

1       The rule of subsection (b) obviously is not appropriate where the collateral consists of  
2       intangibles and there is no representative piece of paper whose physical delivery is the only or  
3       the customary method of transfer or no means of taking control of the collateral as a functional  
4       equivalent of a delivery. Therefore, with respect to such intangibles (including accounts other  
5       than controllable accounts, ~~electronic chattel paper~~, electronic documents not subject to control,  
6       general intangibles other than controllable payment intangibles, and investment property other  
7       than certificated securities), subsection (d) gives priority to any buyer who gives value without  
8       knowledge, and before perfection, of the security interest. A licensee of a general intangible  
9       takes free of an unperfected security interest in the general intangible under the same  
10      circumstances (to the extent of the licensee's rights under the license). Note that a licensee of a  
11      general intangible in ordinary course of business takes rights under a nonexclusive license free of  
12      security interests created by the licensor, even if perfected. See Section 9-321.

13  
14      Unless Section 9-109 excludes the transaction from this Article, a buyer of accounts,  
15      ~~chattel paper~~, payment intangibles, or promissory notes is a "secured party" (defined in Section  
16      9-102), and ~~subsections (b) and (d) do~~ subsection (d) does not determine priority of the security  
17      interest created by the sale. Rather, the priority rules generally applicable to competing security  
18      interests apply. See Section 9-322.

19  
20      6A. [Buyers of Electronic Documents, Controllable Electronic Records,  
21      Controllable Accounts, and Controllable Payment Intangibles.] Subsection (g) provides a  
22      take-free rule for electronic documents, subsection (h) so provides for controllable electronic  
23      records, and subsection (i) so provides for controllable accounts and controllable payment  
24      intangibles. Subsection (g) conditions the take-free rule on the buyer obtaining control of  
25      authoritative electronic copies of the document ~~as a condition for taking free only~~ if the  
26      authoritative electronic copies can be subjected to control.

27  
28      ~~4. Control of controllable electronic records, controllable accounts, and controllable~~  
29      ~~payment intangibles. Consistent with the treatment of electronic copies of records evidencing~~  
30      ~~chattel paper and electronic documents in subsections (f) and (g), subsection~~ Subsection (h)  
31      conditions the take-free rule for a buyer of a controllable electronic record on the buyer's  
32      obtaining control of the electronic record. Similarly, under subsection (i), the take-free rule for a  
33      buyer, other than a secured party, of a controllable account or controllable payment intangible is  
34      conditioned on the buyer's obtaining control of the account or payment intangible. Although in  
35      general a buyer of an account or a payment intangible is a secured party, there are limited  
36      exceptions. See Sections 1-201(b)(35) ("security interest" includes interest of buyer of accounts  
37      or payment intangibles); 9-109(d)(4) (inapplicability of Article 9 to sale of accounts or payment  
38      intangibles as a part of the sale of a business).

39  
40      \* \* \*

41      Section 9-322. Priorities Among Conflicting Security Interests in and Agricultural  
42      Liens on Same Collateral.

43      \* \* \*

1 Official Comment

2 \* \* \*

3  
4 6. Priority in Proceeds: General Rule. Subsection (b)(1) follows former Section 9-  
5 312(6). It provides that the baseline rules of subsection (a) apply generally to priority conflicts  
6 in proceeds except where otherwise provided (e.g., as in subsections (c) through (e)). Under  
7 Section 9-203, attachment cannot occur (and therefore, under Section 9-308, perfection cannot  
8 occur) as to particular collateral until the collateral itself comes into existence and the debtor has  
9 rights in it. Thus, a security interest in proceeds of original collateral does not attach and is not  
10 perfected until the proceeds come into existence and the debtor acquires rights in them.

11  
12 Example 5: On April 1, Debtor authenticates signs a security agreement granting to A a  
13 security interest in all Debtor's existing and after-acquired inventory. The same day, A  
14 files a financing statement covering inventory. On May 1, Debtor authenticates signs a  
15 security agreement granting B a security interest in all Debtor's existing and future  
16 accounts. The same day, B files a financing statement covering accounts. On June 1,  
17 Debtor sells inventory to a customer on 30-day unsecured credit. When Debtor acquires  
18 the account, B's security interest attaches to it and is perfected by B's financing  
19 statement. At the very same time, A's security interest attaches to the account as  
20 proceeds of the inventory and is automatically perfected. See Section 9-315. Under  
21 subsection (b) of this section, for purposes of determining A's priority in the account, the  
22 time of filing as to the original collateral (April 1, as to inventory) is also the time of  
23 filing as to proceeds (account). Accordingly, A's security interest in the account has  
24 priority over B's. Of course, had B filed its financing statement before A filed (e.g., on  
25 March 1), then B would have priority in the accounts.

26  
27 Section 9-324 governs the extent to which a special purchase-money priority in goods or  
28 software carries over into the proceeds of the original collateral.

29 \* \* \*

30  
31 Section 9-323. Future Advances.

32 \* \* \*

33 (d) [Buyer of goods.] Except as otherwise provided in subsection (e), a buyer of  
34 goods ~~other than a buyer in ordinary course of business~~ takes free of a security interest to the  
35 extent that it secures advances made after the earlier of:

36 (1) the time the secured party acquires knowledge of the buyer's purchase;  
37 or

1 (2) 45 days after the purchase.

2 (e) [Advances made pursuant to commitment: priority of buyer of goods.]

3 Subsection (d) does not apply if the advance is made pursuant to a commitment entered into  
4 without knowledge of the buyer's purchase and before the expiration of the 45-day period.

5 (f) [Lessee of goods.] Except as otherwise provided in subsection (g), a lessee of  
6 goods, other than a lessee in ordinary course of business, takes the leasehold interest free of a  
7 security interest to the extent that it secures advances made after the earlier of:

8 (1) the time the secured party acquires knowledge of the lease; or

9 (2) 45 days after the lease contract becomes enforceable.

10 (g) [Advances made pursuant to commitment: priority of lessee of goods.]

11 Subsection (f) does not apply if the advance is made pursuant to a commitment entered into  
12 without knowledge of the lease and before the expiration of the 45-day period.

13 **Official Comment**

14 \* \* \*

15 6. **Competing Buyers and Lessees.** Under subsections (d) and (e), a buyer will not take  
16 subject to a security interest to the extent it secures advances made after the secured party has  
17 knowledge that the buyer has purchased the collateral or more than 45 days after the purchase  
18 unless the advances were made pursuant to a commitment entered into before the expiration of  
19 the 45-day period and without knowledge of the purchase. Subsections (f) and (g) provide an  
20 analogous rule for lessees. Subsections (d) and (e) replace former Section 9-307(3), and  
21 subsections (f) and (g) replace former Section 2A-307(4). No change in meaning is intended.

22  
23 Of course, a buyer in ordinary course who takes free of the security interest under Section  
24 9-320 and a lessee in ordinary course who takes free under Section 9-321 are not subject to any  
25 future advances. However, the exceptions for a buyer in ordinary course of business and a lessee  
26 in ordinary course of business in the previous text of subsections (d) and (f) have been deleted.  
27 Even if such a buyer or lessee does not meet the requirements under Section 9-320 or 9-321 to  
28 take free of a security interest, it should be entitled to the benefits of those subsections. This  
29 change is consistent with the intended result under the previous text. Subsections (d) and (e)  
30 replace former Section 9-307(3), and subsections (f) and (g) replace former Section 2A-307(4).  
31 No change in meaning is intended.  
32

1        **Section 9-324. Priority of Purchase-Money Security Interests.**

2        \* \* \*

3        (b) [Inventory purchase-money priority.] Subject to subsection (c) and except  
4 as otherwise provided in subsection (g), a perfected purchase-money security interest in  
5 inventory has priority over a conflicting security interest in the same inventory, has priority over  
6 a conflicting security interest in chattel paper or an instrument constituting proceeds of the  
7 inventory and in proceeds of the chattel paper, if so provided in Section 9-330, and, except as  
8 otherwise provided in Section 9-327, also has priority in identifiable cash proceeds of the  
9 inventory to the extent the identifiable cash proceeds are received on or before the delivery of the  
10 inventory to a buyer, if:

11        (1) the purchase-money security interest is perfected when the debtor  
12 receives possession of the inventory;

13        (2) the purchase-money secured party sends ~~an authenticated~~ a signed  
14 notification to the holder of the conflicting security interest;

15        (3) the holder of the conflicting security interest receives the notification  
16 within five years before the debtor receives possession of the inventory; and

17        (4) the notification states that the person sending the notification has or  
18 expects to acquire a purchase-money security interest in inventory of the debtor and describes the  
19 inventory.

20        \* \* \*

21        (d) [Livestock purchase-money priority.] Subject to subsection (e) and except  
22 as otherwise provided in subsection (g), a perfected purchase-money security interest in livestock  
23 that are farm products has priority over a conflicting security interest in the same livestock, and,

1 except as otherwise provided in Section 9-327, a perfected security interest in their identifiable  
2 proceeds and identifiable products in their unmanufactured states also has priority, if:  
3 \_\_\_\_\_ (1) the purchase-money security interest is perfected when the debtor  
4 receives possession of the livestock;  
5 \_\_\_\_\_ (2) the purchase-money secured party sends ~~an authenticated~~ a signed  
6 notification to the holder of the conflicting security interest;  
7 \_\_\_\_\_ (3) the holder of the conflicting security interest receives the notification  
8 within six months before the debtor receives possession of the livestock; and  
9 \_\_\_\_\_ (4) the notification states that the person sending the notification has or  
10 expects to acquire a purchase-money security interest in livestock of the debtor and describes the  
11 livestock.

#### 12 **Official Comment**

13 \* \* \*

14  
15 14. **“Signed” Replaces “Authenticated.”** Consistent with the revised definition of  
16 “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in  
17 the previous text of this section.

18  
19 \* \* \*

20 **Section 9-326A. Priority of Security Interest in Controllable Account,**  
21 **Controllable Electronic Record, and Controllable Payment Intangible.** A security  
22 interest in a controllable account, controllable electronic record, or controllable payment  
23 intangible held by a secured party having control of the account, electronic record, or payment  
24 intangible has priority over a conflicting security interest held by a secured party that does not  
25 have control.

#### 26 **Official Comment**

27

1 1.- **[Control priority-]** This section adopts an approach to priority in controllable  
2 accounts, controllable electronic records, and controllable payment intangibles that is similar to  
3 the approach of Sections 9-327 (deposit accounts) and 9-328 (investment property): A security  
4 interest perfected by control has priority over conflicting security interests that are not perfected  
5 by control.

6  
7 2. **[Multiple persons having control-]** This section does not apply if more than one  
8 secured party has control of a controllable account, controllable electronic record, or controllable  
9 payment intangible, which may occur through shared control or a person in control  
10 acknowledging that it has control on behalf of another person. See, e.g., Section 12-105(eb)(2)  
11 (shared control), (de) (control through another person). In those situations, the residual first-to-  
12 file-or-perfect rule of Section 9-322(a)(1) would apply. However, application of that first-in-  
13 time rule may not be appropriate in some circumstances. For example, a person (A) having  
14 control might acknowledge that it has control on behalf of another person (B), which did not  
15 have control. If B had filed a financing statement covering the collateral before A obtained  
16 control, however, the result would be to give B's security interest priority over A's previously  
17 senior security interest. To avoid that result, A might insist on B's subordination as a condition  
18 to A's acknowledgment. See Section 9-339 (subordination by agreement). In cases of multiple  
19 persons having control it will be important for interested persons to adjust priorities by  
20 agreement, when appropriate. See also Section 12-105, Comment 5.

21 \* \* \*

## 22 **Section 9-330. Priority of Purchaser of Chattel Paper or Instrument.**

23  
24 **(a) [Purchaser's priority: security interest claimed merely as proceeds.]** A purchaser  
25 of chattel paper has priority over a security interest in the chattel paper which is claimed merely  
26 as proceeds of inventory subject to a security interest if:

27 (1) in good faith and in the ordinary course of the purchaser's business, the  
28 purchaser gives new value and takes possession of each authoritative tangible copy of the record  
29 evidencing the chattel paper ~~or~~ and obtains control of under Section 9-105 of each authoritative  
30 electronic copy of the record evidencing the chattel paper ~~under Section 9-105~~; and

31 (2) ~~the chattel paper does~~ authoritative copies of the record evidencing the chattel  
32 paper do not indicate that it the chattel paper has been assigned to an identified assignee other  
33 than the purchaser.

34 **(b) [Purchaser's priority: other security interests.]** A purchaser of chattel paper has

1 priority over a security interest in the chattel paper which is claimed other than merely as  
2 proceeds of inventory subject to a security interest if the purchaser gives new value and takes  
3 possession of each authoritative tangible copy of the record evidencing the chattel paper or and  
4 obtains control ~~of~~ under Section 9-105 of each authoritative electronic copy of the record  
5 evidencing the chattel paper under Section 9-105 in good faith, in the ordinary course of the  
6 purchaser's business, and without knowledge that the purchase violates the rights of the secured  
7 party.

8 \* \* \*

9 (f) [Indication of assignment gives knowledge.] For purposes of subsections (b) and  
10 (d), if the authoritative copies of the record evidencing chattel paper or an instrument indicates  
11 indicate that it the chattel paper or instrument has been assigned to an identified secured party  
12 other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the  
13 purchase violates the rights of the secured party.

14 **Reporter's Note**

15 ~~1. New rule for buyers of chattel paper.~~ Official Comment

16 \* \* \*

17  
18 2. Non-Temporal Priority. This Article permits a security interest to be perfected  
19 in chattel paper either by filing or by the secured party's possession and control under Section 9-  
20 314A and in or instruments to be perfected either by filing or by the secured party's taking  
21 possession. This section enables secured parties and other purchasers of chattel paper (both  
22 evidenced by authoritative electronic and tangible records) and instruments to obtain priority  
23 over earlier-perfected security interests, thereby promoting the negotiability of these types of  
24 receivables.

25  
26 3. Chattel Paper. Subsections (a) and (b) follow former Section 9-308 in  
27 distinguishing between earlier-perfected security interests in chattel paper that is claimed merely  
28 as proceeds of inventory subject to a security interest and chattel paper that is claimed other than  
29 merely as proceeds. Like former Section 9-308, this section does not elaborate upon the phrase  
30 "merely as proceeds." For an elaboration, see PEB Commentary No. 8.  
31



1        This section makes explicit the “good faith” requirement and retains the requirements of  
2        “the ordinary course of the purchaser’s business” and the giving of “new value” as conditions for  
3        priority. Concerning the last, this Article deletes former Section 9-108 and adds to Section 9-102  
4        a completely different definition of the term “new value.” Under subsection (e), the holder of a  
5        purchase-money security interest in inventory is deemed to give “new value” for chattel paper  
6        constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may  
7        qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even  
8        if it does not make an additional advance against the chattel paper.

9  
10       If a ~~possessory security interest in tangible chattel paper or a~~ that is perfected by control  
11       ~~security interest in electronic chattel paper~~ by possession and control under Section 9-314A does  
12       not qualify for priority under this section, it may be subordinate to a perfected-by-filing security  
13       interest under Section 9-322(a)(1).

14  
15       **4. Possession and Control.** To qualify for priority under subsection (a) or (b), a  
16       purchaser must “take[ ] possession of each authoritative tangible copy of the record evidencing  
17       the chattel paper ~~or~~ and obtain[ ] control ~~of~~ under Section 9-105 of each authoritative electronic  
18       copy of the record evidencing the chattel paper.” ~~When chattel paper comprises one or more~~  
19       ~~tangible records and one or more electronic records, a purchaser may satisfy the possession or~~  
20       ~~control this requirement by taking possession of the tangible records under Section 9-313 and~~  
21       ~~having control of the electronic records under Section 9-105.~~ Note that this is a method of  
22       perfection under Section 9-314A. In determining which of several related records constitutes  
23       chattel paper and thus is relevant to possession or control, the form of the records is irrelevant.  
24       Rather, the ~~touchstone is whether possession or control of the record would afford the~~  
25       ~~possession-and-control requirement is based on the premise that it affords public notice~~  
26       ~~contemplated by the possession and control requirements.~~ For example, because possession or  
27       control of an amendment extending the term of a lease would not afford the contemplated public  
28       notice, the amendment would not constitute a record evidencing chattel paper regardless of  
29       whether the amendment is in tangible form and the lease is in electronic form, the amendment is  
30       electronic and the lease is tangible, the amendment and lease are both tangible, or the  
31       amendment and lease are both electronic.

32  
33       Two common practices have raised particular concerns with respect to the possession  
34       requirement. First, in some cases the parties create more than one copy or counterpart of chattel  
35       paper evidencing a single secured obligation or lease. This practice raises questions as to which  
36       counterpart is the “original” and whether it is necessary for a purchaser to take possession of all  
37       counterparts in order to “take possession” of the chattel paper. Second, parties sometimes enter  
38       into a single “master” agreement. The master agreement contemplates that the parties will enter  
39       into separate “schedules” from time to time, each evidencing chattel paper. Must a purchaser of  
40       an obligation or lease evidenced by a single schedule also take possession of the record  
41       evidencing the master agreement as well as the record evidencing the schedule in order to “take  
42       possession” of each authoritative tangible copy of the record evidencing the chattel paper”?

43  
44       The problem raised by the first practice is easily solved. The parties may in the terms of  
45       their agreement and by designation on the chattel paper identify only one counterpart as the  
46       original, authoritative tangible copy of the chattel paper for purposes of taking the possession of

1 the chattel paper requirement. Concerns about the second practice also are easily solved by  
2 careful drafting. Each schedule should provide that it incorporates the terms of the master  
3 agreement, not the other way around. This will make it clear that each schedule is a “stand  
4 alone” document.

5  
6 A secured party may wish to convert tangible chattel paper evidenced by authoritative  
7 tangible copies to electronic chattel paper evidenced by electronic copies and vice versa. The  
8 priority of a security interest in chattel paper under subsection (a) or (b) may be preserved, even  
9 if the form of the chattel paper changes. The principle implied in the preceding paragraph, i.e.,  
10 that not every copy of chattel paper is relevant, applies to “control” as well as to “possession.”  
11 When there are multiple copies of chattel paper, a secured party may take “possession” or obtain  
12 “control” of the chattel paper if it acts with respect to the copy or copies that are reliably  
13 identified as the authoritative copy or copies that are relevant for purposes of possession or  
14 control. Concerning the identification of copies as authoritative or nonauthoritative, see Section  
15 9-105(c) and Comment 3. This principle applies as well to chattel paper that has been converted  
16 from one form to another, even if the relevant copies are not the “original” chattel paper.

17  
18 **5. Chattel Paper Claimed Merely as Proceeds.** Subsection (a) revises the rule in  
19 former Section 9-308(b) to eliminate reference to what the purchaser knows. Instead Under  
20 subsection (a), a purchaser who meets the possession-or-control possession-and-control, good  
21 faith, ordinary course, and new value requirements takes priority over a competing security  
22 interest claimed merely as proceeds of inventory unless the authoritative copies of the record  
23 evidencing the chattel paper itself indicates indicate that it has been assigned to an identified  
24 assignee other than the purchaser. Thus subsection (a) recognizes the common practice of  
25 placing a “legend” on chattel paper to indicate that it has been assigned. This approach, under  
26 which the chattel paper purchaser who gives new value in ordinary course can rely on possession  
27 and control of unlegended, tangible chattel paper without any concern for other facts that it may  
28 know, comports with the expectations of both inventory and chattel paper financiers.

29  
30 **6. Chattel Paper Claimed Other Than Merely as Proceeds.** Subsection (b)  
31 eliminates the requirement that the purchaser take without knowledge that the “specific paper” is  
32 subject to the security interest and substitutes for it the requirement that the purchaser take Under  
33 subsection (b), a purchaser who meets the possession-and-control, good faith, ordinary course,  
34 and new value requirements takes priority over a competing security interest claimed other than  
35 merely as proceeds of inventory if it takes “without knowledge that the purchase violates the  
36 rights of the secured party.” This standard derives from the definition of “buyer in ordinary  
37 course of business” in Section 1-201(b)(9). The source of the purchaser’s knowledge is  
38 irrelevant. Note, however, that “knowledge” means “actual knowledge.” Section 1-202(b).

39  
40 In contrast to a junior secured party in accounts, who may be required in some special  
41 circumstances to undertake a search under the “good faith” requirement, see Comment 5 to  
42 Section 9-331, a purchaser of chattel paper under this section is not required as a matter of good  
43 faith to make a search in order to determine the existence of prior security interests. There may  
44 be circumstances where the purchaser undertakes a search nevertheless, either on its own volition  
45 or because other considerations make it advisable to do so, e.g., where the purchaser also is  
46 purchasing accounts. Without more, a purchaser of chattel paper who has seen a financing

1 statement covering the chattel paper or who knows that the chattel paper is encumbered with a  
2 security interest, does not have knowledge that its purchase violates the secured party's rights.  
3 However, if a purchaser sees a statement in a financing statement to the effect that a purchase of  
4 chattel paper from the debtor would violate the rights of the filed secured party, the purchaser  
5 would have such knowledge. Likewise, under new subsection (f), if the authoritative copies of  
6 the chattel paper itself indicates indicate that it had been assigned to an identified secured party  
7 other than the purchaser, the purchaser would have wrongful knowledge for purposes of  
8 subsection (b), thereby preventing the purchaser from qualifying for priority under that  
9 subsection, even if the purchaser did not have actual knowledge. In the case of authoritative  
10 tangible copies of a record evidencing chattel paper, the indication normally would consist of a  
11 written legend on the copies chattel paper. In the case of authoritative electronic copies of the  
12 record evidencing chattel paper, this Article leaves to developing market and technological  
13 practices the manner in which the chattel paper copies would indicate an assignment.

14  
15 Subsections (a) and (f) each refer to the possibility that authoritative copies of~~The~~  
16 ~~revisions to the rules for purchasers of chattel paper reflect the corresponding changes in the~~  
17 ~~definition of chattel paper and methods of perfection. See Sections 9-102(a)(11) (defining~~  
18 ~~"chattel paper"); 9-314A (perfection by possession and control).~~

19  
20 ~~2. Indication of earlier assignment to identified assignee. Subsections (a) and (f) each~~  
21 ~~refer to the possibility that~~ records evidencing chattel paper may indicate that the chattel paper  
22 has been assigned to an identified assignee. Those subsections should be read and interpreted in  
23 a manner consistent with Section 9-105 on control of authoritative electronic copies of records  
24 evidencing chattel paper. Accordingly, references in subsections (a) and (f) to an indication in a  
25 record evidencing chattel paper also embrace, for authoritative electronic copies of such records,  
26 records attached to or logically associated with the authoritative electronic copies and systems in  
27 which the authoritative electronic copies are recorded. See Section 9-105(c) and (d)(1).

28  
29 \* \* \*

30  
31 11. Assignment of Lease Chattel Paper. As defined in Section 9-102, "chattel  
32 paper" includes not only writings that evidence security interests in rights to payment secured by  
33 specific goods but also those that evidence rights to payment owed by a lessee under a true leases  
34 lease of goods.

35  
36 \* \* \*

### 37 Reporter's Note

38 Revised rules for purchasers of chattel paper. The revisions to the rules for purchasers of  
39 chattel paper reflect the corresponding changes in the definition of chattel paper and methods of  
40 perfection. See Sections 9-102(a)(11) (defining "chattel paper"); 9-314A (perfection by  
41 possession and control).

### 42 43 Section 9-331. Priority of Rights of Purchasers of Controllable Accounts,

**Controllable Electronic Records, Controllable Payment Intangibles, Instruments, Documents, Instruments, and Securities Under Other Articles; Priority of Interests in Financial Assets and Security Entitlements and Protections Against Assertions of Claims Under Article 8 Articles 8 and 12.**

(a) **[Rights under Articles 3, 7, and 8, and 12 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, or a qualifying purchaser of a controllable account, controllable electronic record, or controllable payment intangible. These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, ~~and 8,~~ and 12.

(b) **[Protection under Article 8 Articles 8 and 12.]** 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 or Article 12.

(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).

**Official Comment**

\* \* \*

3. \* \* \*

The state-law Uniform Electronic Transactions Act (UETA) and the federal Electronic Signature in Global and National Commerce Act, 15 U.S.C. §§ 7001 *et seq.* (E-SIGN), provide certain rules for records referred to and defined as “transferable records.” See UETA ~~§~~ Section 16 and E-SIGN, 15 U.S.C. § 7021. When certain conditions have been met, those acts confer on a person the status of a “holder” (as defined in ~~former 1-201(b)(21), formerly~~ Section 1-201(20); current Section 1-201(b)(21)) of an “equivalent record” under former Section 9-308 (now, in part, Section 9-330) and the rights and defenses of a “purchaser” under that section, among other effects. E-SIGN also refers to the rights and defenses of a purchaser under ~~current~~ Section 9-330. As a matter of the application of the Uniform Commercial Code, those are not the only sections of the Uniform Commercial Code that would logically be affected by UETA and E-SIGN. For

example, the rights of a holder in due course under Section 9-331(a) would also be covered by the application of those acts, when the conditions for applicability have been satisfied.

\* \* \*

### Reporter's Note

~~1. Purpose of revisions to this section.~~ The revisions of this section ensure that Article 9 does not interfere with the protections that Article 12 affords to qualifying purchasers under the take-free and no-action rules in Section 12-104(e) and (g).

~~2. Relationship to UETA and E-SIGN. The proposed addition to the official comment addresses the relationship of this section to UETA and E-SIGN.~~

### Section 9-332. Transfer of Money; Transfer of Funds from Deposit Account.

(a) [Transferee of tangible money.] A transferee of tangible money takes the money free of a security interest ~~unless the transferee acts~~ if the transferee receives possession of the money without acting in collusion with the debtor in violating the rights of the secured party.

(b) [Transferee of electronic money.] A transferee of electronic money takes the money free of a security interest if the transferee obtains control of the money without acting in collusion with the debtor in violating the rights of the secured party.

~~(b)(c)~~ [Transferee of funds from deposit account.] A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account ~~unless the transferee acts~~ if the transferee receives the funds without acting in collusion with the debtor in violating the rights of the secured party.

### Reporter's Note

~~1. "Possession" of tangible money; "control" of electronic money. Conditioning the takes-free rule of subsection (a) on receipt of possession of tangible money by the transferee reflects what has always been assumed—that a transfer of an interest in money that is not accompanied by a physical transfer of possession would not impair the rights of third parties. Inasmuch as "electronic money" is a new classification, no pattern of past practices or understandings exists.~~

~~New subsection (b) provides a rule for electronic money that complements subsection (a)~~

1 ~~by conditioning the takes-free rule on the transferee obtaining control.~~

2  
3 ~~——— 2. Transferees of funds from deposit account. Similarly, the revisions to subsection (c)~~  
4 ~~(formerly subsection (b)) make a corresponding change for a transfer of funds from a deposit~~  
5 ~~account. To qualify for the take-free protection under subsection (c), the transferee must~~  
6 ~~“receive[] the funds without acting in collusion [etc.] . . .” The draft amendments to Section 9-~~  
7 ~~332(a) and (c) are intended to clarify what is implicit under the original text. Although “funds” is~~  
8 ~~not defined in the UCC, if deposit accounts with a central bank or another bank were to become~~  
9 ~~money, as defined in Section 1-201(b)(24), transfers from such deposit accounts would be~~  
10 ~~covered by subsection (c) and not subsection (b). See Section 9-102(a)(54A) (defining “money”~~  
11 ~~for purposes of Article 9 to exclude deposit accounts).~~

12  
13 ~~——— 3. Meaning of “transfer”.~~ Official Comment

14  
15 \* \* \*

16  
17 2. Scope of this Section. This section affords broad protection ~~to~~ for transferees  
18 ~~who take~~ of money and of funds from a deposit account ~~and to those who take money.~~ to take  
19 free of a security interest.

20  
21 2A. Meaning of “Transfer.” The term “transferee” is not defined; however, the  
22 debtor itself is not a transferee. Thus this section does not cover the case in which a debtor  
23 withdraws money (currency) from its deposit account or the case in which a bank debits an  
24 encumbered account and credits another account it maintains for the debtor.

25  
26 A “transfer” of property occurs when the transferee has obtained a property interest in the  
27 relevant property. See Section 9-102, Comment 26 (“In numerous provisions, this ~~article~~Article  
28 refers to the “assignment” or the “transfer” of *property* interests.” (emphasis added)). Other law  
29 determines when the transferee has acquired a property interest. See Section 9-408, Comment 3  
30 (“Other law determines whether a debtor has a property interest (‘rights in the collateral’) and the  
31 nature of that interest.”). Although the terms “transfer” and “transferee” are not defined in the  
32 UCC, the term “transfer” is broader in scope than “purchase,” which requires taking in a  
33 “voluntary transaction creating an interest in property.” Section ~~1-201(29)~~ 1-201(b)(29) . For  
34 example, “transfer” includes involuntary transfers such as the acquisition of a judicial lien by a  
35 lien creditor. See Section 9-102(a)(52) (defining “lien creditor”). However, many references to a  
36 “transfer” in the UCC and official comments relate to a voluntary transfer to a purchaser, as  
37 indicated by the context.

38  
39 2B. Transferees of Tangible Money and Electronic Money. Subsection (a)  
40 conditions the takes-free rule on the transferee’s receipt of possession of tangible money. This  
41 reflects what had always been assumed under the previous text—that a transfer of an interest in  
42 tangible money which is not accompanied by a physical transfer of possession would not impair  
43 the rights of third parties. Inasmuch as “electronic money” is a new classification, no pattern of  
44 past practices or understandings exists. However, subsection (b) provides a rule for electronic  
45 money that complements subsection (a) by conditioning the takes-free rule on the transferee’s  
46 obtaining control.

1  
2 2C. Transferees of Funds from Deposit Account. Subsection (c) (formerly  
3 subsection (b)) reflects the corresponding change for a transfer of funds from a deposit account.  
4 To qualify for the take-free protection under subsection (c), the transferee must “receive[] the  
5 funds without acting in collusion . . .” The amendments to subsections (a) and (c) clarify what  
6 was implicit under the original text. Although “funds” is not defined in the UCC, if deposit  
7 accounts with a central bank or another bank were to become money, as defined in Section 1-  
8 201(b)(24), transfers from such deposit accounts would be covered by subsection (c) and not  
9 subsection (b). ~~4. Transfer~~ See Section 9-102(a)(54A) (defining “money,” for purposes of  
10 ~~interest in~~ Article 9, to exclude deposit accounts).

11  
12 A transfer of funds from a deposit account. ~~With respect,~~ to which subsection ~~(b) (c);~~  
13 ~~because~~ applies, normally will be made by check, by funds transfer, or by debiting the debtor’s  
14 deposit account and crediting another depositor’s account.

15  
16 Example 1: Debtor maintains a deposit account with Bank A. The deposit account is  
17 subject to a perfected security interest in favor of Lender. Debtor draws a check on the  
18 account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit  
19 account (it is an order to pay funds from the deposit account), Lender’s security interest in  
20 the deposit account does not give rise to a security interest in the check. Payee deposits  
21 the check into its own deposit account, and Bank A pays it. Unless Payee acted in  
22 collusion with Debtor in violating Lender’s rights, Payee takes the funds (the credits  
23 running in favor of Payee) free of Lender’s security interest. This is true regardless of  
24 whether Payee is a holder in due course of the check and even if Payee gave no value for  
25 the check.

26  
27 Example 2: Debtor maintains a deposit account with Bank A. The deposit account is  
28 subject to a perfected security interest in favor of Lender. At Bank B’s suggestion,  
29 Debtor moves the funds from the account at Bank A to Debtor’s deposit account with  
30 Bank B. Unless Bank B acted in collusion with Debtor in violating Lender’s rights, Bank  
31 B takes the funds (the credits running in favor of Bank B) free from Lender’s security  
32 interest. See subsection ~~(b) (c)~~. However, inasmuch as the deposit account maintained  
33 with Bank B constitutes the proceeds of the deposit account at Bank A, Lender’s security  
34 interest would attach to that account as proceeds. See Section 9-315.

35  
36 Subsection ~~(b) (c)~~ also would apply if, in the example these examples, Bank A debited  
37 Debtor’s deposit account in exchange for the issuance of Bank A’s cashier’s check. Lender’s  
38 security interest would attach to the cashier’s check as proceeds of the deposit account, and the  
39 rules applicable to instruments would govern any competing claims to the cashier’s check. See,  
40 e.g., Sections 3-306, 9-322, 9-330, 9-331.

41  
42 If Debtor withdraws money (currency) funds from an encumbered deposit account,  
43 receives the funds in the form of tangible money, and transfers the money to a third party, then  
44 subsection (a), to the extent not displaced by federal law relating to money, applies to the  
45 transfer. It contains substantially the same rule as subsection ~~(b) (c)~~.



1        Subsection ~~(b)~~ (c) applies to *transfers of funds from a deposit account*; it does not apply  
2 to *transfers of the deposit account itself* or of an interest therein. Because a deposit account is a  
3 monetary obligation (debt) of the depository bank to its depositor, a transfer of the deposit  
4 account itself does not transfer the funds credited to the deposit account. ~~See Section 9-332,~~  
5 ~~Comment 2 (5th paragraph) (distinguishing “transfers of funds from a deposit account” from~~  
6 ~~“transfers of the deposit account itself or an interest therein.” (Emphasis in original.)~~ For  
7 example, this section does not apply to the creation of a security interest in a deposit account.  
8 Competing claims to the deposit account itself are dealt with by other Article 9 priority rules.  
9 See Sections 9-317(a), 9-327, 9-340, 9-341. Similarly, a corporate merger normally would not  
10 result in a transfer of funds from a deposit account. Rather, it might result in a transfer of the  
11 deposit account itself. If so, the normal rules applicable to transferred collateral would apply;  
12 this section would not.

13  
14        The depositor’s creditors (whether secured parties or lien creditors) do not have any  
15 interest in the deposited funds (or any other assets of the depository bank) as a result of having an  
16 interest in the deposit account (the right to payment of the bank’s obligation). ~~This is so, for~~  
17 ~~example, whether~~ Consequently, a transferee of funds that takes free of a security interest under  
18 subsection (c) does so whether the security interest in ~~at~~ the deposit account from which the funds  
19 were transferred arises as original collateral or as proceeds. ~~It follows that a~~

20  
21        A transferee of *an interest in the deposit account*, such as a garnishing lien creditor, does  
22 not take free of a security interest in a deposit account under subsection (c). A transferee takes  
23 free under subsection (c) only upon the actual receipt of *funds* from the deposit account. The  
24 proper construction of ~~current~~ subsection (c) (formerly subsection (b) ~~and draft subsection (c))~~  
25 rejects cases that treat garnishment of a deposit account as an immediate transfer of an interest in  
26 funds credited to the deposit account.

27  
28        The last event that provides a recovery for a creditor in a garnishment action virtually  
29 always would be a transfer of funds from a deposit account. However, this does not mean that a  
30 perfected security interest will always be cut off by a garnishing creditor. By intervening in the  
31 garnishment proceeding to assert its senior security interest before funds are disbursed, the  
32 secured party might assert and retain its priority. However, the relevant procedural law may not  
33 provide the secured party with adequate advance notice. In some cases, a control agreement that  
34 perfects a security interest in the deposit account may require the garnished bank to provide  
35 prompt notice to the secured party. But not all control agreements will so provide. Moreover, the  
36 secured party’s priority is not absolute. See, e.g., Section 9-401, Comment 6 (explaining that the  
37 equitable doctrine of marshaling may be appropriate in the case of a lien creditor’s interest in  
38 collateral when a senior secured party is oversecured).

39  
40        ~~5-2D. Temporal aspect~~ Aspect of ~~collusion test. In order for~~ Collusion Test. For a  
41 transferee to take free of a security interest under this section the transferee must receive delivery  
42 of tangible money, obtain control of electronic money, or receive funds from a deposit account  
43 without acting in collusion. Whether the transferee is acting without collusion is determined as of  
44 the time of delivery to the transferee or obtaining control or receipt of funds by the transferee.



1       3.       **Policy.** Broad protection for transferees helps to ensure that security interests in  
2       deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a  
3       secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules  
4       concerning recovery of payments traditionally have placed a high value on finality. The  
5       opportunity to upset a completed transaction, or even to place a completed transaction in  
6       jeopardy by bringing suit against the transferee of funds, should be severely limited. Although  
7       the giving of value usually is a prerequisite for receiving the ability to take free from third-party  
8       claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c)  
9       provides that, even where the law of restitution otherwise would permit recovery of funds paid  
10      by mistake, no recovery may be had from a person “who in good faith changed position in  
11      reliance on the payment.” Rather than adopt this standard, this section eliminates all reliance  
12      requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds  
13      from encumbered deposit accounts (e.g., deposit accounts containing collections from accounts  
14      receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would  
15      object to these payments. In the vast proportion of cases, the transferee probably would be able  
16      to show a change of position in reliance on the payment. This section does not put the transferee  
17      to the burden of having to make this proof.

18  
19      4.       **“Bad Actors.”** To deal with the question of the “bad actor,” this section borrows  
20      “collusion” language from Article 8. See, e.g., Sections 8-115, 8-503(e). This is the most  
21      protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g.,  
22      Section 1-201(b)(9) (“without knowledge that the sale violates the rights of another person,” in  
23      the definition of “buyer in ordinary course of business”); Section 1-201(b)(20) (defining “good  
24      faith” as “honesty in fact and the observance of reasonable commercial standards of fair  
25      dealing”); Section 3-302(a)(2)(v) (“without notice of any claim”).

26  
27      5.       **Transferee Who Does Not Take Free.** This section sets forth the circumstances  
28      under which certain transferees of money or funds take free of security interests. It does not  
29      determine the rights of a transferee who does not take free of a security interest.

30  
31      **Example 3:** The facts are as in Example 2, but, in wrongfully moving the funds from the  
32      deposit account at Bank A to Debtor’s deposit account with Bank B, Debtor acts in  
33      collusion with Bank B. Bank B does not take the funds free of Lender’s security interest  
34      under this section. If Debtor grants a security interest to Bank B, Section 9-327 governs  
35      the relative priorities of Lender and Bank B. Under Section 9-327(3), Bank B’s security  
36      interest in the Bank B deposit account is senior to Lender’s security interest in the deposit  
37      account as proceeds. However, Bank B’s senior security interest does not protect Bank B  
38      against any liability to Lender that might arise from Bank B’s wrongful conduct.

39  
40      \* \* \*

## 41      **Section 9-334. Priority of Security Interests in Fixtures and Crops.**

42      \* \* \*

1 (f) [Priority based on consent, disclaimer, or right to remove.] A security  
2 interest in fixtures, whether or not perfected, has priority over a conflicting interest of an  
3 encumbrancer or owner of the real property if:

4 (1) the encumbrancer or owner has, in ~~an authenticated~~ a signed record,  
5 consented to the security interest or disclaimed an interest in the goods as fixtures; or

6 (2) the debtor has a right to remove the goods as against the encumbrancer  
7 or owner.

#### 8 Official Comment

9 \* \* \*

10  
11 13. “Signed” Replaces “Authenticated.” Consistent with the revised definition of  
12 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in  
13 the previous text of this section.

14  
15 \* \* \*

#### 16 Section 9-341. Bank’s Rights and Duties with Respect to Deposit Account.

17 Except as otherwise provided in Section 9-340(c), and unless the bank otherwise agrees  
18 in ~~an authenticated~~ a signed record, a bank’s rights and duties with respect to a deposit account  
19 maintained with the bank are not terminated, suspended, or modified by:

20 (1) the creation, attachment, or perfection of a security interest in the deposit  
21 account;

22 (2) the bank’s knowledge of the security interest; or

23 (3) the bank’s receipt of instructions from the secured party.

#### 24 Official Comment

25 \* \* \*

26  
27 6. “Signed” Replaces “Authenticated.” Consistent with the revised definition of  
28 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in

1 the previous text of this section.

2  
3 \* \* \*

4 **Section 9-404. Rights Acquired by Assignee; Claims and Defenses Against**  
5 **Assignee.**

6 (a) [Assignee's rights subject to terms, claims, and defenses; exceptions.] Unless an  
7 account debtor has made an enforceable agreement not to assert defenses or claims, and subject  
8 to subsections (b) through (e), the rights of an assignee are subject to:

9 (1) all terms of the agreement between the account debtor and assignor and any  
10 defense or claim in recoupment arising from the transaction that gave rise to the contract; and

11 (2) any other defense or claim of the account debtor against the assignor which  
12 accrues before the account debtor receives a notification of the assignment ~~authenticated~~ signed  
13 by the assignor or the assignee.

14 \* \* \*

15 **Official Comment**

16 \* \* \*

17  
18 6. **"Signed" Replaces "Authenticated."** Consistent with the revised definition of  
19 "sign" in Section 1-201, the cognate term "signed" replaces the reference to "authenticated" in  
20 the previous text of this section.

21  
22 \* \* \*

23 **Section 9-406. Discharge of Account Debtor; Notification of Assignment;**  
24 **Identification and Proof of Assignment; Restrictions on Assignment of Accounts,**  
25 **Chattel Paper, Payment Intangibles, and Promissory Notes Ineffective.**

26 (a) **[Discharge of account debtor; effect of notification.]** Subject to subsections (b)  
27 through (i) and (l), an account debtor on an account, chattel paper, or a payment intangible may

1 discharge its obligation by paying the assignor until, but not after, the account debtor receives a  
2 notification, ~~authenticated~~ signed by the assignor or the assignee, that the amount due or to  
3 become due has been assigned and that payment is to be made to the assignee. After receipt of  
4 the notification, the account debtor may discharge its obligation by paying the assignee and may  
5 not discharge the obligation by paying the assignor.

6 (b) **[When notification ineffective.]** Subject to ~~subsection~~ subsections (h) and (l),  
7 notification is ineffective under subsection (a):

8 (1) if it does not reasonably identify the rights assigned;  
9 (2) to the extent that an agreement between an account debtor and a seller of a  
10 payment intangible limits the account debtor's duty to pay a person other than the seller and the  
11 limitation is effective under law other than this article; or

12 (3) at the option of an account debtor, if the notification notifies the account  
13 debtor to make less than the full amount of any installment or other periodic payment to the  
14 assignee, even if:

15 (A) only a portion of the account, chattel paper, or payment intangible has  
16 been assigned to that assignee;

17 (B) a portion has been assigned to another assignee; or

18 (C) the account debtor knows that the assignment to that assignee is  
19 limited.

20 (c) **[Proof of assignment.]** Subject to ~~subsection~~ subsections (h) and (l), if requested by  
21 the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment  
22 has been made. Unless the assignee complies, the account debtor may discharge its obligation  
23 by paying the assignor, even if the account debtor has received a notification under subsection

1 (a).

2 (d) [Term restricting assignment generally ineffective.] Except as otherwise  
3 provided in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term  
4 in an agreement between an account debtor and an assignor or in a promissory note is ineffective  
5 to the extent that it:

6 (1) prohibits, restricts, or requires the consent of the account debtor or  
7 person obligated on the promissory note to the assignment or transfer of, or the creation,  
8 attachment, perfection, or enforcement of a security interest in, the account, chattel paper,  
9 payment intangible, or promissory note; or

10 (2) provides that the assignment or transfer or the creation, attachment,  
11 perfection, or enforcement of the security interest may give rise to a default, breach, right of  
12 recoupment, claim, defense, termination, right of termination, or remedy under the account,  
13 chattel paper, payment intangible, or promissory note.

14 (d.1) [“Promissory note” as used in subsection (d).] As used in subsection (d), the term  
15 “promissory note” includes a negotiable instrument that is not an instrument solely because it is  
16 a writing that evidences chattel paper.

17 \* \* \*

18 (g) **[Subsection (b)(3) not waivable.]** Subject to ~~subsection~~ subsections (h) and (l), an  
19 account debtor may not waive or vary its option under subsection (b)(3).

20 (h) **[Rule for individual under other law.]** This section is subject to law other than this  
21 article which establishes a different rule for an account debtor who is an individual and who  
22 incurred the obligation primarily for personal, family, or household purposes.

23 (i) **[Inapplicability to health-care-insurance receivable.]** This section does not apply to

an assignment of a health-care-insurance receivable.

(j) **[Section prevails over specified inconsistent law.]** This section prevails over any inconsistent provisions of the following statutes, rules, and regulations:

[List here any statutes, rules, and regulations containing provisions inconsistent with this section.]

(k) **[Inapplicability to interests in certain entities.]** Subsections (d), (f), and (j) do not apply to a security interest in an ownership interest in a general partnership, limited partnership, or limited liability company.

**(l) [Inapplicability of certain subsections.]** Subsections (a) through (c) and (g) do not apply to a controllable account or controllable payment intangible.

***Legislative Note:** States that amend statutes, rules, and regulations to remove provisions inconsistent with this section need not enact subsection (j).*

#### **Reporter's Note**

#### **Official Comment**

**\*\*\***

**2. Account Debtor's Right to Pay Assignor Until Notification.** Subsection (a) provides the general rule concerning an account debtor's right to pay the assignor until the account debtor receives appropriate notification. The revision makes clear that once the account debtor receives the notification, the account debtor cannot discharge its obligation by paying the assignor. It also makes explicit that payment to the assignor before notification, or payment to the assignee after notification, discharges the obligation. No change in meaning from former Section 9-318 is intended. Nothing in this section conditions the effectiveness of a notification on the identity of the person who gives it. An account debtor that doubts whether the right to payment has been assigned may avail itself of the procedures in subsection (c). See Comment 4. As to the rights and powers of an assignee generally, see Sections 9-102(a)(7A) (defining "assignee"); (7B) (defining "assignor") and Comment 2.c.

An effective notification under subsection (a) must be ~~authenticated~~ signed. This requirement normally could be satisfied by sending notification on the notifying person's letterhead or on a form on which the notifying person's name appears. In each case the printed name would be a symbol adopted by the notifying person for the purpose of identifying the

1 person and adopting the notification. See Section 9-102 1-201(b)(37) (defining “authenticate”  
2 “sign”).

3  
4 \* \* \*  
5

6 **5. Contractual Restrictions on Assignment.** Former Section 9-318(4) rendered  
7 ineffective an agreement between an account debtor and an assignor which prohibited  
8 assignment of an account (whether outright or to secure an obligation) or prohibited a security  
9 assignment of a general intangible for the payment of money due or to become due. Subsection  
10 (d) essentially follows former Section 9-318(4), but expands the rule of free assignability to  
11 chattel paper (subject to Sections 2A-303 and 9-407) and promissory notes and explicitly  
12 overrides both restrictions and prohibitions of assignment. The policies underlying the  
13 ineffectiveness of contractual restrictions under this section build on common-law developments  
14 that essentially have eliminated legal restrictions on assignments of rights to payment as security  
15 and other assignments of rights to payment such as accounts and chattel paper. Any that might  
16 linger for accounts and chattel paper are addressed by new subsection (f). See Comment 6.  
17

18 Subsection (d.1) ensures that subsection (d) applies to a negotiable instrument that would  
19 be a promissory note but for (i) the exclusion of writings that evidence chattel paper from the  
20 revised definition of “instrument” (Section 9-102(a)(47)) and (ii) the definition of “promissory  
21 note” (Section 9-102(a)(65)) as a subset of “instrument.” Subsection (d.1) also ensures that  
22 subsection (d) applies to an obligor on such a negotiable instrument, even though the obligor is  
23 not an “account debtor” (Section 9-102(a)(3)). The goal of subsection (d.1) is to restore the scope  
24 of subsection (d) to apply to all obligations and obligors on chattel paper as was the case prior to  
25 the revision of the definition of “instrument.”  
26

27 Former Section 9-318(4) did not apply to a sale of a payment intangible (as described in  
28 the former provision, “a general intangible for money due or to become due”) but did apply to an  
29 assignment of a payment intangible for security. Subsection (e) continues this approach and also  
30 makes subsection (d) inapplicable to sales of promissory notes. Section 9-408 addresses anti-  
31 assignment clauses with respect to sales of payment intangibles and promissory notes.  
32

33 \* \* \*  
34

35 **10. Inapplicability to Certain Ownership Interests.** ~~This section does~~ Subsection  
36 (k) provides that subsections (d), (f), and (j) do not apply to an ownership interest in a limited  
37 liability company, limited partnership, or general partnership, regardless of the name of the  
38 interest and whether the interest: (i) pertains to economic rights, governance rights, or both; (ii)  
39 arises under: (a) an operating agreement, the applicable limited liability company act, or both; or  
40 (b) a partnership agreement, the applicable partnership act, or both; or (iii) is owned by: (a) a  
41 member of a company or transferee or assignee of a member; or (b) a partner or a transferee or  
42 assignee of a partner; or (iv) comprises contractual, property, other rights, or some combination  
43 thereof. Ownership interests referred to in subsection (k) include interests in a series of a limited  
44 liability company, limited partnership, or general partnership, if the series is a “person” (Section  
45 1-201(b)(27)).  
46

1 11. Controllable ~~accounts~~ **Accounts** and ~~controllable~~ **Controllable** payment  
2 **intangibles.** For controllable accounts and controllable payment intangibles, subsections (a)  
3 through (c) and (g) are replaced by analogous provisions in Section 12-106.

4  
5 \*\*\* 12. “Signed” Replaces “Authenticated.” Consistent with the revised  
6 definition of “sign” in Section 1-201, the term “signed” replaces the reference to “authenticated”  
7 in the previous text of this section.

8  
9 \*\*\*

10 **Section 9-502. Contents of Financing Statement; Record of Mortgage as**  
11 **Financing Statement; Time of Filing Financing Statement.**

12 \*\*\*

13 **Official Comment**

14 \*\*\*

15  
16 **3. Debtor’s Signature; Required Authorization.** Subsection (a) sets forth the simple  
17 formal requirements for an effective financing statement. These requirements are: (1) the  
18 debtor’s name; (2) the name of a secured party or representative of the secured party; and (3) an  
19 indication of the collateral.

20  
21 \*\*\*

22  
23 Law other than this Article, including the law with respect to ratification of past acts,  
24 generally determines whether a person has the requisite authority to file a record under this  
25 Article. See Sections 1-103 and 9-509, Comment 3. However, under Section 9-509(b), the  
26 debtor’s ~~authentication~~ signing of (or becoming bound by) a security agreement *ipso facto*  
27 constitutes the debtor’s authorization of the filing of a financing statement covering the collateral  
28 described in the security agreement. The secured party need not obtain a separate authorization.  
29 *Amendment approved by the Permanent Editorial Board for Uniform Commercial Code*  
30 *December 31, 2001.*

31  
32 \*\*\*

33  
34 **Section 9-508. Effectiveness of Financing Statement if New Debtor Becomes**  
35 **Bound by Security Agreement.**

36 \*\*\*

37 **Official Comment**  
38



1       \* \* \*

2  
3       **3. How New Debtor Becomes Bound.** Normally, a security interest is unenforceable  
4 unless the debtor has ~~authenticated~~ signed a security agreement describing the collateral. See  
5 Section 9-203(b). ~~New~~ Section 9-203(e) creates an exception, under which a security agreement  
6 entered into by one person is effective with respect to the property of another. This exception  
7 comes into play if a “new debtor” becomes bound as debtor by a security agreement entered into  
8 by another person (the “original debtor”). (The quoted terms are defined in Section 9-102.) If a  
9 new debtor does become bound, then the security agreement entered into by the original debtor  
10 satisfies the security-agreement requirement of Section 9-203(b)(3) as to existing or after-  
11 acquired property of the new debtor to the extent the property is described in the security  
12 agreement. In that case, no other agreement is necessary to make a security interest enforceable  
13 in that property. See Section 9-203(e).

14  
15       \* \* \*

16       **Section 9-509. Persons Entitled to File a Record.**

17       (a) [Person entitled to file record.] A person may file an initial financing statement,  
18 amendment that adds collateral covered by a financing statement, or amendment that adds a  
19 debtor to a financing statement only if:

20               (1) the debtor authorizes the filing in ~~an authenticated~~ a signed record or  
21 pursuant to subsection (b) or (c); or

22               (2) the person holds an agricultural lien that has become effective at the  
23 time of filing and the financing statement covers only collateral in which the person holds an  
24 agricultural lien.

25       (b) [Security agreement as authorization.] By ~~authenticating~~ signing or  
26 becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing  
27 of an initial financing statement, and an amendment, covering:

28               (1) the collateral described in the security agreement; and

29               (2) property that becomes collateral under Section 9-315(a)(2), whether or  
30 not the security agreement expressly covers proceeds.

\*\*\*

### Official Comment

\* \* \*

**2. Scope and Approach of This Section.** This section collects in one place most of the rules determining whether a record may be filed. Section 9-510 explains the extent to which a filed record is effective. Under these sections, the identity of the person who effects a filing is immaterial. The filing scheme contemplated by this Part does not contemplate that the identity of a “filer” will be a part of the searchable records. This is consistent with, and a necessary aspect of, eliminating signatures or other evidence of authorization from the system. (Note that the 1972 amendments to this Article eliminated the requirement that a financing statement contain the signature of the secured party.) As long as the appropriate person authorizes the filing, or, in the case of a termination statement, the debtor is entitled to the termination, it is insignificant whether the secured party or another person files any given record. The question of authorization is one for the court, not the filing office. However, a filing office may choose to employ authentication signature procedures in connection with electronic communications, e.g., to verify the identity of a filer who seeks to charge the filing fee.

**3. Unauthorized Filings.** Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for the debtor's signature on a financing statement the requirement that the debtor authorize in an authenticated a signed record the filing of an initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under Section 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a). Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the priority of a security interest perfected by the filing of a financing statement. See Section 9-322, Comment 4. *Amendment approved by the Permanent Editorial Board for Uniform Commercial Code December 31, 2001.*

4. ***Ipso Facto Authorization.*** Under subsection (b), the authentication signing of a security agreement *ipso facto* constitutes the debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement. The secured party need not obtain a separate authorization. Similarly, a new debtor's becoming bound by a security agreement *ipso facto* constitutes the new debtor's authorization of the filing of a financing statement covering the collateral described in the security agreement by which the new debtor has become bound. And, under subsection (c), the acquisition of collateral in which a security interest continues after disposition under Section 9-315(a)(1) *ipso facto* constitutes an authorization to file an initial financing statement against the person who acquired the collateral. The authorization to file an initial financing statement also constitutes an authorization to file a

1 record covering actual proceeds of the original collateral, even if the security agreement is silent  
2 as to proceeds.

3  
4 **Example 1:** Debtor authenticates signs a security agreement creating a security interest  
5 in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement  
6 covering inventory and accounts. The financing statement is authorized insofar as it  
7 covers inventory and unauthorized insofar as it covers accounts. (Note, however, that the  
8 financing statement will be effective to perfect a security interest in accounts constituting  
9 proceeds of the inventory to the same extent as a financing statement covering only  
10 inventory.)

11  
12 **Example 2:** Debtor authenticates signs a security agreement creating a security interest  
13 in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement  
14 covering inventory. Debtor sells some inventory, deposits the buyer's payment into a  
15 deposit account, and withdraws the funds to purchase equipment. As long as the  
16 equipment can be traced to the inventory, the security interest continues in the equipment.  
17 See Section 9-315(a)(2). However, because the equipment was acquired with cash  
18 proceeds, the financing statement becomes ineffective to perfect the security interest in  
19 the equipment on the 21st day after the security interest attaches to the equipment unless  
20 Secured Party continues perfection beyond the 20-day period by filing a financing  
21 statement against the equipment or amending the filed financing statement to cover  
22 equipment. See Section 9-315(d). Debtor's authentication signing of the security  
23 agreement authorizes the filing of an initial financing statement or amendment covering  
24 the equipment, which is "property that becomes collateral under Section 9-315(a)(2)."  
25 See Section 9-509(b)(2).

26  
27 \* \* \*  
28

29 **6. Amendments; Termination Statements Authorized by Debtor.** Most amendments  
30 may not be filed unless the secured party of record, as determined under Section 9-511,  
31 authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization  
32 of the secured party of record is not required for the filing of a termination statement if the  
33 secured party of record failed to send or file a termination statement as required by Section 9-  
34 513, the debtor authorizes it to be filed, and the termination statement so indicates. An  
35 authorization to file a record under subsection (d) is effective even if the authorization is not in  
36 an authenticated a signed record. Compare subsection (a)(1). However, both the person filing  
37 the record and the person giving the authorization may wish to obtain and retain a record  
38 indicating that the filing was authorized.

39  
40 \* \* \*

41 **9. "Signed" and "Signing" Replace "Authenticated" and "Authenticating."**  
42 Consistent with the revised definition of "sign" in Section 1-201, the terms "signed" and  
43 "signing" replace the references to "authenticated" and "authenticating" in the previous text of  
44 this section.

1       \* \* \*

2       **Section 9-513. Termination Statement.**

3       (a) [Consumer goods.] A secured party shall cause the secured party of record  
4 for a financing statement to file a termination statement for the financing statement if the  
5 financing statement covers consumer goods and:

6       (1) there is no obligation secured by the collateral covered by the  
7 financing statement and no commitment to make an advance, incur an obligation, or otherwise  
8 give value; or

9       (2) the debtor did not authorize the filing of the initial financing statement.

10      (b) [Time for compliance with subsection (a).] To comply with subsection (a),  
11 a secured party shall cause the secured party of record to file the termination statement:

12      (1) within one month after there is no obligation secured by the collateral  
13 covered by the financing statement and no commitment to make an advance, incur an obligation,  
14 or otherwise give value; or

15      (2) if earlier, within 20 days after the secured party receives an  
16 authenticated a signed demand from a debtor.

17      (c) [Other collateral.] In cases not governed by subsection (a), within 20 days  
18 after a secured party receives an authenticated a signed demand from a debtor, the secured party  
19 shall cause the secured party of record for a financing statement to send to the debtor a  
20 termination statement for the financing statement or file the termination statement in the filing  
21 office if:

22      (1) except in the case of a financing statement covering accounts or chattel  
23 paper that has been sold or goods that are the subject of a consignment, there is no obligation

1 secured by the collateral covered by the financing statement and no commitment to make an  
2 advance, incur an obligation, or otherwise give value;

3 (2) the financing statement covers accounts or chattel paper that has been  
4 sold but as to which the account debtor or other person obligated has discharged its obligation;

5 (3) the financing statement covers goods that were the subject of a  
6 consignment to the debtor but are not in the debtor's possession; or

7 (4) the debtor did not authorize the filing of the initial financing statement.

8 (d) [Effect of filing termination statement.] Except as otherwise provided in  
9 Section 9-510, upon the filing of a termination statement with the filing office, the financing  
10 statement to which the termination statement relates ceases to be effective. Except as otherwise  
11 provided in Section 9-510, for purposes of Sections 9-519(g), 9-522(a), and 9-523(c), the filing  
12 with the filing office of a termination statement relating to a financing statement that indicates  
13 that the debtor is a transmitting utility also causes the effectiveness of the financing statement to  
14 lapse.

### 15 **Official Comment**

16  
17 \* \* \*  
18

19 2. **Duty to File or Send.** This section specifies when a secured party must cause the  
20 secured party of record to file or send to the debtor a termination statement for a financing  
21 statement. Because most financing statements expire in five years unless a continuation  
22 statement is filed (Section 9-515), no compulsion is placed on the secured party to file a  
23 termination statement unless demanded by the debtor, except in the case of consumer goods.  
24 Because many consumers will not realize the importance to them of clearing the public record,  
25 an affirmative duty is put on the secured party in that case. But many purchase-money security  
26 interests in consumer goods will not be filed, except for motor vehicles. See Section 9-309(1).  
27 Under Section 9-311(b), compliance with a certificate-of-title statute is "equivalent to the filing  
28 of a financing statement under this Article." Thus, this section applies to a certificate of title  
29 unless the section is superseded by a certificate-of-title statute that contains a specific rule  
30 addressing a secured party's duty to cause a notation of a security interest to be removed from a  
31 certificate of title. In the context of a certificate of title, however, the secured party could

1 comply with this section by causing the removal itself or providing the debtor with  
2 documentation sufficient to enable the debtor to effect the removal.

3  
4 Subsections (a) and (b) apply to a financing statement covering consumer goods.  
5 Subsection (c) applies to other financing statements. Subsection (a) and (c) each makes explicit  
6 what was implicit under former Article 9: If the debtor did not authorize the filing of a financing  
7 statement in the first place, the secured party of record should file or send a termination  
8 statement. The liability imposed upon a secured party that fails to comply with subsection (a) or  
9 (c) is identical to that imposed for the filing of an unauthorized financing statement or  
10 amendment. See Section 9-625(e).

11  
12 References to a “termination statement” in this section and in Part 5 generally should be  
13 interpreted functionally, based on the purposes of the termination. A termination statement  
14 includes any amendment that meets the definition of that term by containing an indication that  
15 the amendment “is a termination statement” or that the identified financing statement “is no  
16 longer effective.” Section 9-102(a)(80). The amendment may terminate the effectiveness of a  
17 financing statement in whole or in part. For example, if a person did not authorize the filing of a  
18 financing statement against it as debtor, under subsection (a)(2) and (c)(4) the person may  
19 demand that the financing statement be terminated *as to that person*, even if the financing  
20 statement remains of record and effective as to one or more other persons named as debtors in  
21 the financing statement. Such a termination statement may take the form of an amendment that  
22 deletes the person as a debtor. Similarly, if a person authorized the filing of a financing  
23 statement as to some collateral but not as to other property identified as collateral on the  
24 financing statement, the person may demand that the financing statement be terminated *as to the*  
25 *unauthorized identified collateral*, even if the financing statement remains of record and  
26 effective as to other collateral. Such a termination statement may take the form of an amendment  
27 that deletes the unauthorized identified collateral from coverage of the financing statement. Even  
28 if such amendments do not indicate explicitly that they are termination statements, they would  
29 nonetheless indicate that the financing statement “is no longer effective” to the extent specified  
30 and fall within the definition of “termination statement.”

31  
32 3. “Bogus” Filings. A secured party’s duty to send a termination statement arises when  
33 the secured party “receives” ~~an authenticated~~ a signed demand from the debtor. In the case of an  
34 unauthorized financing statement, the person named as debtor in the financing statement may  
35 have no relationship with the named secured party and no reason to know the secured party’s  
36 address. Inasmuch as the address in the financing statement is “held out by [the person named as  
37 secured party in the financing statement] as the place for receipt of such communications [i.e.,  
38 communications relating to security interests],” the putative secured party is deemed to have  
39 “received” a notification delivered to that address. See Section 1-202(e). If a termination  
40 statement is not forthcoming, the person named as debtor itself may authorize the filing of a  
41 termination statement, which will be effective if it indicates that the person authorized it to be  
42 filed. See Sections 9-509(d)(2), 9-510(c).

43  
44 \* \* \*

45  
46 6. “Signed” Replaces “Authenticated.” Consistent with the revised definition of

1 “sign” in Section 1-201, the term “signed” replaces the references to “authenticated” in the  
2 previous text of this section.

3  
4 \* \* \*

5  
6 **Section 9-516. What Constitutes Filing; Effectiveness of Filing.**

7 \* \* \*

8 **Official Comment**

9 \* \* \*

10  
11 **4. Method or Medium of Communication.** Rejection pursuant to subsection (b)(1) for  
12 failure to communicate a record properly should be understood to mean noncompliance with  
13 procedures relating to security, authentication signing, or other communication-related  
14 requirements that the filing office may impose. Subsection (b)(1) does not authorize a filing  
15 office to impose additional substantive requirements. See Section 9-520, Comment 2.

16  
17 \* \* \*

18  
19 **Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer**  
20 **of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.**

21 \* \* \*

22 \_\_\_\_\_ (b) **[Rights and duties of secured party in possession or control.]** A secured  
23 party in possession of collateral or control of collateral under Section 7-106, 9-104, 9-105, 9-  
24 105A, 9-106, ~~or~~ 9-107, or 9-107A has the rights and duties provided in Section 9-207.

25 \* \* \*

26 **Section 9-602. Waiver and Variance of Rights and Duties.**

27 \* \* \*

28 **Official Comment**

29  
30 \* \* \*

31  
32 **5. Certain Post-Default Waivers.** Section 9-624 permits post-default waivers in  
33 limited circumstances. These waivers must be made in agreements that are ~~authenticated~~ signed.

1 Under Section 1-201, an “‘agreement’ means the bargain of the parties in fact.” In considering  
2 waivers under Section 9-624 and analogous agreements in other contexts, courts should carefully  
3 scrutinize putative agreements that appear in records that also address many additional or  
4 unrelated matters.

5  
6 \* \* \*  
7

8 **Section 9-605. Unknown Debtor or Secondary Obligor.**

9 A (a) ~~[When no~~In general: No duty owed by secured party.] Except as provided in  
10 subsection (b), a secured party does not owe a duty based on its status as secured party:

11 (1) to a person that is a debtor or obligor, unless the secured party knows:

12 (A) that the person is a debtor or obligor;

13 (B) the identity of the person; and

14 (C) how to communicate with the person; or

15 (2) to a secured party or lienholder that has filed a financing statement against a  
16 person, unless the secured party knows:

17 (A) that the person is a debtor; and

18 (B) the identity of the person.

19 (b) ~~[When secured~~Exception: Secured party owes duty to debtor or obligor.] A  
20 secured party owes a duty based on its status as a secured party to a person that~~is a debtor if,~~ at  
21 the later of the time the secured party obtains control of collateral that is a controllable account,  
22 controllable electronic record, or controllable payment intangible; ~~or the time the security interest~~  
23 attaches to that collateral, is a debtor or obligor, if at that time the secured party knows that the  
24 information specified in subsection (a)(1)(A), (B), or (C) with respect to the person is not  
25 provided by the collateral, a record attached to or logically associated with the collateral, or the  
26 system in which the collateral is recorded.

27 **Reporter's Note to Sections 9-605 and 9-628**



~~Liability to unknown persons. Practices are developing under which lenders~~ **Official Comment**

\* \* \*

2. **Duties to Unknown Persons and Limitation of Liability.** This section relieves a secured party from duties owed to a debtor or obligor if the secured party does not know about the debtor or obligor. Similarly, it relieves a secured party from duties owed to a secured party or lienholder who has filed a financing statement against the debtor if the secured party does not know about the debtor. Section 9-628(a) and (b) provide analogous limitations of liability. For example, a secured party may be unaware that the original debtor has sold the collateral subject to the security interest and that the new owner has become the debtor. If so, the secured party owes no duty to the new owner (debtor) or to a secured party who has filed a financing statement against the new owner. ~~This section should be read in conjunction with the exculpatory provisions in Section 9-628.~~ Note that this section relieves a secured party not only from duties arising under this Article but also from duties arising under other law by virtue of the secured party's status as such under this Article, unless the other law otherwise provides.

This section should be read in conjunction with the limitations on liability contained in the exculpatory provisions in subsections (a), (b), and (c) of Section 9-628. Without this group of provisions, a secured party could incur liability to unknown persons and under circumstances that would not allow the secured party to protect itself. The broadened definition of the term "debtor" underscores the need for these provisions. For example, as noted above, a debtor may dispose of collateral subject to a security interest, resulting in the transferee becoming a debtor, but the secured party may have no knowledge of the disposition or that the transferee has become a debtor. In that situation the secured party will have no means of giving notice to or accounting to the transferee debtor. Sections 9-605 and 9-628 contemplate such situations by relieving the secured party of its duties to the debtor and limiting the secured party's liability to the debtor.

3. **Exceptions to Relief from Duties and Limitation of Liability.** In some cases, lenders may extend secured credit without knowing, or having the ability to discover, the identity of their borrowers. ~~Existing~~ Sections 9-605(a) and 9-628(a) and (b) would excuse these secured parties from having duties to their debtors and obligors, including, e.g., the duty to notify the debtor or secondary obligor before disposing of the collateral and the duty to account to the debtor for any surplus arising from a disposition, ~~and would limit the secured parties' liability to their debtors and obligors.~~ In many cases these debtors and obligors may be aware that their identities are unknown to their secured parties. By failing to make their identities and contact information known, these debtors and obligors may be ~~knowingly~~ impairing the ability of their secured parties to comply with their duties under Article 9. However, such debtor complicity notwithstanding, if secured parties were relieved of their duties in these circumstances, ~~arguably~~ it would conflict with the policy of Section 9-602, which prohibits a waiver or variance of many rights of debtors and obligors and duties of secured parties.

~~Comment 2 to Section 9-628 observes, "[w]ithout this group of provisions [in Sections 9-605 and 9-628], a secured party could incur liability to unknown persons and under~~

1 circumstances that would not allow the secured party to protect itself.” That comment also notes  
2 that “[t]he broadened definition of the term ‘debtor’ underscores the need for these provisions.”  
3 For example, a debtor may dispose of collateral subject to a security interest, resulting in the  
4 transferee becoming a debtor, but the secured party may have no knowledge of the disposition or  
5 that the transferee has become a debtor. In that situation the secured party will have no means of  
6 giving notice to or accounting to the transferee debtor. Sections 9-605 and 9-628 contemplate  
7 such situations by relieving the secured party of its duties to the debtor.  
8

9 ~~————~~ The draft amendments to Sections 9-605 and 9-628. Sections 9-605(b) and 9-628(f)  
10 reflect the policy that a secured party should not be free to avoid statutory duties or absolve itself  
11 from liability to a debtor or obligor when the secured party knows that the collateral, records  
12 attached to or logically associated with the collateral, and the system in which the collateral is  
13 recorded do not provide the secured party with the information necessary to fulfill its statutory  
14 duties. As discussed in the following paragraph, the secured party’s knowledge that it may not be  
15 able to comply with its duties enables the secured party to protect itself from being in breach of  
16 these duties. (A person has knowledge of or knows a fact if it has “actual knowledge.” Section 1-  
17 202(b).) The exceptions from the exculpatory protections otherwise afforded to secured parties  
18 are determined by the secured party’s knowledge at the later of the time the secured party obtains  
19 control of a controllable account, controllable electronic record, or controllable payment  
20 intangible or the time that the security interest attaches to the collateral.  
21

22 Obtaining control or attachment of the security interest serves as a rough proxy for the  
23 context in which a secured party may know that it may be unable to comply with its duties,  
24 usually because the transferor is pseudonymous. The carve-out from the exculpatory protection  
25 is limited to duties owed to and liability to a debtor—the transferor of a controllable account,  
26 controllable electronic record, or controllable payment intangible over which the secured party  
27 obtains control—or obligor. The secured party in such situations could protect itself by choosing  
28 not to enter into a transaction in which it might be unable to comply with its statutory duties or  
29 by conditioning its participation on disclosure of the debtor’s or obligor’s identity and contact  
30 information. Ideally, systems providing for the transfer of controllable electronic records would  
31 provide mechanisms that would permit compliance with such duties (such as methods of  
32 communication and making payments that would preserve a debtor’s or obligor’s pseudonymity,  
33 where that is desired). The amendments to Sections 9-605 and 9-608628 provide incentives for  
34 system design that would allow for compliance with Article 9 duties.  
35

36 Secured parties that enter into transactions with knowledge that they may not be able to  
37 comply with their Article 9 duties do so at their own peril. Of course, if a secured party  
38 possesses, or is able to can obtain, the information necessary to comply with its duties, there is no  
39 need for the exculpation from those duties. Note, however, that the limitation on a secured  
40 party’s relief from duties and liability relates only to secured transactions involving controllable  
41 accounts, controllable electronic records, or controllable payment intangibles. Designing systems  
42 for these assets that would afford secured parties with opportunities to comply with their Article  
43 9 duties, as suggested above, could eliminate the risks to secured parties and also provide for the  
44 protection of debtors’ and obligors’ rights.  
45

46 \*\*\* \*\*

**Section 9-608. Application of Proceeds of Collection or Enforcement; Liability for Deficiency and Right to Surplus.**

**(a) [Application of proceeds, surplus, and deficiency if obligation secured.]**

If a security interest or agricultural lien secures payment or performance of an obligation, the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds of collection or enforcement under Section 9-607 in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives an authenticated a signed demand for proceeds before distribution of the proceeds is completed.

\* \* \*

**Official Comment**

\* \* \*

6. "Signed" Replaces "Authenticated." Consistent with the revised definition of "sign" in Section 1-201, the term "signed" replaces the reference to "authenticated" in the previous text of this section.

\* \* \*

**Section 9-610. Disposition of Collateral After Default.**

1 \_\_\_\_\_ (a) **[Disposition after default.]** After default, a secured party may sell, lease,  
2 license, or otherwise dispose of any or all of the collateral in its present condition or following  
3 any commercially reasonable preparation or processing.

4 \_\_\_\_\_ (b) **[Commercially reasonable disposition.]** Every aspect of a disposition of  
5 collateral, including the method, manner, time, place, and other terms, must be commercially  
6 reasonable. If commercially reasonable, a secured party may dispose of collateral by public or  
7 private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place  
8 and on any terms.

9 \_\_\_\_\_ (c) **[Purchase by secured party.]** A secured party may purchase collateral:

10 \_\_\_\_\_ (1) at a public disposition; or

11 \_\_\_\_\_ (2) at a private disposition only if the collateral is of a kind that is  
12 customarily sold on a recognized market or the subject of widely distributed standard price  
13 quotations.

14 \* \* \*

15 ~~Official Comment~~  
16 Official Comment

17 \* \* \*

18 9.- \_\_\_\_\_ **“Recognized Market.”** A “recognized market,” as used in subsection (c)(2), and  
19 Section 9-611(d), ~~and Section 9-627(b)(1) and (2),~~ is one in which the items sold are fungible  
20 and ~~prices are not subject to individual negotiation. For example, the New York Stock Exchange~~  
21 ~~is a recognized market. A market in which prices are individually negotiated or the items are not~~  
22 ~~fungible is not a recognized market, even if the items are the subject of widely disseminated~~  
23 ~~price guides or are disposed of through dealer auctions, which generally produces market prices~~  
24 ~~that are not lower than those that would be expected to result from, as applicable, (i)~~  
25 ~~commercially reasonable dispositions to persons other than the secured party, (ii) commercially~~  
26 ~~reasonable dispositions made with otherwise required notifications to the debtor or other affected~~  
27 ~~persons, or (iii) dispositions otherwise made in a commercially reasonable manner. (As used~~  
28 ~~here, “fungible” items are those that are considered interchangeable in the relevant market and~~  
29 ~~not only items that are strictly “identical” to the other items.) The intended goals of the~~  
30 ~~recognized market exceptions are to ensure that neither the debtor nor other affected parties~~

1 would be disadvantaged by the special treatment given to recognized markets and to facilitate the  
2 efficiencies and cost savings that the special treatment may provide. The purpose of including in  
3 subsection (c)(2) collateral that is “the subject of widely distributed standard price quotations”  
4 and the criteria for determining whether price quotations meet this standard in subsection (c)(2)  
5 are the same as for a recognized market, although the availability of such standard price  
6 quotations may be based on, but distributed independently of, a “market” in which acquisitions  
7 and dispositions are made. Although a recognized market need not be subject to direct or indirect  
8 (e.g., self-regulatory) regulation or supervision, the existence of regulatory requirements or  
9 guidelines that are designed to arrive at prices consistent with those contemplated by subsection  
10 (c)(2) may provide useful guidance for applying the regulated market standard.

11  
12 Traditionally, it has been understood that a market in which prices are individually  
13 negotiated is not a recognized market, even if the items are the subject of widely disseminated  
14 price guides (such as the Kelly Blue Book for automobiles) or are disposed of through  
15 specialized auctions (such as those conducted for dealers in livestock and automobiles).  
16 However, this does not suggest that ~~such~~, for example, dispositions at prices reflected in such  
17 guides or of livestock or automobiles, ~~for example, at such auctions~~ could not be commercially  
18 reasonable.

19  
20 The New York Stock Exchange, NASDAQ, the Chicago Mercantile Exchange, and ICE  
21 Futures U.S., Inc. are examples of recognized markets. Such exchanges match buy and sell  
22 orders submitted by or on behalf of buyers and sellers that are not typically known to each other  
23 and do not involve individual negotiations. Other parties, such as inter-dealer brokers in the on-  
24 the-run U.S. Treasury market and broker-dealers in the equities market, often operate similar  
25 trading facilities that would likewise not involve known buyers or sellers or individual  
26 negotiations and may constitute recognized markets. These markets provide for robust trading  
27 with active bidding on fungible assets. There is no reason to believe that prices obtained on these  
28 markets would be less favorable to debtors, other obligors, and other interested persons than if  
29 collateral were disposed of in an off-market public or private disposition.

30  
31 Trading environments generally referred to as “over-the-counter” or “OTC” markets,  
32 however, typically have involved prospective buyers and sellers that can know each other and  
33 have direct communication in order to make trades. Unlike typical exchanges, OTC markets  
34 normally do involve the individual negotiation of a price. See Carl S. Bjerre, *Investment*  
35 *Securities*, 71 Bus. Law. 1311, 1316-17 (2016) (contrasting exchanges and typical OTC markets  
36 for equity securities and explaining that OTC markets have tended to feature thinner markets  
37 with less liquidity and more variability of pricing).

38  
39 In considering the recognized market exceptions, it is important to appreciate that  
40 recognized markets and other systems that produce equivalent “widely distributed standard price  
41 quotations” are not limited to traditional exchanges, such as those mentioned above. In  
42 particular, the exchange-OTC dichotomy no longer offers such a reliable, bright-line test for  
43 determining status as a recognized market or as a source of widely distributed standard price  
44 quotations. To be sure, some OTC markets do not qualify for the exceptions. However, recent  
45 years have witnessed a variety of new trading platforms, the use of new technologies, and new  
46 sources of providing and consuming information. ~~In particular, there~~ There now exist markets, in

1 particular for debt securities (including United States Treasury securities), that might be  
2 classified as OTC markets under the traditional taxonomy, but which qualify for the exceptions  
3 as recognized markets or as sources of data for widely distributed standard price quotations.  
4 Market participants rely on prices provided by these markets to the same extent and for the same  
5 purposes (including in connection with default and enforcement of security interests) as they rely  
6 on prices generated by traditional securities and commodities exchanges. These prices are widely  
7 available from business publications and online sources as well as from private subscription-  
8 based service providers. It can safely be assumed that these financial markets and the data that  
9 they provide to the public will continue to evolve. The touchstone for determining whether a  
10 market structure is a recognized market or one that produces equivalent price quotations is a  
11 functional one. It is not based on the “type” of market (e.g., “exchange,” “OTC,” or other  
12 classification). It is based on whether the market or distribution of price quotations provides  
13 reliable and trusted data on prices consistent with the purposes of subsection (c)(2) and the  
14 corresponding provisions of Sections 9-611 and 9-627.

### 15 16 Reporter’s Note

17 1. *Contexts of “recognized market” exceptions.* With the exception of Section 9-  
18 627(b)(1), the special treatment afforded by the relevant sections involving a “recognized  
19 market” rely on prices determined in such a market but do not involve dispositions actually made  
20 on a recognized market. The official comment therefore does not limit its discussion to such  
21 dispositions and uses neutral references to “exceptions” and “special treatment” that the relevant  
22 sections provide.

23  
24 2. *No change.* No change is proposed to Section 9-610, which is provided for  
25 convenience.

### 26 27 Section 9-611. Notification Before Disposition of Collateral.

28 \_\_\_\_\_ (a) [**“Notification date.”**] In this section, “notification date” means the earlier of  
29 the date on which:

30 \_\_\_\_\_ (1) a secured party sends to the debtor and any secondary obligor an  
31 ~~authenticated~~ a signed notification of disposition; or

32 \_\_\_\_\_ (2) the debtor and any secondary obligor waive the right to notification.

33 \_\_\_\_\_ (b) [**Notification of disposition required.**] Except as otherwise provided in  
34 subsection (d), a secured party that disposes of collateral under Section 9-610 shall send to the  
35 persons specified in subsection (c) a reasonable ~~authenticated~~ signed notification of disposition.

36 \_\_\_\_\_ (c) [**Persons to be notified.**] To comply with subsection (b), the secured party

1 shall send ~~an authenticated~~ a signed notification of disposition to:

2 \_\_\_\_\_ (1) the debtor;

3 \_\_\_\_\_ (2) any secondary obligor; and

4 \_\_\_\_\_ (3) if the collateral is other than consumer goods:

5 \_\_\_\_\_ (A) any other person from which the secured party has received,

6 before the notification date, ~~an authenticated~~ a signed notification of a claim of an interest in the  
7 collateral;

8 \_\_\_\_\_ (B) any other secured party or lienholder that, 10 days before the  
9 notification date, held a security interest in or other lien on the collateral perfected by the filing  
10 of a financing statement that:

11 \_\_\_\_\_ (i) identified the collateral;

12 \_\_\_\_\_ (ii) was indexed under the debtor's name as of that date;

13 and

14 \_\_\_\_\_ (iii) was filed in the office in which to file a financing  
15 statement against the debtor covering the collateral as of that date; and

16 \_\_\_\_\_ (C) any other secured party that, 10 days before the notification  
17 date, held a security interest in the collateral perfected by compliance with a statute, regulation,  
18 or treaty described in Section 9-311(a).

19 \_\_\_\_\_ (d) **[Subsection (b) inapplicable: perishable collateral; recognized market.]**

20 Subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in  
21 value or is of a type customarily sold on a recognized market.

22 \_\_\_\_\_ (e) **[Compliance with subsection (c)(3)(B).]** A secured party complies with the  
23 requirement for notification prescribed by subsection (c)(3)(B) if:



\_\_\_\_\_ (1) not later than 20 days or earlier than 30 days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subsection (c)(3)(B); and

\_\_\_\_\_ (2) before the notification date, the secured party:  
\_\_\_\_\_ (A) did not receive a response to the request for information; or  
\_\_\_\_\_ (B) received a response to the request for information and sent an ~~an~~ authenticated a signed notification of disposition to each secured party or other lienholder named in that response whose financing statement covered the collateral.

~~Official Comment~~

~~\*\*\*~~

~~Official Comment~~

~~\*\*\*~~

2. **Reasonable Notification.** This section requires a secured party who wishes to dispose of collateral under Section 9-610 to send "a reasonable ~~authenticated~~ signed notification of disposition" to specified interested persons, subject to certain exceptions. The notification must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time before the disposition is to take place), and its content. See Sections 9-612 (timeliness of notification), 9-613 (contents of notification generally), 9-614 (contents of notification in consumer-goods transactions).

~~\*\*\*~~

5. **Authentication Signature Requirement.** Subsections (b), and (c), and (e) explicitly provide that a ~~notification of disposition~~ notifications must be "~~authenticated.~~" "signed." Some cases read former Section 9-504(3) as validating oral notification. Consistent with the revised definition of "sign" in Section 1-201, the term "signed" replaces the references to "authenticated" in the previous text of this section.

~~\*\*\*~~

7.- **Recognized Market; Perishable Collateral.** New subsection Subsection (d) makes it clear that there is no obligation to give notification of a disposition in the case of perishable collateral or collateral customarily sold on a recognized market (e.g., marketable



1 securities). Former Section 9-504(3) might be read (incorrectly) to relieve the secured party from  
2 its duty to notify a debtor but not from its duty to notify other secured parties in connection with  
3 dispositions of such collateral. As to what constitutes a recognized market, see Section 9-610,  
4 Comment 9.

5  
6 \* \* \*

#### 7 **Reporter's Note**

8 ~~“Signed.” Consistent with the new definition of “signed” in Section 1-201, that term~~  
9 ~~replaces references to “authenticated.”~~

10  
11 \* \* \*

12 9. **Waiver.** A debtor or secondary obligor may waive the right to notification under  
13 this section only by a post-default authenticated signed agreement. See Section 9-624(a).

14  
15 \* \* \*

#### 16 Section 9-612. Timeliness of Notification Before Disposition of Collateral.

17  
18 \* \* \*

#### 19 Official Comment

20  
21 \* \* \*

22 2. **Reasonable Notification.** Section 9-611(b) requires the secured party to send a  
23 “reasonable authenticated signed notification.” Under that section, as under former Section 9-  
24 504(3), one aspect of a reasonable notification is its timeliness. This generally means that the  
25 notification must be sent at a reasonable time in advance of the date of a public disposition or the  
26 date after which a private disposition is to be made. A notification that is sent so near to the  
27 disposition date that a notified person could not be expected to act on or take account of the  
28 notification would be unreasonable.

29 3. **Timeliness of Notification: Safe Harbor.** The 10-day notice period in subsection (b)  
30 is intended to be a “safe harbor” and not a minimum requirement. To qualify for the “safe  
31 harbor” the notification must be sent after default. A notification also must be sent in a  
32 commercially reasonable manner. See Section 9-611(b) (“reasonable authenticated signed  
33 notification”). These requirements prevent a secured party from taking advantage of the “safe  
34 harbor” by, for example, giving the debtor a notification at the time of the original extension of  
35 credit or sending the notice by surface mail to a debtor overseas.

36 **Section 9-613. Contents and Form of Notification Before Disposition of**  
37 **Collateral: General.**

Except in a consumer-goods transaction, the following rules apply:

(1) The contents of a notification of disposition are sufficient if the notification:

(A) describes the debtor and the secured party;

(B) describes the collateral that is the subject of the intended disposition;

(C) states the method of intended disposition;

(D) states that the debtor is entitled to an accounting of the unpaid indebtedness and states the charge, if any, for an accounting; and

(E) states the time and place of a public disposition or the time after which any other disposition is to be made.

(2) Whether the contents of a notification that lacks any of the information specified in paragraph (1) are nevertheless sufficient is a question of fact.

(3) The contents of a notification providing substantially the information specified in paragraph (1) are sufficient, even if the notification includes:

(A) information not specified by that paragraph; or

(B) minor errors that are not seriously misleading.

(4) A particular phrasing of the notification is not required.

(5) The following form of notification and the form appearing in Section 9-614(3), when completed, each provides sufficient information:

~~NOTIFICATION OF DISPOSITION OF COLLATERAL~~

To: [Name of debtor, obligor, or other person to which the  
notification is sent]

From: [Name, address, and telephone number of secured  
party]

Name of Debtor(s): [Include only if debtor(s) are not an addressee]

~~[For a public disposition:]~~

~~We will sell [or lease or license, *as applicable*] the [describe collateral] [to the highest qualified bidder] in public as follows:~~

Day and Date: \_\_\_\_\_

Time: \_\_\_\_\_

~~Place:~~

~~[For a private disposition:]~~ \_\_\_\_\_

We will sell ~~[or lease or license, as applicable]~~ the ~~[describe collateral]~~ privately  
sometime after ~~[day and date]~~.

~~You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, *as applicable*] [for a charge of \$ \_\_\_\_\_]. You may request an accounting by calling us at \_\_\_\_\_ [telephone number].~~

~~[End of Form]~~

## NOTIFICATION OF DISPOSITION OF COLLATERAL

To: (Name of debtor, obligor, or other person to which the notification is sent)

From: (Name, address, and telephone number of secured party)

Name of Debtor(s): (Include only if debtor(s) are not an addressee)

We will sell (or lease or license, as applicable) the (describe collateral) (include, if  
applicable: to the highest qualified bidder) in public as follows:

Day and Date: (day and date)

Time: (time)

Place: \_\_\_\_\_ (place)<sup>3</sup>

We will sell (or lease or license, as applicable) the \_\_\_\_\_ (describe collateral) privately  
sometime after \_\_\_\_\_ (day and date) .<sup>4</sup>

You are entitled to an accounting of the unpaid indebtedness secured by the property that  
we intend to sell (or lease or license, as applicable) (include, if applicable: for a charge of  
\$ (specify amount) ). You may request an accounting by calling us at \_\_\_\_\_ (telephone number).

**[End of Form]**

**Official Comment**

\* \* \*

2. **Contents of Notification.** To comply with the “reasonable authenticated signed  
notification” requirement of Section 9-611(b), the contents of a notification must be reasonable.  
\* \* \*

3. **[Style Changes in Form]** The form contained in paragraph (5) of the previous  
text of this section has been simplified. No change in substance is intended by these changes in  
style.

**Section 9-614. Contents and Form of Notification Before Disposition of  
Collateral: Consumer-Goods Transaction.**

In a consumer-goods transaction, the following rules apply:

(1) A notification of disposition must provide the following information:

(A) the information specified in Section 9-613(1);

(B) a description of any liability for a deficiency of the person to which

---

<sup>3</sup> The sender must include this paragraph for a public disposition of the collateral.

<sup>4</sup> The sender must include this paragraph for a private disposition of the collateral.

1 the notification is sent;

2 (C) a telephone number from which the amount that must be paid to the  
3 secured party to redeem the collateral under Section 9-623 is available; and

4 (D) a telephone number or mailing address from which additional  
5 information concerning the disposition and the obligation secured is available.

6 (2) A particular phrasing of the notification is not required.

7 (3) The following form of notification, when completed, provides sufficient  
8 information:

9 ~~[Name and address of secured party]~~

10 ~~[Date]~~

11 **~~NOTICE OF OUR PLAN TO SELL PROPERTY~~**

12 ~~[Name and address of any obligor who is also a debtor]~~

13 Subject: ~~[Identification of Transaction]~~

14  
15 We have your ~~[describe collateral]~~, because you broke promises in our agreement.

16  
17 ~~[For a public disposition:]~~

18 We will sell ~~[describe collateral]~~ at public sale. A sale could include a lease or license.

19 The sale will be held as follows:

20 Date: ~~\_\_\_\_\_~~

21 Time: ~~\_\_\_\_\_~~

22 Place: ~~\_\_\_\_\_~~

23 You may attend the sale and bring bidders if you want.

1  
2 ~~[For a private disposition:]~~

3 We will sell ~~\_\_\_\_\_~~ ~~[describe collateral]~~ at private sale sometime after ~~\_\_\_\_\_~~ ~~[date]~~. A sale could  
4 include a lease or license.

5  
6 The money that we get from the sale (after paying our costs) will reduce the amount you owe. If  
7 we get less money than you owe, you ~~\_\_\_\_\_~~ ~~[will or will not, as applicable]~~ still owe us the  
8 difference. If we get more money than you owe, you will get the extra money, unless we must  
9 pay it to someone else.

10 You can get the property back at any time before we sell it by paying us the full amount you owe  
11 (not just the past due payments), including our expenses. To learn the exact amount you must  
12 pay, call us at ~~\_\_\_\_\_~~ ~~[telephone number]~~.

13  
14 If you want us to explain to you in writing how we have figured the amount that you owe us, you  
15 may call us at ~~\_\_\_\_\_~~ ~~[telephone number]~~ [or write us at ~~\_\_\_\_\_~~ ~~[secured party's address]~~] and  
16 request a written explanation. [We will charge you \$ ~~\_\_\_\_\_~~ for the explanation if we sent you  
17 another written explanation of the amount you owe us within the last six months.]

18  
19 If you need more information about the sale call us at ~~\_\_\_\_\_~~ ~~[telephone number]~~ [or write us  
20 at ~~\_\_\_\_\_~~ ~~[secured party's address]~~].

21  
22 We are sending this notice to the following other people who have an interest in ~~\_\_\_\_\_~~ ~~[describe~~  
23 ~~collateral]~~ or who owe money under your agreement:

1 ~~—[Names of all other debtors and obligors, if any]—~~

2 {End of Form}

3 **NOTICE OF OUR PLAN TO SELL PROPERTY**

4 (Name and address of any obligor who is also a debtor)

5 Subject: (Identification of Transaction)

7 We have your (describe collateral) , because you broke promises in our agreement.

9 We will sell (describe collateral) at public sale. A sale could include a lease or license. The  
10 sale will be held as follows:

11 Date: (date)

12 Time: (time)

13 Place: (place)

14 You may attend the sale and bring bidders if you want.<sup>5</sup>

16 We will sell (describe collateral) at private sale sometime after (date). A sale could include a  
17 lease or license.<sup>6</sup>

18 The money that we get from the sale (after paying our costs) will reduce the amount you owe. If  
19 we get less money than you owe, you (will or will not, as applicable) still owe us the difference.

20 If we get more money than you owe, you will get the extra money, unless we must pay it to  
21 someone else.

---

<sup>5</sup> The sender must include this paragraph for a public disposition of the collateral.

<sup>6</sup> The sender must include this paragraph for a private disposition of the collateral.

1  
2 You can get the property back at any time before we sell it by paying us the full amount you owe  
3 (not just the past due payments), including our expenses. To learn the exact amount you must  
4 pay, call us at (telephone number).

5  
6 If you want us to explain to you<sup>7</sup> ( in writing) (in writing or in an electronic document) (in an  
7 electronic document) how we have figured the amount that you owe us, you may call us  
8 at (telephone number) (or<sup>8</sup> (write us at (secured party's address) ) (description of electronic  
9 communication method) ) and request<sup>9</sup> (a written explanation) (or) (a written explanation or an  
10 explanation in an electronic document) (or) (an explanation in an electronic document). (We  
11 will charge you \$ (specify amount) for the explanation if we sent you another written  
12 explanation of the amount you owe us within the last six months.<sup>10</sup>)

13  
14 If you need more information about the sale call us at (telephone number) (or<sup>11</sup> (write us at  
15 (secured party's address) ) (description of electronic communication method) ).

---

<sup>7</sup> The sender of the form must insert *any one* of the three alternative modes for the explanation  
(writing, writing and electronic document, or electronic document)

<sup>8</sup> The sender of the form may include *either, both, or neither* of the two alternative methods  
(writing or electronic communication) in addition to telephone for the recipient of the Notice to  
communicate with the sender.

<sup>9</sup> The sender of the form must refer to the mode or modes for the explanation inserted pursuant to  
the first set of alternatives for this form mentioned above

<sup>10</sup> If a written explanation is one of the alternative methods inserted pursuant to the first set of  
alternatives mentioned above, the sender may include this sentence and specify the amount of the  
charge.

<sup>11</sup> The sender of the form may include *either, both, or neither* of the two alternative methods  
(writing or electronic communication) in addition to telephone for the recipient of the Notice to  
communicate with the sender.



1 We are sending this notice to the following other people who have an interest in -(describe  
2 collateral) -or who owe money under your agreement:

3 (Names of all other debtors and obligors, if any)

4 **[End of Form]**

5 \* \* \*

6 **Reporter's Note**

7 **Official Comment**

8 \* \* \*

9  
10 4. [Style Changes in Safe-Harbor Form and Medium Neutrality] The form  
11 contained in paragraph (3) of the previous text of this section has been simplified. No change in  
12 substance is intended by these changes in style. In furtherance of medium neutrality, references  
13 to “electronic document” and “electronic communication method” have been added to the form.

14  
15 **\* \* \* Section 9-615. Application of Proceeds of Disposition; Liability for**  
16 **Deficiency and Right to Surplus.**

17 (a) [Application of proceeds.] A secured party shall apply or pay over for  
18 application the cash proceeds of disposition under Section 9-610 in the following order to:

19 (1) the reasonable expenses of retaking, holding, preparing for disposition,  
20 processing, and disposing, and, to the extent provided for by agreement and not prohibited by  
21 law, reasonable attorney's fees and legal expenses incurred by the secured party;

22 (2) the satisfaction of obligations secured by the security interest or  
23 agricultural lien under which the disposition is made;

24 (3) the satisfaction of obligations secured by any subordinate security  
25 interest in or other subordinate lien on the collateral if:

1 (A) the secured party receives from the holder of the subordinate  
2 security interest or other lien ~~an authenticated~~ a signed demand for proceeds before distribution  
3 of the proceeds is completed; and

4 (B) in a case in which a consignor has an interest in the collateral,  
5 the subordinate security interest or other lien is senior to the interest of the consignor; and

6 (4) a secured party that is a consignor of the collateral if the secured party  
7 receives from the consignor ~~an authenticated~~ a signed demand for proceeds before distribution of  
8 the proceeds is completed.

9 \* \* \*

#### 10 Official Comment

11 \* \* \*

12 8. “Signed” Replaces “Authenticated.” Consistent with the revised definition of  
13 “sign” in Section 1-201, the term “signed” replaces the reference to “authenticated” in the  
14 previous text of this section.

#### 16 **Section 9-616. Explanation of Calculation of Surplus or Deficiency.**

17 (a) **[Definitions.]** In this section:

18 (1) “Explanation” means a ~~writing~~ record that:

19 (A) states the amount of the surplus or deficiency;

20 (B) provides an explanation in accordance with subsection (c) of how the  
21 secured party calculated the surplus or deficiency;

22 (C) states, if applicable, that future debits, credits, charges, including  
23 additional credit service charges or interest, rebates, and expenses may affect the amount of the  
24 surplus or deficiency; and

25 (D) provides a telephone number or mailing address from which additional

1 information concerning the transaction is available.

2 (2) “Request” means a record:

3 (A) ~~authenticated~~ signed by a debtor or consumer obligor;

4 (B) requesting that the recipient provide an explanation; and

5 (C) sent after disposition of the collateral under Section 9-610.

6 (b) **[Explanation of calculation.]** In a consumer-goods transaction in which the debtor is  
7 entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615, the  
8 secured party shall:

9 (1) send an explanation to the debtor or consumer obligor, as applicable, after the  
10 disposition and:

11 (A) before or when the secured party accounts to the debtor and pays any  
12 surplus or first makes ~~written~~ demand in a record on the consumer obligor after the disposition  
13 for payment of the deficiency; and

14 (B) within 14 days after receipt of a request; or

15 (2) in the case of a consumer obligor who is liable for a deficiency, within 14 days  
16 after receipt of a request, send to the consumer obligor a record waiving the secured party’s right  
17 to a deficiency.

18 (c) **[Required information.]** To comply with subsection (a)(1)(B), ~~a writing~~ an  
19 explanation must provide the following information in the following order:

20 (1) the aggregate amount of obligations secured by the security interest under  
21 which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit  
22 service charge, an indication of that fact, calculated as of a specified date:

23 (A) if the secured party takes or receives possession of the collateral after

1 default, not more than 35 days before the secured party takes or receives possession; or

2 (B) if the secured party takes or receives possession of the collateral  
3 before default or does not take possession of the collateral, not more than 35 days before the  
4 disposition;

5 (2) the amount of proceeds of the disposition;

6 (3) the aggregate amount of the obligations after deducting the amount of  
7 proceeds;

8 (4) the amount, in the aggregate or by type, and types of expenses, including  
9 expenses of retaking, holding, preparing for disposition, processing, and disposing of the  
10 collateral, and attorney's fees secured by the collateral which are known to the secured party and  
11 relate to the current disposition;

12 (5) the amount, in the aggregate or by type, and types of credits, including rebates  
13 of interest or credit service charges, to which the obligor is known to be entitled and which are  
14 not reflected in the amount in paragraph (1); and

15 (6) the amount of the surplus or deficiency.

16 \* \* \*

17 **Reporter's Note**

18 ~~—In furtherance of medium neutrality, references to “writing” and “written” have been~~  
19 ~~changed to refer to a “record.”~~

20  
21 ~~—~~ \* \* \* **Official Comment**

22 \* \* \*

23  
24 **2. Duty to Send Information Concerning Surplus or Deficiency.** This section reflects  
25 the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the  
26 amount of a surplus or deficiency and the basis upon which the surplus or deficiency was  
27 calculated. Under subsection (b)(1), a secured party is obligated to provide this information (an  
28 “explanation,” defined in subsection (a)(1)) no later than the time that it accounts for and pays a

1 surplus or the time of its first ~~written attempt~~ demand in a record in an attempt to collect the  
2 deficiency. The obligor need not make a request for an accounting in order to receive an  
3 explanation. A secured party who does not attempt to collect a deficiency in ~~writing~~ a demand in  
4 a record or account for and pay a surplus has no obligation to send an explanation under  
5 subsection (b)(1) and, consequently, cannot be liable for noncompliance.  
6

7 A debtor or secondary obligor need not wait until the secured party commences ~~written~~  
8 collection efforts in a demand in a record in order to receive an explanation of how a deficiency  
9 or surplus was calculated. Subsection (b)(1)(B) obliges the secured party to send an explanation  
10 within 14 days after it receives a “request” (defined in subsection (a)(2)).  
11

12 \* \* \*  
13

14 5. **“Signed” Replaces “Authenticated”; Medium Neutrality.** Consistent with the  
15 revised definition of “sign” in Section 1-201, the term “signed” replaces the reference to  
16 “authenticated” in the previous text of this section. In furtherance of medium neutrality, the  
17 reference in the previous text of this section to a “written demand” has been replaced by a  
18 reference to refer to a “demand in a record” and the reference to a “writing” has been replaced by  
19 a reference to a “record.”  
20

21 \* \* \*  
22

### 23 **Section 9-619. Transfer of Record or Legal Title.**

24 (a) [**“Transfer statement.”**] In this section, “transfer statement” means a record  
25 ~~authenticated~~ signed by a secured party stating:

26 (1) that the debtor has defaulted in connection with an obligation secured  
27 by specified collateral;

28 (2) that the secured party has exercised its post-default remedies with  
29 respect to the collateral;

30 (3) that, by reason of the exercise, a transferee has acquired the rights of  
31 the debtor in the collateral; and

32 (4) the name and mailing address of the secured party, debtor, and  
33 transferee.

34 \* \* \*

1 Official Comment

2 \* \* \*

3 4. “Signed” Replaces “Authenticated.” Consistent with the revised definition of  
4 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in  
5 the previous text of this section.

6  
7 Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of  
8 Obligation; Compulsory Disposition of Collateral.

9 (a) [Conditions to acceptance in satisfaction.] Except as otherwise provided in  
10 subsection (g), a secured party may accept collateral in full or partial satisfaction of the  
11 obligation it secures only if:

12 (1) the debtor consents to the acceptance under subsection (c);

13 (2) the secured party does not receive, within the time set forth in  
14 subsection (d), a notification of objection to the proposal ~~authenticated~~ signed by:

15 (A) a person to which the secured party was required to send a  
16 proposal under Section 9-621; or

17 (B) any other person, other than the debtor, holding an interest in  
18 the collateral subordinate to the security interest that is the subject of the proposal;

19 (3) if the collateral is consumer goods, the collateral is not in the  
20 possession of the debtor when the debtor consents to the acceptance; and

21 (4) subsection (e) does not require the secured party to dispose of the  
22 collateral or the debtor waives the requirement pursuant to Section 9-624.

23 (b) [Purported acceptance ineffective.] A purported or apparent acceptance of  
24 collateral under this section is ineffective unless:

1 (1) the secured party consents to the acceptance in an ~~authenticated~~ a  
2 signed record or sends a proposal to the debtor; and

3 (2) the conditions of subsection (a) are met.

4 (c) **[Debtor's consent.]** For purposes of this section:

5 (1) a debtor consents to an acceptance of collateral in partial satisfaction of  
6 the obligation it secures only if the debtor agrees to the terms of the acceptance in a record  
7 ~~authenticated~~ signed after default; and

8 (2) a debtor consents to an acceptance of collateral in full satisfaction of  
9 the obligation it secures only if the debtor agrees to the terms of the acceptance in a record  
10 ~~authenticated~~ signed after default or the secured party:

11 (A) sends to the debtor after default a proposal that is  
12 unconditional or subject only to a condition that collateral not in the possession of the secured  
13 party be preserved or maintained;

14 (B) in the proposal, proposes to accept collateral in full satisfaction  
15 of the obligation it secures; and

16 (C) does not receive a notification of objection ~~authenticated~~  
17 signed by the debtor within 20 days after the proposal is sent.

18 \* \* \*

19 (f) **[Compliance with mandatory disposition requirement.]** To comply with  
20 subsection (e), the secured party shall dispose of the collateral:

21 (1) within 90 days after taking possession; or

1 (2) within any longer period to which the debtor and all secondary  
2 obligors have agreed in an agreement to that effect entered into and ~~authenticated~~ signed after  
3 default.

4 \* \* \*

### 5 **Official Comment**

6 \* \* \*

7  
8 **3. Conditions to Effective Acceptance.** Subsection (a) contains the conditions  
9 necessary to the effectiveness of an acceptance of collateral. Subsection (a)(1) requires the  
10 debtor's consent. Under subsections (c)(1) and (c)(2), the debtor may consent by agreeing to the  
11 acceptance in writing after default. Subsection (c)(2) contains an alternative method by which to  
12 satisfy the debtor's-consent condition in subsection (a)(1). It follows the proposal-and-objection  
13 model found in former Section 9-505: The debtor consents if the secured party sends a proposal  
14 to the debtor and does not receive an objection within 20 days. Under subsection (c)(1),  
15 however, that silence is not deemed to be consent with respect to acceptances in partial  
16 satisfaction. Thus, a secured party who wishes to conduct a "partial strict foreclosure" must  
17 obtain the debtor's agreement in a record ~~authenticated~~ signed after default. In all other respects,  
18 the conditions necessary to an effective partial strict foreclosure are the same as those governing  
19 acceptance of collateral in full satisfaction. (But see subsection (g), prohibiting partial strict  
20 foreclosure of a security interest in consumer transactions.)

21  
22 \* \* \*

23  
24 **4. Proposals.** Section 9-102 defines the term "proposal." It is necessary to send a  
25 "proposal" to the debtor only if the debtor does not agree to an acceptance in ~~an authenticated a~~  
26 signed record as described in subsection (c)(1) or (c)(2). Section 9-621(a) determines whether it  
27 is necessary to send a proposal to third parties. A proposal need not take any particular form as  
28 long as it sets forth the terms under which the secured party is willing to accept collateral in  
29 satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating  
30 the amount, such as by including a per diem accrual figure) of the secured obligations to be  
31 satisfied, state the conditions (if any) under which the proposal may be revoked, and describe  
32 any other applicable conditions. Note, however, that a conditional proposal generally requires  
33 the debtor's agreement in order to take effect. See subsection (c).

34  
35 **5. Secured Party's Agreement; No "Constructive" Strict Foreclosure.** The  
36 conditions of subsection (a) relate to actual or implied consent by the debtor and any secondary  
37 obligor or holder of a junior security interest or lien. To ensure that the debtor cannot  
38 unilaterally cause an acceptance of collateral, subsection (b) provides that compliance with these  
39 conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under  
40 subsection (b), acceptance does not occur unless, in addition, the secured party consents to the  
41 acceptance in ~~an authenticated~~ a signed record or sends to the debtor a proposal. For this reason,



1 a mere delay in collection or disposition of collateral does not constitute a “constructive” strict  
2 foreclosure. Instead, delay is a factor relating to whether the secured party acted in a  
3 commercially reasonable manner for purposes of Section 9-607 or 9-610. A debtor’s voluntary  
4 surrender of collateral to a secured party and the secured party’s acceptance of possession of the  
5 collateral does not, of itself, necessarily raise an implication that the secured party intends or is  
6 proposing to accept the collateral in satisfaction of the secured obligation under this section.

7  
8 \* \* \*  
9

10 **10. Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.** If the  
11 collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured  
12 party’s acceptance of the collateral in satisfaction of secured obligations would constitute a sale  
13 to the secured party. That sale normally would give rise to a new security interest (the ownership  
14 interest) under Sections 1-201(37) and 9-109. In the case of accounts and chattel paper, the new  
15 security interest would remain perfected by a filing that was effective to perfect the secured  
16 party’s original security interest. In the case of payment intangibles or promissory notes, the  
17 security interest would be perfected when it attaches. See Section 9-309. However, the  
18 procedures for acceptance of collateral under this section satisfy all necessary formalities and a  
19 new security agreement ~~authenticated~~ signed by the debtor would not be necessary.

20  
21 \* \* \*  
22

23 **13. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of  
24 “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in  
25 the previous text of this section.

26 **Section 9-621. Notification Of Proposal to Accept Collateral.**

27 (a) [Persons to which proposal to be sent.] A secured party that desires to  
28 accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal  
29 to:

30 (1) any person from which the secured party has received, before the  
31 debtor consented to the acceptance, ~~an authenticated~~ a signed notification of a claim of an  
32 interest in the collateral;

33 (2) any other secured party or lienholder that, 10 days before the debtor  
34 consented to the acceptance, held a security interest in or other lien on the collateral perfected by  
35 the filing of a financing statement that:

36 (A) identified the collateral;

1 (B) was indexed under the debtor's name as of that date; and

2 (C) was filed in the office or offices in which to file a financing

3 statement against the debtor covering the collateral as of that date; and

4 (3) any other secured party that, 10 days before the debtor consented to the

5 acceptance, held a security interest in the collateral perfected by compliance with a statute,

6 regulation, or treaty described in Section 9-311(a).

7 \* \* \*

8 **Official Comment**

9 \* \* \*

10 3. **"Signed" Replaces "Authenticated."** Consistent with the revised definition of

11 "sign" in Section 1-201, the cognate term "signed" replaces the reference to "authenticated" in

12 the previous text of this section.

13 \* \* \*

14 **Section 9-624. Waiver.**

15

16

17 (a) **[Waiver of disposition notification.]** A debtor or secondary obligor may

18 waive the right to notification of disposition of collateral under Section 9-611 only by an

19 agreement to that effect entered into and ~~authenticated~~ signed after default.

20 (b) **[Waiver of mandatory disposition.]** A debtor may waive the right to

21 require disposition of collateral under Section 9-620(e) only by an agreement to that effect

22 entered into and ~~authenticated~~ signed after default.

23 (c) **[Waiver of redemption right.]** Except in a consumer-goods transaction, a

24 debtor or secondary obligor may waive the right to redeem collateral under Section 9-623 only

25 by an agreement to that effect entered into and ~~authenticated~~ signed after default.

26 **Official Comment**

27

1       \* \* \*

2  
3       3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of  
4 “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in  
5 the previous text of this section.

6  
7       \* \* \*

8  
9       **Section 9-627. Determination of Whether Conduct Was Commercially**

10 **Reasonable.**

11       \* \* \*

12       (b) **[Dispositions that are commercially reasonable.]** A disposition of collateral is made  
13 in a commercially reasonable manner if the disposition is made:

14               (1) in the usual manner on any recognized market;

15               (2) at the price current in any recognized market at the time of the disposition; or

16               (3) otherwise in conformity with reasonable commercial practices among dealers  
17 in the type of property that was the subject of the disposition.

18       \* \* \*

19                               **Official Comment**

20       \* \* \*

21       4. **“Recognized Market.”** As in Sections 9-610(c) and 9-611(d), the concept of a  
22 “recognized market” in subsections (b)(1) and (2) is quite limited; it applies only to markets in  
23 which there are standardized price quotations for property that is essentially fungible, such as  
24 (but not limited to) stock securities and commodities exchanges. See Section 9-610, Comment 9  
25 (discussing standards for a “recognized market”).

26  
27       \* \* \*

28                               **Reporter’s Note**

29       *No change.* No change is proposed to Section 9-627, which is provided for convenience.

30       **Section 9-628. Nonliability and Limitation on Liability of Secured Party;**

1    **Liability of Secondary Obligor.**

2    \_\_\_\_\_ (a) **[Limitation of liability of secured party for noncompliance with article.]**

3    ~~Unless~~ Subject to subsection (f), unless a secured party knows that a person is a debtor or  
4    obligor, knows the identity of the person, and knows how to communicate with the person:

5    \_\_\_\_\_ (1) the secured party is not liable to the person, or to a secured party or  
6    lienholder that has filed a financing statement against the person, for failure to comply with this  
7    article; and

8    \_\_\_\_\_ (2) the secured party's failure to comply with this article does not affect  
9    the liability of the person for a deficiency.

10   \_\_\_\_\_ (b) **[Limitation of liability based on status as secured party.]** ~~A~~ Subject to  
11   subsection (f), a secured party is not liable because of its status as secured party:

12   \_\_\_\_\_ (1) to a person that is a debtor or obligor, unless the secured party knows:

13   \_\_\_\_\_ (A) that the person is a debtor or obligor;

14   \_\_\_\_\_ (B) the identity of the person; and

15   \_\_\_\_\_ (C) how to communicate with the person; or

16   \_\_\_\_\_ (2) to a secured party or lienholder that has filed a financing statement  
17   against a person, unless the secured party knows:

18   \_\_\_\_\_ (A) that the person is a debtor; and

19   \_\_\_\_\_ (B) the identity of the person.

20                    \* \* \*

21   \_\_\_\_\_ (f) ~~[When secured party owes duty~~ **Exception: Limitations of liability under**  
22   **subsections (a) and (b) do not apply.]** Subsections (a) and (b) do not apply to ~~debtor~~  
23   ~~**notwithstanding subsection (b).]**~~ ~~A secured party owes a duty based on its status as~~ **limit the**

1 liability of a secured party to a person that ~~is a debtor if~~, at the later of the time the secured party  
2 obtains control of collateral that is a controllable account, controllable electronic record, or  
3 controllable payment intangible; or the time the security interest attaches to that collateral, is a  
4 debtor or obligor, if at that time the secured party knows that the information specified in  
5 subsection (b)(1)(A), (B), or (C) is not provided by the collateral, a record attached to or  
6 logically associated with the collateral, or the system in which the collateral is recorded.

7 **Reporter's Note**

8 ~~See the Reporter's Note to Section 9-605.~~

9 ~~\*\*\*~~ **Official Comment**

10 \*\*\*

11  
12 2. Exculpatory Provisions. Subsections (a), (b), and (c) contain exculpatory  
13 provisions that should be read in conjunction with Section 9-605 and Comments. Without this  
14 group of provisions, a secured party could incur liability to unknown persons and under  
15 circumstances that would not allow the secured party to protect itself. The broadened definition  
16 of the term "debtor" underscores the need for these provisions. With respect to subsection (f), see  
17 Section 9-605, Comments 2 and 3.

18  
19 \*\*\*

20  
21 **ARTICLE 12**

22 **CONTROLLABLE ELECTRONIC RECORDS**

23 **Prefatory Note to Article 12**

24 1. *Introduction to controllable electronic records.* ~~New-UCC~~ Article 12, which deals with  
25 controllable electronic records, and the conforming amendments to Articles 1 and 9, in  
26 particular, are a major part of the effort to adapt the UCC to emerging technologies as they might  
27 affect electronic commerce.

28  
29 Article 12 creates a legal regime that is meant to apply more broadly than to electronic  
30 (intangible) assets that are created using existing technologies such as distributed ledger  
31 technology (DLT), including blockchain technology, which records transactions in bitcoin and  
32 other digital assets. It also aspires to apply to electronic assets that may be created using  
33 technologies that have yet to be developed, or even imagined.  
34

1 The adoption of DLT has underscored two important trends in electronic commerce.  
2 First, people have begun to assign economic value to some electronic records that bear no  
3 relationship to extrinsic rights and interests. For example, without any law or legally enforceable  
4 agreement, people around the world have agreed to treat virtual currencies such as bitcoin (or,  
5 more precisely “transaction outputs” generated by the Bitcoin protocol) as a medium of  
6 exchange and store of value. Second, people are using the creation or transfer of electronic  
7 records to transfer rights to receive payment, rights to receive performance of other obligations  
8 (e.g., services or delivery of goods), and other rights and interests in personal and real property.  
9

10 These trends will inevitably result in disputes among claimants to electronic records and  
11 their related rights and other benefits. Uncertainty as to the criteria for resolving these claims  
12 creates commercial risk. The magnitude of these risks will grow as these trends continue.  
13

14 As explained in more detail below, Article 12 is designed to reduce these risks by  
15 providing ~~the~~ legal rules governing the transfer—both outright and for security—of interests in  
16 some, but not all, electronic records (*controllable electronic records*). These rules specify  
17 ~~the~~certain rights in a controllable electronic record that a purchaser would acquire. Many systems  
18 for transferring controllable electronic records are pseudonymous, so that the transferee of a  
19 controllable electronic record may be unable to verify the identity of the transferor or the source  
20 of the transferor’s title. Accordingly, the Article 12 rules would make controllable electronic  
21 records negotiable, in the sense that a qualifying good faith purchaser for value would take a  
22 controllable electronic record free of third-party claims of a property interest in the controllable  
23 electronic record.  
24

25 Experience with DLT and other records-management systems has established some  
26 general functions required for electronic records to serve as an effective and reliable means of  
27 transferring economic value.  
28

- 29 • The electronic record must have some “use” or benefit that one person can enjoy  
30 and can exclude all others from enjoying, e.g., the power to “spend” a bitcoin (or,  
31 more precisely, the power to include an unspent transaction output (a UTXO) in a  
32 message that the Bitcoin protocol will record to its blockchain).  
33
- 34 • A person must be able to transfer to another person this exclusive power to use  
35 and the exclusive power to transfer the electronic record. To remain exclusive, the  
36 transfer must divest the transferor of the power to use the electronic record.  
37
- 38 • A person must be able to demonstrate to others that the person has the power to  
39 use and transfer control of the electronic record.  
40

41 As discussed in the Comments to Section 12-105, these functions form the basis of the  
42 Article 12 concept of *control*. To receive the benefits of negotiability and take free of third-party  
43 claims of a property interest in a controllable electronic record, a person must have control of the  
44 controllable electronic record. In addition, control serves as a method of perfection of a security  
45 interest in a controllable electronic record and as a condition for achieving a non-temporal  
46 priority of a security interest. In this context, it may be useful to think of control as the functional

analogue of possession of tangible personal property such as goods. Note that the concept of control allows for certain exceptions to the exclusivity of powers.

Article 12 governs certain rights (primarily property rights) of transacting parties and other persons that might be affected by the transactions. ~~With the important exception of certain rights to payment evidenced by a controllable electronic record (discussed below),~~ Article 12 does not govern assets other than controllable electronic records ~~and except,~~ in coordination with Article 9, controllable accounts and controllable payment intangibles ~~- evidenced by controllable electronic records (discussed below).~~ Like the UCC in general, Article 12 is not a regulatory statute. The fact that an asset is or is not a controllable electronic record under the UCC would not necessarily affect the application of laws regulating, for example, securities, commodities, money transmission, and taxation.

## 2. What is the scope of Article 12?

Article 12 applies to *controllable electronic records*. Controllable electronic records are a subset of what often are referred to as digital assets. Article 12 is designed to work for both technologies that are known and those that may be developed in the future. Whether an asset is a controllable electronic record (and therefore within the scope of Article 12) depends on whether the characteristics of the asset and the protocols of any system on which the asset is recorded make it suitable for the application of Article 12's substantive rules. The nature of electronic commerce is constantly changing. For this reason, the technology on which an asset depends, the type of asset, and the prevailing use of the asset should all be irrelevant to whether the asset is a controllable electronic record.

To determine whether Article 12 applies to a particular asset, e.g., bitcoin, one must determine whether the asset falls within the definition of *controllable electronic record*. A controllable electronic record is a *record*, as the UCC defines the term. A record is information that is retrievable in perceivable form.<sup>12</sup> A controllable electronic record is a record that is stored in an electronic medium<sup>13</sup> and that can be subjected to *control*, as defined in Section 12-105. An electronic record that cannot be subjected to control under Section 12-105 is outside the scope of Article 12.<sup>14</sup> As already mentioned, Article 12 addresses primarily certain property rights in controllable electronic records.

The meaning of control in the UCC depends on the type of property involved.<sup>15</sup> The Comments to Section 12-105 explain the requirements for obtaining control of a controllable

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<sup>12</sup> See Section 1-201(b)(31).

<sup>13</sup> See Section 12-102(a)(2) (defining "electronic record").

<sup>14</sup> That an electronic record is not subject to control does not imply that it does not have commercial utility. Businesses generate and sell or license large quantities of electronic records that do not require the attributes of negotiability that Article 12 affords to controllable electronic records.

<sup>15</sup> E.g., Sections 7-106 (electronic documents of title); 8-106 (four different types of investment property, each with a different definition of "control"); 9-104 (deposit accounts); 9-105 (electronic chattel paper). See also Section 9-105A (control of electronic money).

1 electronic record. For present purposes, it is sufficient to think of bitcoin as the prototypical  
2 controllable electronic record.

3  
4 The ~~existing provisions under other~~ law that ~~governs govern~~ control ~~and other matters~~ for  
5 some types of electronic records (~~including provisions on control for some types that of which~~ are  
6 ~~proposed to be~~ modified ~~in this draft~~) ~~is sufficient. These~~ by these amendments are not addressed  
7 by Article 12 and these electronic records are excluded from Article 12.<sup>16</sup>

### 8 9 3. *What are the substantive provisions of Article 12?*

10  
11 The principal function of Article 12 is to specify ~~the~~ certain rights of a *purchaser* of a  
12 controllable electronic record. A purchaser is a person that acquires an interest in property by a  
13 voluntary transaction, such as a sale.<sup>17</sup> Purchasers include both buyers and secured parties. Law  
14 other than Article 12 would determine whether a person acquires any rights in a controllable  
15 electronic record and so would be eligible to be a purchaser.

16  
17 Section 12-104 adopts the “shelter” principle, under which a purchaser of a controllable  
18 electronic record acquires whatever rights the transferor had or had power to transfer. This rule  
19 appears in Article 2 with respect to goods and Article 8 with respect to securities.<sup>18</sup>

20  
21 The ability to take a controllable electronic record free of third-party property claims  
22 appears to be necessary for a controllable electronic record to have commercial utility. As is the  
23 case with Articles 2, 3, 7, and 9, Article 12 would facilitate commerce by affording to certain  
24 good-faith purchasers for value greater rights than their transferors had or had power to  
25 transfer.<sup>19</sup> Article 12 refers to these purchasers as *qualifying purchasers*. Qualifying purchasers  
26 are purchasers that obtain control of a controllable electronic record for value, in good faith, and  
27 without notice of any claim of a property interest in the controllable electronic record. Like a  
28 holder in due course of a negotiable instrument, a qualifying purchaser of a controllable  
29 electronic record takes the controllable electronic record free of property claims.

30  
31 Consider the case in which *B* contracts to buy bitcoin from *S*.

- 32  
33 • Law other than Article 12 generally would determine whether *S* is the owner of  
34 the bitcoin.

---

<sup>16</sup> See Section 12-102(a)(1) (defining “controllable electronic record”).

<sup>17</sup> “‘Purchase’ means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.” Section 1-201(b)(29).

<sup>18</sup> Section 2-403(1) provides, “A purchaser of goods acquires all title which his transferor had or had power to transfer . . . .” Section 8-302(a) provides, “a purchaser of a certificated or uncertificated security acquires all rights in the security that the transferor had or had power to transfer.” Other UCC provisions also reflect the shelter principle. See, e.g., Section 3-203(b) (concerning negotiable instruments); Section 7-504(a) (concerning documents of title).

<sup>19</sup> Article 8 also provides for certain purchasers for value to take greater rights than their transferors had but does not contain a good-faith requirement. See Section 8-303.



- Law other than Article 12 would resolve issues concerning the formation of the contract of sale between *B* and *S* and the obligations of the parties under the contract.
- Except to the extent provided by Article 12, law other than Article 12 would determine what steps are necessary for *B* to acquire rights in the bitcoin.<sup>20</sup>
- By acquiring rights in the bitcoin by sale, *B* would become a purchaser of the bitcoin within the meaning of UCC Article 1.
- Article 12 provides that if *B* becomes a purchaser, *B* will acquire whatever rights *S* had or had power to transfer. As a general matter, law other than Article 12 would define these rights. *B* would acquire these rights regardless of whether *B* obtained control of the bitcoin.

Now assume that *O* is the owner of the bitcoin and that *S* is a hacker, who acquired control of the bitcoin illegally from *O*.

- Just as a buyer of goods can obtain possession from a seller that has no rights in the goods, *B* can obtain control of the bitcoin, even if *S* “stole” it from *O*.
- If *B* obtains control of the bitcoin for value, in good faith, and without notice of any claim of a property interest, *B* would be a qualifying purchaser.
- Even if *B* would not have acquired any rights in the bitcoin under non-Article 12 law (for example, because *S*, a “thief, had no rights to give), as an Article 12 qualifying purchaser, *B* would acquire the bitcoin free of all claims of a property interest in the bitcoin. *S*’s control of the bitcoin gave *S* the power to transfer rights to a qualifying purchaser, such as *B*. ~~In the unlikely event that~~ Even if *O* could locate *B*, *B* would defeat *O*’s claim of ownership and own the bitcoin free and clear. (The same result would obtain if *B* bought a negotiable instrument from a thief under circumstances where *B* became a holder in due course<sup>21</sup>).

4. How would Article 12 deal with rights or property that is linked to a controllable electronic record?

a. The general rules.

<sup>20</sup> Law other than Article 12 includes UCC Article 9. Although in general law other than Article 12 determines whether a person has rights in collateral, Article 9 would determine the steps necessary for a security interest to attach to a controllable electronic record. More generally, Article 9 governs any conflict between Article 9 and Article 12. Section 12-102(b).

<sup>21</sup> This distinguishes “negotiable” property from property such as goods, as to which a buyer from a thief normally obtains no rights.

1 Recall that a controllable electronic record is a record, i.e., information. Some records  
2 have what one might call “inherent value” solely because the market treats them as having value  
3 Bitcoin would be an example of such a record. Bitcoin can be exchanged (sold) for cash or other  
4 valuable assets. Or, the owner of bitcoin can hold the bitcoin as an investment.

5  
6 The value of many (if not most) records, however, is as evidence of the rights of the  
7 parties to a transaction or of the rights of a party in other property. In these situations, it is  
8 essential to differentiate between the *record* and the *rights* that are evidenced by the record.

9  
10 Suppose, for example, that *S* and *B* enter into a written contract for the sale of 100 air  
11 purifiers. The contract provides that at a specified time in the future, *S* is to deliver the goods and  
12 *B* is to pay for them. *B* may sell (assign) to *P* the right to receive delivery of the goods from *S*. *P*  
13 has acquired a valuable asset, i.e., the right to receive delivery.

14  
15 In contrast, if *B* sells to *P* only the paper (record) on which the contract is written, *P*  
16 might or might not acquire the right to delivery of the goods, depending on whether applicable  
17 law treats the sale of the paper as an assignment of the right to delivery. [\(as can be the case with](#)  
18 [a negotiable document of title under UCC Article 7\).](#) *P* would become the owner of the paper in  
19 any event, but the paper itself may be of little value.

20  
21 If the contract for the sale of air purifiers were electronic rather than written, the same  
22 analysis would apply. The right evidenced by the electronic record (i.e., *B*’s right to receive  
23 delivery from *S*) would be the valuable asset, not the record itself.

24  
25 Suppose that the contract of sale between *B* and *S* is evidenced by a controllable  
26 electronic record that *B* sells to *P*. Under Section 12-104(d), *P* would acquire all rights *in the*  
27 *controllable electronic record* that the transferor (*B*) had or had power to transfer. If *P* obtains  
28 control of the controllable electronic record for value, in good faith, and without notice of any  
29 claim of a property right in the controllable electronic record, *P* will become a qualifying  
30 purchaser and, as such, would acquire its rights *in the controllable electronic record* free of any  
31 claim of a property right under Section 12-104.

32  
33 But the controllable electronic record itself may or may not be a valuable asset. In this  
34 example, unlike bitcoin, the record would have value to *P* only if by virtue of acquiring rights in  
35 the controllable electronic record, *P* would also acquire the right to receive delivery of the goods  
36 from *S*.

37  
38 Except to the extent provided by Article 12, that ~~article~~[Article](#) leaves to other law the  
39 question whether *P*’s acquisition of rights in the controllable electronic record gives *P* the right  
40 to receive delivery of the goods. We would typically expect that under other law *P* would not  
41 acquire the right to receive the goods merely by acquiring rights in the controllable electronic  
42 record, any more than *P* would have acquired the right to receive the goods if the record were in  
43 paper form and physically delivered to *P*.

44  
45 Suppose, however, that other law does provide that, by acquiring the controllable  
46 electronic record, *P* would acquire the right to receive delivery of the goods from *S*. Suppose also

1 that *P* becomes a qualifying purchaser of the controllable electronic record. As we have seen, as  
2 a qualifying purchaser, *P* would take its rights in the controllable electronic record free of  
3 property claims. But even though under non-Article 12 law *P* would (as posited) acquire the right  
4 to receive delivery of the goods, *P* would not acquire that right free of property claims unless  
5 non-Article 12 law also were to provide otherwise.

6  
7 *b. The exceptions: controllable accounts and controllable payment intangibles.*  
8

9 As a general rule, Article 12 applies to records and not to rights evidenced by records (or  
10 to rights that records purport to evidence). And, in general, law other than Article 12 would  
11 govern what steps must be taken for a person to acquire an interest in a controllable electronic  
12 record and the rights, if any, that the person acquires in other property as a result of acquiring an  
13 interest in the record. This “other” law includes UCC Article 9.  
14

15 ~~The draft~~ [Article 12](#) provides an important exception to this general rule. The exception  
16 concerns rights to payment (specifically, accounts and payment intangibles) that are evidenced  
17 by a controllable electronic record that provides that the obligor (account debtor) undertakes to  
18 pay the person that has control of the controllable electronic record. These rights to payment are  
19 referred to as “controllable accounts” and “controllable payment intangibles.”<sup>22</sup> A qualifying  
20 purchaser of a controllable account or controllable payment intangible takes free of property  
21 claims.  
22

23 The ~~draft amends~~ [revisions amend](#) several sections of Article 9 to deal with various  
24 aspects of security interests in controllable accounts, [controllable electronic records](#), and  
25 controllable payment intangibles. ~~The Prefatory Note~~ [Comment 5](#) to ~~Article~~ [Section 9](#)  
26 ~~Amendments-101~~ and the ~~Reporter’s Notes~~ [comments](#) to those sections discuss those  
27 amendments.  
28

29 Finally, Section 12-107 provides rules on governing law. The general rule under  
30 subsection (a) is that the local law of a “controllable record’s jurisdiction” governs matters  
31 covered by Article 12. The controllable record’s jurisdiction is determined by an express  
32 provision in the record or in the system in which the record is recorded. If not so designated, it is  
33 determined based on the designation of the law governing the record or the system generally.  
34 Absent such designations, at the bottom of this “waterfall” of alternatives, the governing law will  
35 be that of the District of Columbia. Subsection (b) provides an exception for the rights and duties  
36 of account debtors under Section 12-106 if an agreement between the account debtor and an  
37 assignor of the record provides for the law of another jurisdiction to govern those rights and  
38 duties.

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<sup>22</sup> See Section 9-102(a) (defining “controllable account” and “controllable payment intangible”). Both controllable accounts and controllable payment intangibles are “monetary obligations,” i.e., obligations to pay “money.” Because cryptocurrencies such as bitcoin are not “money” as defined in Section 1-201 (unless they were not in existence and used before adoption by a government), obligations to pay in cryptocurrency would not be included in controllable accounts and controllable payment intangibles.

1  
2       **Section 12-101. Title.**

3       This article may be cited as Uniform Commercial Code—Controllable Electronic  
4 Records.

5                               **Official Comment**

6       **Subsection headings.** Subsection headings are not a part of the official text itself and  
7 have not been approved by the sponsors. [See Section 1-107, Comment 1.](#)

8  
9       **Section 12-102. Definitions.**

10       **(a) [Article 12 definitions.]**

11       In this article:

12               (1) “Controllable electronic record” means a record stored in an electronic  
13 medium that can be subjected to control under Section 12-105. The term does not include a  
14 controllable account, a controllable payment intangible, a deposit account, an electronic copy of  
15 a record evidencing chattel paper, an electronic document of title, electronic money, investment  
16 property, or a transferable record.

17               (2) “Qualifying purchaser” means a purchaser of a controllable electronic record  
18 or an interest in the controllable electronic record that obtains control of the controllable  
19 electronic record for value, in good faith, and without notice of a claim of a property right in the  
20 controllable electronic record.

21               (3) “Transferable record” has the meaning provided for that term in either:

22                       (A) the Electronic Signatures in Global and National Commerce Act, 15  
23 U.S.C. Section 7021(a)(1) [as amended]; or

24                       (B) [cite to Uniform Electronic Transactions Act Section 16(a)].

25               (4) “Value” has the meaning provided in Section 3-303(a-), [as if references in](#)

1 [that subsection to an “instrument” were references to a controllable account, controllable](#)  
2 [electronic record, or controllable payment intangible.](#)

3 (b) **[Definitions in Article 9.]** The definitions in Article 9 of “account debtor”,  
4 “controllable account”, “controllable payment intangible”, “chattel paper”, “deposit account”,  
5 “electronic money”, and “investment property” apply to this article.

6 (c) **[Article 1 definitions and principles.]** Article 1 contains general definitions and  
7 principles of construction and interpretation applicable throughout this article.

8 ***Legislative Note:** It is the intent of this act to incorporate future amendments to the federal law*  
9 *cited in subsection (a)(3)(A). A state in which the constitution or other law does not permit*  
10 *incorporation of future amendments when a federal statute is incorporated into state law should*  
11 *omit the phrase “[as amended]”. A state in which, in the absence of a legislative declaration,*  
12 *future amendments are incorporated into state law also should omit the phrase.*

13  
14 *In subsection (a)(3)(B), the state should cite to the state’s version of the Uniform Electronic*  
15 *Transactions Act Section 16(a) or comparable state law.*

## 16 17 **Official Comment**

18  
19 1. **Source.** Subsection (a)(~~1~~2), defining “qualifying purchaser,” derives from Section  
20 3-302(a)(2), which defines “holder in due course” of a negotiable instrument.

21  
22 2. **“Controllable electronic record.”** To be a “controllable electronic record”  
23 [\(CER\)](#) within the scope of Article 12, an electronic record must be susceptible of control under  
24 Section 12-105. Unlike “transferable records” under the Electronic Signatures in Global and  
25 National Commerce Act [\(E-SIGN\)](#) or a “transferable record” under the Uniform Electronic  
26 Transactions Act, [\(UETA\)](#), a record can be a ~~controllable electronic record~~ [CER](#) under Article 12  
27 in the absence of an agreement to that effect.

28  
29 ~~The provisions of Article 12 do not apply to certain types of electronic records, and the~~  
30 ~~definition has been limited accordingly. For example, under the applicable law and terms of~~  
31 ~~issuance, a platform for the transfer of control of electronic records may constitute the books and~~  
32 ~~records of an issuer for the registration of transfer of uncertificated securities. Even if such an~~  
33 ~~electronic record would otherwise fall within the definition of a controllable electronic record, as~~  
34 ~~an uncertificated security (“investment property,” as defined in Section 9-102), it would be~~  
35 ~~excluded from that definition. Moreover, Article 12 does not limit the extent to which property,~~  
36 ~~including a controllable electronic record, may be a financial asset under Article 8, including as a~~  
37 ~~result of an express agreement between a securities intermediary and another person to treat such~~  
38 ~~property held by the securities intermediary as a “financial asset” credited to a securities account~~  
39 ~~pursuant to Section 8-102(a)(9)(iii).~~

1  
2 This definition uses the term “record,” defined in Section 1-201 to include  
3 “information . . . that is stored in an electronic or other medium and is retrievable in perceivable  
4 form,” and the term “electronic,” also defined in Section 1-201.  
5

6 The provisions of Article 12 do not apply to certain types of electronic records, and the  
7 definition has been limited accordingly. For example, the definition does not include a  
8 “transferable record” under E-SIGN or UETA. It also does not include “investment property,” as  
9 defined in Section 9-102(a)(49). For this reason, the rights of an entitlement holder in a  
10 controllable electronic record that is a financial asset with respect to which the entitlement holder  
11 has a security entitlement are excluded from the definition (although the entitlement holder’s  
12 securities intermediary may hold directly an interest in a controllable electronic record that it has  
13 credited to a securities account). See Sections 8-102(a)(9) (defining “financial asset”), (a)(14)  
14 (defining “securities intermediary”), (a)(17) (defining “security entitlement”) and Comment 9; 9-  
15 102(a)(49) (defining “investment property”). See also Section 8-103(h), clarifying that a  
16 controllable electronic record is not a “financial asset” except pursuant to Section 8-  
17 102(a)(9)(iii).  
18

19 A CER is not itself a “security,” defined in part in Section 8-102(a)(15) as “an obligation  
20 of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise  
21 of an issuer.” It also is not “a share or similar equity interest,” an “investment company  
22 security,” or “an interest in a partnership or limited liability company.” See Section 8-103(a), (b),  
23 and (c). Of course, a CER might be involved in the issuance and distribution of something that is  
24 a security for other, non-Article 8 purposes, including the federal securities laws. For example, a  
25 CER (perhaps labeled as a “token” or “coin”) might provide a mechanism for facilitating  
26 investments in such other securities. As Section 8-102(d) makes clear, however, characterization  
27 under Article 8 does not determine characterization for other purposes. The converse is also  
28 true—characterization for other purposes does not determine characterization under Article 8.  
29

30 Although a CER is not an Article 8 security, CERs might play a role in the facilitating  
31 transactions in Article 8 securities. The following examples address situations in which CERs  
32 may have such a role as well as situations in which investment property is not involved.

33 **Example 1 (corporate shares: Article 8 uncertificated securities; token as**  
34 **instruction).** A Delaware corporation (D Corp) issues shares of stock and maintains  
35 books and records evidencing the registered ownership of the shares. Because the shares  
36 are not represented by security certificates, they are uncertificated securities. Pursuant to  
37 the applicable law, other than the UCC, and the organic documentation of D Corp, CERs  
38 (“tokens”) are created to facilitate transfers of the shares. Also pursuant to that law and  
39 documentation, the transfer of control of a token on the platform on which the token is  
40 recorded constitutes an instruction to D Corp, as issuer, for the transfer of registration of  
41 the share(s) represented by the token to the transferee of control. Following receipt of the  
42 instruction upon transfer of control of a token, D Corp transfers registration of the  
43 share(s) on its books and records. See Sections 8-102(a)(12) (defining “instruction”); 8-  
44 401 (duty of issuer to register transfer). Although Article 12 governs the tokens (as  
45 CERs) and the transfer of control, other law, including Delaware corporate law and

Delaware Article 8 (and Article 9, where applicable) governs rights in the uncertificated securities and the transfer of registration. See Sections 8-110(a); 12-104(f).

**Example 2 (LLC membership interests: Article 8 uncertificated securities; token as instruction).** A Delaware limited liability company (LLC) issues membership interests that are dealt in or traded on securities exchanges or in securities markets and which by their terms are securities governed by Article 8. See Section 8-103(c). LLC maintains books and records evidencing the registered ownership of the interests. Because the interests are not represented by security certificates, they are uncertificated securities. Pursuant to the applicable law, other than the UCC, and the organic documentation of LLC, CERs (“tokens”) are created to facilitate transfers of the interests. Also pursuant to that law and documentation, the transfer of control of a token on the platform on which the token is recorded constitutes an instruction to LLC, as issuer, for the transfer of registration of the interest(s) represented by the token to the transferee of control. Following receipt of the instruction upon transfer of control of a token, LLC transfers registration of the interest(s) on its books and records. See Sections 8-102(a)(12) (defining “instruction”); 8-401 (duty of issuer to register transfer). Although Article 12 governs the tokens (as CERs) and the transfer of control, other law, including Delaware LLC law and Delaware Article 8 (and Article 9, where applicable), governs rights in the uncertificated securities and the transfer of registration. See Sections 8-110(a); 12-104(f).

**Example 3 (LLC membership interests not covered by Article 8; interests are general intangibles).** A Delaware limited liability company issues membership interests that are not securities governed by UCC Article 8 and, consequently, are not investment property. See Section 8-103(c). Instead, the membership interests are general intangibles. LLC maintains books and records evidencing ownership of the interests. Pursuant to the applicable law and the organic documentation of LLC, CERs (“tokens”) are created to facilitate transfers of the interests. Also pursuant to that law and documentation, the transfer of control of a token on the platform on which the token is recorded constitutes a request to LLC, as issuer, for the transfer of the interest(s) represented by the token. Following receipt of the request upon transfer of control of a token, LLC transfers the interest(s) on its books and records. Although Article 12 governs the tokens (as CERs) and the transfer of control, other law (including Article 9, where applicable, but not Article 8) governs rights in the interests (general intangibles). See Section 12-104(f).

Examples 1 and 2 posit that CERs function as instructions to the issuers. The central point is that the roles of the CERs must comply with the organic corporate and LLC laws and documentation as well as the Article 8 regime for uncertificated securities. Although CERs might be structured to functionally “represent” the underlying uncertificated securities, Article 8 makes no provision for such a “representation” for uncertificated securities (unlike the role of security certificates for certificated securities). Whether it would be possible and feasible to expand the structure contemplated in Examples 1 and 2 so that transfer of control of a CER would, *ipso facto*, constitute a transfer of registration on the issuer’s books and records would depend on the terms of and compliance with both the underlying organic laws and documentation for the uncertificated securities and the requirements of Article 8.



1 If the securities issued by D Corp or LLC in Examples 1 and 2 were payment obligations  
2 of the issuers that met the definition of “security” in Section 8-102(a)(15)—i.e., debt securities—  
3 the same analysis discussed in those examples as to the applicability and scope of Articles 8 and  
4 12 would apply. However, if the debt obligations were not Article 8 securities (as in Example 3)  
5 but were obligations of account debtors on controllable accounts or controllable payment  
6 intangibles, then the relevant provisions of Articles 9 and 12, and not those of Article 8, would  
7 apply. See, e.g., Sections 9-107A; 9-306B; 9-314; 12-104(a), (b), and (e) and Comments 6 – 10;  
8 Article 12, Prefatory Note 4.  
9

10 3. **“Qualifying purchaser.”** The conditions for becoming a qualifying purchaser  
11 were drawn from Article 3. More specifically, the conditions for becoming a qualifying  
12 purchaser were drawn from Section 3-302(a)(2), which defines “holder in due course” of a  
13 negotiable instrument. Among these conditions is that a person take the instrument “for value.”  
14 As Comment 10 to Section 12-104 explains, the concept of value in Article 3 differs from the  
15 concept of value that is generally applicable in the UCC. Article 12 adopts the Article 3 concept.  
16 To qualify as a qualifying purchaser under subsection (a)(2), there must be a time at which all of  
17 the requirements are satisfied. For example, if a purchaser obtains notice of a claim of a property  
18 right before giving value or satisfying the requirements for control, the purchaser cannot be a  
19 qualifying purchaser.  
20

21 Under Section 12-104(a), not only a purchaser of a controllable electronic record but also  
22 a purchaser of a controllable account or controllable payment intangible may be a qualifying  
23 purchaser. Moreover, a purchaser of a controllable account or a controllable payment intangible  
24 may be a ~~qualified~~ qualifying purchaser even if the purchaser does not also purchase the  
25 controllable electronic record that evidences the account or payment intangible. For example, a  
26 secured party having a security interest in all of a debtor’s accounts and payment intangibles  
27 would be a purchaser of those rights to payment, which would include the debtor’s controllable  
28 accounts and payment intangibles. If the secured party were to obtain control of the debtor’s  
29 controllable account or payment intangible, it would become a qualifying purchaser if it also met  
30 the other conditions for that status. However, to obtain control of the controllable account or  
31 controllable payment intangible, a requirement for qualifying purchaser status, the purchaser  
32 must obtain control of ~~that~~ the controllable electronic record: evidencing the controllable account  
33 or controllable payment intangible. Section 12-104(b); see also Section 9-107A. A person need  
34 not be a purchaser, however, to obtain control of a controllable electronic record.  
35

36 4. **“Transferable record.”** This definition facilitates the exclusion of transferable  
37 records from the definition of controllable electronic record.  
38

39 5. **“Value.”** The concept of value in Section 3-303 is narrower than the generally  
40 applicable concept in Section 1-201. Comment 9 to Section 12-104 explains the difference  
41 between the two concepts and that the Article 12 adopts the Article 3 approach.  
42

#### 43 **Section 12-103. Relation to Article 9 and Consumer Laws.**

44 (a) **[Article 9 governs in case of conflict.]** If there is conflict between this article and



Article 9, Article 9 governs.

(b) **[Applicable consumer law and other laws.]** A transaction subject to this article is subject to any applicable rule of law that establishes a different rule for consumers and [insert reference to (i) any other statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and (ii) any consumer-protection statute or regulation].

### Official Comment

**Source.** Subsection (a) follows Section 3-102(b). As is the case with respect to Article 3, Article 9 would defer to Article 12 in some instances. See, e.g., Section 9-331. Subsection (b) is copied from Section 9-~~102~~-201(b).

### **Section 12-104. Rights in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible.**

(a) **[Applicability of section to controllable account and controllable payment intangible.]** This section applies to the acquisition and purchase of rights in a controllable account or controllable payment intangible, including the rights and benefits under subsections (c), (d), (e), (g), and (h) of a purchaser and qualifying purchaser, in the same manner this section applies to a controllable electronic record.

(b) **[Control of controllable account and controllable payment intangible.]** For the purpose of determining whether a purchaser of a controllable account or a controllable payment intangible is a qualifying purchaser, the purchaser obtains control of the account or payment intangible if it obtains control of the controllable electronic record that evidences the account or payment intangible.

(c) **[Applicability of other law to acquisition of rights.]** Except as provided in this section, law other than this article determines whether a person acquires a right in a controllable

1 electronic record and the right the person acquires.

2 (d) **[Shelter principle and purchase of limited interest.]** A purchaser of a controllable  
3 electronic record acquires all rights in the controllable electronic record that the transferor had or  
4 had power to transfer, except that a purchaser of a limited interest in a controllable electronic  
5 record acquires rights only to the extent of the interest purchased.

6 (e) **[Rights of qualifying purchaser.]** A qualifying purchaser acquires ~~its~~ rights in the  
7 controllable electronic record free of a claim of a property right in the controllable electronic  
8 record.

9 (f) **[Limitation of rights of qualifying purchaser in other property.]** Except as  
10 provided in subsections (a) and (e) for controllable accounts and controllable payment  
11 intangibles or law other than this article, a qualifying purchaser takes a right to payment, right to  
12 performance, or other interest in property evidenced by the controllable electronic record subject  
13 to a claim of a property right in the right to payment, right to performance, or other interest in  
14 property.

15 (g) **[No-action protection for qualifying purchaser.]** An action may not be asserted  
16 against a qualifying purchaser based on both a purchase by the qualifying purchaser of a  
17 controllable electronic record and a claim of a property right in another controllable electronic  
18 record, whether ~~the action is~~ framed in conversion, replevin, constructive trust, equitable lien,  
19 or other theory.

20 (h) **[Filing not notice.]** Filing of a financing statement under Article 9 is not notice of a  
21 claim of a property right in a controllable electronic record.

## 22 Official Comment

23  
24 1. **Source.** Subsection (d) derives from Section 2-403(1) (concerning the rights of a  
25 purchaser).

Subsection (e) derives from Sections 3-306 (concerning the rights of a holder in due course of an instrument) and 8-303 (concerning rights of a protected purchaser of a security).

Subsection (g) derives from Section 8-502 (protecting entitlement holders).

Subsection (h) derives from Section 9-331(c) (filing under Article 9 does not provide notice for purposes of protections of purchasers under other articles).

**2. Applicability of section to controllable accounts and controllable payment intangibles.** Under subsection (a), the provisions of this section apply to controllable accounts and controllable payment intangibles in the same manner that they apply to controllable electronic records. For example, a qualifying purchaser of a controllable account that obtains control of the controllable electronic record that evidences the account (and who thereby obtains control of the account under [subsection \(b\) and Section 9-107A](#)) would take the account free of conflicting ~~rights~~[claims of a property right](#) in the account under subsection (e). Under subsection (b), for purposes of determining whether a purchaser of a controllable account or controllable payment intangible obtains control, the purchaser obtains control by obtaining control of the controllable electronic record that evidences the account or payment intangible. Unless otherwise specified or the context otherwise requires, references to a controllable electronic record in the official comments in this ~~article~~[Article](#) also refer to a controllable account or controllable payment intangible.

**3. Applicability of other law.** As a general matter, this section leaves to other law the resolution of questions concerning the transfer of rights in a controllable electronic record, such as the acts that must be taken to effectuate a transfer of rights and the scope of the rights that a transferee acquires. See subsection (c). Subsections (d) through (h) contain important exceptions to this subsection.

**Example:** *A* creates a controllable electronic record. Although the system in which the electronic record is recorded may determine how the electronic record can be used and control may be transferred, other law would determine what rights *A* has in the controllable electronic record. If, for example, *A* created the electronic record in the scope of its employment, *A*'s rights would be subject to the terms of *A*'s employment contract.

*A* and *B* agree to the sale of the controllable electronic record to *B*. Other law would determine what steps need to be taken for *B* to acquire rights in the controllable electronic record. Once *B* acquires those rights under other law, *B* would be a purchaser (as defined in Section 1-201), whose rights also would be determined by subsection (d) (i.e., the shelter principle, discussed below in Comment 4-). However, even if *B* did not acquire rights under other law, if *B* met the requirements for a qualifying purchaser, its rights would be determined by subsections (e) and (g). See Comments 7 and 8, below.

The "law other than this article" that may apply to the transfer of rights in a controllable electronic record under subsection (c) includes UCC Article 9. Section 9-203 would apply, for

1 example, to determine whether a purported secured party acquired an enforceable security  
2 interest in a controllable electronic record.

3  
4 **4. Purchaser and transferor under subsection (d): shelter principle and**  
5 **resulting controllable electronic records.** Subsection (d) sets forth the familiar “shelter”  
6 principle, under which a purchaser of a controllable electronic record acquires whatever rights  
7 the transferor had or had power to transfer. However, in some cases the controllable electronic  
8 record that is acquired by the purchaser will not be the “same” controllable electronic record that  
9 was transferred by the transferor. Such a transfer might involve the elimination of a “transferred”  
10 controllable electronic record and the resulting and corresponding derivative creation and  
11 acquisition of a new controllable electronic record. An example of such a resulting controllable  
12 electronic record is the unspent transaction output (UTXO) generated by a transaction in bitcoin.  
13 Bitcoin’s protocol operates by allowing users to “spend” their UTXOs to create one or more new  
14 UTXOs for the same amount of bitcoin, so each transfer produces new UTXOs controlled by the  
15 transferees (one of which may be the transferor—spender—of the bitcoin). Subsection (d) should  
16 be construed broadly to encompass such transfers and resulting derivative controllable electronic  
17 records acquired by a purchaser. Because subsection (d) addresses the rights of a purchaser in the  
18 “purchased” asset and not the “transferred” asset, this construction is wholly consistent with the  
19 statutory text.

20  
21 Notwithstanding the broad subsection (d) shelter principle, which provides that a  
22 purchaser acquires “all rights” of the transferor, those rights are subject to the reach of Section 1-  
23 304. Under that section a contract or duty under the UCC imposes an overarching “obligation of  
24 good faith in its performance and enforcement.” Section 1-304. In this context, “performance and  
25 enforcement” include the exercise of rights under the UCC, such as the rights conferred on a  
26 purchaser by the subsection (d) shelter principle. See Section 1-304, Comment 2. For example,  
27 consider a qualifying purchaser of a controllable electronic record, controllable account, or  
28 controllable payment intangible who then sells that asset to a person who is not a qualifying  
29 purchaser. If the second purchaser had previously engaged in fraudulent or illegal activity in  
30 connection with the purchased asset or an asset to which the purchased asset is attributable, the  
31 purchaser’s exercise of rights under subsection (d) as to the purchased asset may be in breach of  
32 its obligation of good faith. Section 3-203(b) states this result directly with respect to a transferee  
33 of a negotiable instrument if the transferee previously engaged in fraud or illegality with respect  
34 to the same instrument. Section 3-203(b). The same result would apply under subsection (d).  
35 Subsection (d) relies on the application of the general obligation of good faith under Section 1-  
36 304 to reach the appropriate result. However, unlike negotiable instruments, many controllable  
37 electronic records are fungible. For this reason, in some cases it might not be possible to  
38 establish that an acquired controllable electronic record has a sufficient nexus with a transferee’s  
39 earlier fraud or illegality.

40  
41 **5. Nonpurchaser having control.** Under Section 12-105, a person may have control  
42 of a controllable electronic record even if the person has no property interest in the controllable  
43 electronic record. A person that has control of, but no [property](#) interest in, a controllable  
44 electronic record would not be a purchaser of the controllable electronic record and so would not  
45 be eligible to be a qualifying purchaser under this section.

1       **Example:** Debtor granted to Secured Party a security interest in all Debtor’s existing and  
2 after-acquired accounts, chattel paper, and payment intangibles. Secured Party perfected  
3 its security interest in a specific controllable account by obtaining control of the  
4 controllable electronic record that evidences the controllable account. See Section 9-  
5 107A.

6  
7 Because Debtor’s security agreement does not cover controllable electronic records, Secured  
8 Party would have no interest in the controllable electronic record. Accordingly, Secured Party  
9 would not be a purchaser of the controllable electronic record. However, as a purchaser of the  
10 controllable accounts and controllable payment intangibles, Secured Party could benefit from the  
11 take-free rule in subsection (e) (discussed in Comment 7). Having taken control of the specific  
12 controllable account, Secured Party may be a qualifying purchaser. Even if Secured Party were  
13 not a qualifying purchaser of the controllable account, its security interest in the account over  
14 which it obtained control would, however, have priority over a conflicting security interest that  
15 was perfected by a method other than control. Section 9-326A.

16  
17       **6. Distinction between controllable electronic record and controllable account**  
18 **or controllable payment intangible evidenced by the controllable electronic record.** Even  
19 though a controllable electronic record evidences a controllable account or controllable payment  
20 intangible, the controllable electronic record is distinct from the account or payment intangible  
21 that it evidences. The account or payment intangible is connected with (or “tethered” to) the  
22 electronic record by virtue of the relevant account debtor’s obligation to pay the person in  
23 control of the controllable electronic record. Moreover, control of the controllable account or  
24 payment intangible is achieved only by obtaining control of the controllable electronic record  
25 that evidences the account or payment intangible. The Example in Comment 5 explains that a  
26 purchaser may obtain a property interest in the controllable account or controllable payment  
27 intangible even if it does not acquire any interest in the controllable electronic record that  
28 evidences the account or payment intangible. (On the other hand, merely obtaining control of a  
29 controllable electronic record does not result in the acquisition of an interest in the record.) This  
30 approach is intended to avoid a trap for the unwary purchaser that obtains an interest in the  
31 account or payment intangible (which is the asset that has stand-alone value) but might fail to  
32 acquire an interest in the related controllable electronic record. However, good practice may  
33 encourage a purchaser to acquire an interest in the controllable electronic record as well, which  
34 would eliminate any potential confusion

35  
36       **7. The take-free rule.** Subsection (e) makes controllable electronic records and,  
37 under subsection (a), controllable accounts and controllable payment intangibles, highly  
38 negotiable. Subsection (e) derives from Section 3-306, under which a holder in due course takes  
39 a negotiable instrument free of a claim of a property right in the instrument. A qualifying  
40 purchaser of a controllable electronic record, controllable account, or controllable payment  
41 intangible takes free of all claims of a property right in the purchased controllable electronic  
42 record, account, or payment intangible.

43  
44       As a general matter, law other than Article 12 would determine whether any particular  
45 transaction creates a property interest in a controllable electronic record. Section 12-104(c). The  
46 applicable law may provide that a hacker, who is essentially a thief, acquires no rights in a

1 “stolen” controllable electronic record. Even if this is the case, subsection (e) would enable a  
2 purchaser that obtains control from a hacker and that otherwise meets the definition of  
3 “qualifying purchaser” (for value, in good faith, and without notice of [a claim of a property](#)  
4 ~~claims~~[right](#)) to take the controllable electronic record (or any purchased controllable account or  
5 controllable payment intangible) free of property claims. A person in control of a controllable  
6 electronic record therefore has the power, even if not the right, to transfer rights in the record to a  
7 qualifying purchaser. Of course, if the qualifying purchaser is a secured party whose security  
8 interest secures an obligation, the purchaser would take free of the conflicting property right only  
9 to the extent of the obligation secured. See Section 12-104(d) (purchaser of a limited interest); *cf.*  
10 Section 3-302(e).

11  
12 8. **Subsection (g)—the “no-action” rule.** Subsection (g) applies in the situation  
13 (explained in Comment 4) in which the “resulting” controllable electronic record (or controllable  
14 account or controllable payment intangible) purchased by a qualifying purchaser is not the  
15 “same” record, account, or payment intangible that was transferred. In such a situation, a person  
16 claiming a property right in the transferred asset may assert a claim against a purchaser of the  
17 “resulting” asset even though the claimant is *not* asserting a claim of a *property right* in the  
18 purchased asset. If the claim is based on both the purchaser’s purchase of the acquired asset and  
19 the claimant’s ~~rights~~[claim of a property right](#) in the transferred asset, subsection (g) protects the  
20 ~~qualified~~[qualifying](#) purchaser from liability to the claimant based on any theory. The  
21 ~~qualified~~[qualifying](#) purchaser’s protection from the assertion of such a claim does not depend on  
22 any proof that the purchased asset is somehow “traceable” to the transferred asset.

23  
24 If instead, such a claimant were to assert a claim based on a property right in the  
25 purchased asset, then the ~~qualified~~[qualifying](#) purchaser would take free of that claim under  
26 subsection (e). Subsection (e) applies whether or not the acquired asset is the same asset that was  
27 transferred.

28  
29 9. **“Tethered” assets.** Certain controllable electronic records may carry with them  
30 rights to other assets, e.g., goods or rights to payment. By its terms, the take-free rule in  
31 subsection (e) applies to controllable electronic records (and, under subsection (a), controllable  
32 accounts and controllable payment intangibles); [evidenced by a controllable electronic record](#).  
33 One might argue that the inclusion of controllable accounts and controllable payment intangibles  
34 in the scope of subsection (e) is unnecessary. By taking a controllable electronic record free of  
35 property claims, the argument would be that a person takes not only the controllable electronic  
36 record itself but also all rights that are “carried” in the controllable electronic record free and  
37 clear.

38  
39 *Subsection (f) defeats that argument.* It limits the application of the take-free rule in  
40 subsection (e) to controllable electronic records and, through the application of subsection (a),  
41 controllable accounts and controllable payment intangibles; [evidenced by a controllable](#)  
42 [electronic record](#). Under subsection (f), except as provided in subsections (a) and (e), a  
43 qualifying purchaser takes rights to payment (other than controllable accounts and controllable  
44 payment intangibles), rights to performance, and interests in property that are evidenced by a  
45 controllable electronic record subject to third-party property claims, unless law other than Article  
46 12 provides to the contrary. The reference in subsection (f) to “law other than this article”

contemplates that another article of the UCC might provide a contrary rule for some types of property that might be tethered to a controllable electronic record.

10. **Creating the functional equivalent of a negotiable instrument.** Two defining characteristics of an Article 3 negotiable instrument are that a holder in due course (i) takes free of claims of a property or possessory right to the instrument (Section 3-306) and (ii) takes free of most defenses and claims in recoupment (Section 3-305). Article 3 applies only to written instruments. ~~This draft provides~~ Article 12 and the revisions to Article 9 provide a method for reaching a similar result with respect to controllable accounts and controllable payment intangibles.

As regards the first characteristic, a qualifying purchaser could acquire the controllable account or controllable payment intangible free of any claim of a property interest. As regards the second characteristic, the definition of “qualifying purchaser” omits some of the conditions for becoming a holder in due course. For example, to qualify as a holder in due course, a holder must take “without notice that any party has a defense or claim in recoupment . . . .” Section 3-302(a)(2)(vi). A controllable electronic record is information; there are no parties to a controllable electronic record. However, there are parties to a controllable account or controllable payment intangible. Accordingly, Sections 9-404 and 9-403 would determine whether a purchaser of the controllable account or controllable payment intangible takes free of a defense. Section 9-403 ordinarily would give effect to the account debtor’s agreement not to assert claims or defenses.

Section 9-403 adopts the meaning of value in Section 3-303, as does Article 12. The concept of value in Section 3-303 is narrower than the concept in Section 1-204, which applies generally to UCC transactions. Under Section 1-204, a person gives value for rights if the person acquires them in return for a promise. However, under Section 3-303, if a negotiable instrument is issued or transferred for a promise of performance, the instrument is transferred for value only to the extent that the promise has been performed.

#### **Section 12-105. Control of Controllable Electronic Record.**

(a) **[General rule: control of controllable electronic record.]** A person has control of a controllable electronic record if the electronic record, a record attached to or logically associated with the electronic record, or a system in which the electronic record is recorded:

(1) gives the person:

(A) the power to avail itself of substantially all the benefit from the electronic record; and

(B) exclusive power, subject to subsection (b), to:



1 (i) prevent others from availing themselves of substantially all the  
2 benefit from the electronic record; and

3 (ii) transfer control of the electronic record to another person or  
4 cause another person to obtain control of another controllable electronic record as a result of the  
5 transfer of the electronic record; and

6 (2) enables the person readily to identify itself in any way, including by name,  
7 identifying number, cryptographic key, office, or account number, as having the powers  
8 specified in paragraph (1).

9 (b) **[Meaning of exclusive.]** ~~A~~Subject to subsection (c), a power is exclusive under  
10 subsection (a)(1)(B)(i) and (ii), even if:

11 (1) the controllable electronic record, a record attached to or logically associated  
12 with the electronic record, or a system in which the electronic record is recorded limits the use of  
13 the electronic record or has a protocol programmed to cause a change, including a transfer or loss  
14 of control or a modification of benefits afforded by the electronic record; or

15 (2) the power is shared with another person.

16 (c) ~~A person does not share a~~ [When power is not shared with another person.] A  
17 power of a person is not shared with another person under subsection (b)(2) and the person's  
18 power is not exclusive if:

19 (i) the person can exercise a power only if the power also is exercised by the  
20 other person; and

21 (ii) the other person either:

22 (A) can exercise the power without exercise of the power by the person; or

23 (B) is the transferor to the person of an interest in the controllable



1 electronic record or a controllable account or controllable payment intangible evidenced by the  
2 controllable electronic record.

3 (d) **[Presumption of exclusivity of certain powers.]** If a person has the powers that are  
4 specified in subsection (a)(1)(B)(i) and (ii), the powers are presumed to be exclusive.

5 (e) **[Control through another person.]** A person has control of a controllable electronic  
6 record if another person, other than the transferor to the person of an interest in the controllable  
7 electronic record or a controllable account or controllable payment intangible evidenced by the  
8 controllable electronic record:

9 (1) has control of the electronic record and acknowledges that it has control on  
10 behalf of the person; or

11 (2) obtains control of the electronic record after having acknowledged that it will  
12 obtain control of the electronic record on behalf of the person.

13 (f) **[No requirement to acknowledge.]** A person that has control under this section is not  
14 required to acknowledge that it has control on behalf of another person.

15 (g) **[No duties or confirmation.]** If a person acknowledges that it has or will obtain  
16 control on behalf of another person, unless the person otherwise agrees or law other than this  
17 article otherwise provides, the person does not owe any duty to the other person and is not  
18 required to confirm the acknowledgment to any other person.

## 19 Official Comment

20  
21 1. **Why “control” matters.** Control serves two major functions in Article 12. An  
22 electronic record is a “controllable electronic record” and is subject to the provisions of this  
23 ~~article~~Article only if it can be subjected to control under this section. See Section 12-102(a)(1)  
24 (defining “controllable electronic record”). And only a person having control of a controllable  
25 electronic record is eligible to become a qualifying purchaser and so to take free of claims of a  
26 property interest in the controllable electronic record, or any controllable account or controllable  
27 payment intangible evidenced by the controllable electronic record, and to ~~receive protection~~  
28 ~~from~~be protected by the “no-action” rule. See Section 12-104(e) and (g).

1  
2 ~~—In addition,~~ Article 9 provides that obtaining control of a controllable electronic record  
3 is one method by which to perfect a security interest in the controllable electronic record or in  
4 any controllable account or controllable payment intangible evidenced by the controllable  
5 electronic record. ~~Under these amendments, perfection of a security interest in controllable~~  
6 ~~accounts and controllable payment intangibles can be achieved by obtaining control of the~~  
7 ~~related controllable electronic record.~~ See Sections 9-107A; 9-314. Moreover, a security interest  
8 perfected by control has priority over a conflicting security interest that was perfected by a  
9 method other than control. ~~Section~~ and “control . . . pursuant to the debtor’s agreement” may  
10 substitute for an authenticated a signed security agreement as an element of attachment. See  
11 Sections 9-326A-; 9-203(b)(3)(D).

12  
13 2. **Powers and sources of powers; inability to exercise a power.** This section  
14 conditions control on a person’s having the three powers specified in subsection (a)(1). A person  
15 would have the powers described in that subsection if the controllable electronic record, a record  
16 attached to or logically associated with the controllable electronic record, or any system in which  
17 it is recorded gives the purchaser those powers. This description of the source of the relevant  
18 powers should be construed broadly and functionally. For example, a person would have a power  
19 even if the characteristics of the particular purchaser disable the person from exercising the  
20 power. This would be the case, for example, when the purchaser holds the private key required to  
21 access the benefit of the controllable electronic record but lacks the hardware required to use it.  
22 In addition, a system in which the person in control is identified is a permissible source of a  
23 power even if it is related to but not precisely the “same” system in which the controllable  
24 electronic record is recorded. Moreover, this broad and functional construction is particularly  
25 important for references to “a record attached to or logically associated with the electronic  
26 record, or a system in which the electronic record is recorded,” as used in Section 12-105(a) and  
27 (b) (and elsewhere). For example, overly literal or technical interpretations of the terminology  
28 “attached to” or “logically associated” are inappropriate. The statutory language must be adapted  
29 and applied in a functional manner to technology, systems, and infrastructure that may be  
30 developed and employed in the future. The goal is to embrace records and systems that are  
31 connected to a particular electronic record in such a manner that the information contained in or  
32 the functions performed by those “attached” or “associated” records are appropriately and  
33 reasonably attributable to and identifiable as connected with the electronic record itself. See also  
34 Sections 7-106, 9-105, 9-105A, 9-306A, 9-605, 9-628, and 12-107.

35  
36 3. **“Benefit.”** Subsection (a)(1)(A) and (a)(1)(B)(i) condition control of a  
37 controllable electronic record on a person’s relationship to the benefit of the controllable  
38 electronic record.

39  
40 As used in this section, the “benefit” of a controllable electronic record refers to the rights  
41 that are afforded by the controllable electronic record and the uses to which the controllable  
42 electronic record can be put. These, in turn, depend on the characteristics of the controllable  
43 electronic record in question. For example, the benefit afforded by control of a bitcoin is that it  
44 can be held or disposed of (sold or spent). And control of a controllable electronic record  
45 evidencing a controllable account or controllable payment intangible affords the benefit of the  
46 right to collect from the account debtor (obligor).

1  
2 The system in which a controllable electronic record is recorded may limit the benefit  
3 from the controllable electronic record that is available to those who interact with the system. In  
4 determining whether a person has the power to avail itself of substantially all the benefit from a  
5 controllable electronic record under subsection (a)(1)(A), or to prevent others from availing  
6 themselves of substantially all the benefit from a controllable electronic record under subsection  
7 (a)(1)(B)(i), only the benefit that the system makes available should be considered and  
8 limitations inherent in the system should be ignored.  
9

10 4. **Power to retrieve information.** By definition, the information constituting an  
11 electronic record must be “retrievable in perceivable form.” Section 1-201(b)(31) (defining  
12 “record”). The power to retrieve the record in perceivable form is included in the benefit of a  
13 controllable electronic record. “Perceivable form” means that the contents of the record are  
14 intelligible; the ability to perceive the indecipherable jumble of an encrypted record does not  
15 give a person the power to retrieve the record in perceivable form.  
16

17 To have control of a controllable electronic record under subsection (a)(1)(A), a person  
18 must have at least the nonexclusive power to avail itself of this benefit. If a person also has the  
19 exclusive power to decrypt the encrypted record, the person will have the exclusive power to  
20 prevent others from availing themselves of substantially all the benefit from the controllable  
21 electronic record and thereby will satisfy the condition in subsection (a)(1)(B)(i).  
22

23 5. **Exclusive powers.** Unlike the power in subsection (a)(1)(A), the powers in  
24 subsection (a)(1)(B)(i) and (a)(1)(B)(ii) must be held exclusively by the person claiming control  
25 in order to establish control. However, once it is established that a person has received those  
26 powers, subsection (d) provides a presumption of exclusivity. Consequently, a person asserting  
27 control need not prove exclusivity in order to make out a *prima facie* case. Application of the  
28 presumption will be governed also by Section 1-206 (effects of a presumption under the UCC)  
29 and applicable non-UCC law (including rules of procedure and evidence). In addition, subsection  
30 (b) contains two qualifications of the term “exclusive” as used in subsection (a)(1)(B). A power  
31 can be “exclusive” under subsection (a)(1)(B) even if one or both of these qualifications apply.  
32

33 Subsection (b)(1) takes account of the fact that the powers of a purchaser of a  
34 controllable electronic record necessarily are subject to the attributes of the controllable  
35 electronic record, records associated with the controllable electronic record, and the protocols of  
36 any system in which the controllable electronic record is recorded. For example, a transfer of  
37 control resulting from a program that is a part of a system’s protocol is inherent in the  
38 controllable electronic record and does not impair the exclusivity of the power of the person in  
39 control of the record. Subsection (b)(1) also contemplates that the potential for the system to  
40 otherwise modify (or even destroy) controllable electronic records would not impair the  
41 exclusivity.  
42

43 **Example 1.** Pursuant to the governance apparatus of a system (Propofolium) for a  
44 cryptocurrency (propofol), an upgrade to the system was made that modified the  
45 consensus mechanism for determining the effectiveness of transfers of propofols within  
46 the system. Although this change did not divest any holder of propofols of its control, it

prospectively modified the system for all propofols. The adoption of this change and the potential for such a change (or any other change) are functions of the attributes of the system and, consequently, of all propofols. Neither this change nor such potential impaired the exclusivity, for purposes of subsection (a)(1)(B), of the powers of a person in control of propofols.

Subsection (b)(2) allows for a power to be shared with another person without impairing the exclusivity of the power. One effect of subsection (b)(2) is that, under a multi-signature (multi-sig) agreement, any person that is readily identifiable under subsection (a)(2) and shares the relevant power would be eligible to have control, even if the action of another person is a condition for the exercise of the power. For example, a person in control may agree that another person's action on the relevant system would be required to effect a transfer of control without impairing the requisite exclusivity.

**Example 2.** Pursuant to a multi-sig arrangement, control of propofols (in the system described in Example 1) is shared by Campbell, Elizabeth, Mia, and Natasha. Under the multi-sig arrangement, the exercise of powers over the propofols requires action by three of the four persons having control. None of the participants acting alone has the power to exercise the relevant powers. Subsection (b)(2) makes clear that all four participants have control over the propofols and exclusivity is not impaired by the shared control under the multi-sig arrangement.

Although all four persons in Example 2 have control, that may leave many questions as to the rights of the four as among themselves. For example, if more than one of the four were secured parties, it would be important for them to settle by agreement issues such as relative priorities and enforcement rights. Similar situations can arise in other contexts and with respect to other types of collateral.

A multi-sig arrangement for a controllable electronic record, such as that described in Example 2, may provide enhanced security. For example, if the power of one participant is compromised by a "hacker," the required actions by the other participants would prevent the hacker from exercising unauthorized power over the record. Although the hacker might possess the power along with the remaining multi-sig participants, those participants would continue to have control. A multi-sig structure also may protect against the misuse of a record by ensuring that actions by multiple persons are required for exercising power over the record.

Subsection (c) provides that in certain circumstances a power is not shared within the meaning of subsection (b)(2) ~~and, consequently,~~ the relaxation of the exclusivity requirement provided by subsection (b)(2) does not apply. and, consequently, a person's power is not exclusive. Subsection (c) provides that a person does not share an exclusive power with another person if the person can exercise the power only with the other person's cooperation (subsection (c)(1)) but the other person either (i) can exercise ~~of the power unilaterally~~ without the person's cooperation (subsection (c)(~~2~~)(A)) or (ii) is the transferor to the person (transferee) of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record (subsection (c)(~~2~~)(B)). It follows that a ~~transferee in that situation~~ person to which subsection (c) applies does not have control ~~because~~

1 ~~it does not have the requisite~~based on its exclusive powers.~~The~~ (although it might have control  
2 through another person under subsection (e), discussed below, or if another person having  
3 control is acting as the person's agent).

4  
5 Comment 9, below, addresses the rationale for disqualifying a the transferee (which  
6 includes from a secured party in a secured transactiontransferor under subsection (c)(2)(B) from  
7 the benefit of shared control is premised on the transferor's retention of a blocking power over  
8 the transferee's exercise of the exclusive sharing a power. Such a transferee would not have  
9 divested the transferor of power over the asset sufficiently to warrant treatment as a secured  
10 party having a security interest perfected by control or as a qualifying purchaser, under  
11 subsection (b)(2).

12  
13 ~~fExamples of~~ The following examples illustrate the application of subsection (c):

14  
15 **Example 3.** Under a multi-sig arrangement, exercise by any two of Campbell, Elizabeth,  
16 and Mia is required to exercise a power with respect to a controllable electronic record  
17 (CER). None of the three can exercise a power without the cooperation of another, so all  
18 three have control because they share the power. Even if Campbell were the transferor of  
19 the CER to Elizabeth, Elizabeth's power is shared, and therefore treated as exclusive,  
20 because Campbell cannot block Elizabeth's exercise of the power if Mia acts with  
21 Elizabeth. It follows that subsection (c)(1) does not apply, subsection (b)(2) does apply,  
22 and Elizabeth shares the power with Campbell. (The same result would apply with  
23 respect to Mia's power if Campbell were the transferor of the CER to Mia.)

24  
25 **Example 4.** Under a multi-sig arrangement, exercise by both Campbell and Elizabeth are  
26 forthcoming.]required to exercise a power, so subsection (c)(1) applies with respect to  
27 each person. However, neither Campbell nor Elizabeth can exercise the power without  
28 cooperation of the other and neither is the transferor to the other, so subsection (c)(2)(A)  
29 and (2)(B) does not apply with respect to either person. It follows that Campbell and  
30 Elizabeth each share the power.

31  
32 **Example 5.** The facts are the same as in Example 4, but Campbell is the transferor of an  
33 interest in the CER to Elizabeth. Elizabeth does not share the power with Campbell and  
34 Elizabeth's power is not exclusive because subsection (c)(1) and (2)(B) applies.

35  
36 **Example 6.** Under a multi-sig arrangement, Mia or Natasha can exercise a power only  
37 with the exercise by Campbell, but Campbell can exercise the power unilaterally without  
38 the exercise by either Mia or Natasha. Neither Mia nor Natasha shares the power with  
39 Campbell because subsection (c)(1) and (2)(A) apply, so neither Mia's nor Natasha's  
40 power is treated as exclusive. Campbell's power is exclusive in fact and Campbell need  
41 not rely on subsection (b)(2) for shared power.

42  
43 **Example 7.** Under a multi-sig arrangement, Mia can exercise a power only with exercise  
44 by Elizabeth or Natasha, but Elizabeth and Natasha each can exercise the power  
45 unilaterally without the exercise by the other or by Mia. Elizabeth and Natasha share the

1 power, but Mia does not share the power with Elizabeth or Natasha. Mia’s power is not  
2 exclusive because subsection (c)(1) and (2)(A) applies.  
3

4 Although the presumption in subsection (d) is not expressly made subject to subsection  
5 (c), it is functionally so. Under Section 1-206, once evidence is introduced that subsection (c)  
6 applies and that, accordingly, a person relying on the presumption cannot rely on the relaxation  
7 of the exclusivity requirement provided by subsection (b)(2), the presumption would no longer  
8 apply.  
9

10 6. **Transfer of control.** The power to transfer control of a controllable electronic  
11 record under subsection (a)(1)(B)(ii) includes the power to cause another person to obtain control  
12 of another derivative and resulting controllable electronic record that results from the transfer of  
13 the controllable electronic record. See Section 12-104, Comment 4.  
14

15 7. **Readily identify.** Subsection (a)(2) provides that a person does not have control  
16 of a controllable electronic record unless the controllable electronic record, a record attached to  
17 or logically associated with the controllable electronic record, or any system in which the  
18 controllable electronic record is recorded enables the person readily to identify itself as the  
19 person having the requisite powers. This subsection does not obligate a person to identify itself  
20 as having control. However, to prove that it has control, a person would need to prove that the  
21 relevant records or any system in which the controllable electronic record is recorded readily  
22 identifies the person as such. Consistent with the subsection (d) presumption of exclusivity,  
23 proof that a person has the powers specified in section (a)(1) does not require proof of  
24 exclusivity—i.e., proof of a negative (that no one else has such powers). The means of  
25 identification mentioned in subsection (a)(2) derive from Section 3-110(c). Subsection (a)(2)  
26 adds “cryptographic key” as an example of a way in which a person may be identified.  
27

28 8. **Control through another person.** Neither Article 12 nor any other provision of  
29 the UCC (or other law that has been brought to the attention of the Drafting Committee) would  
30 restrict or render ineffective any agreement of a person in control of a controllable electronic  
31 record to hold control on behalf of another person. This result is implicit from subsection (b)(2)  
32 dealing with sharing of control. It also would follow under principles of agency. But such an  
33 arrangement should be effective regardless of any agency or fiduciary relationship.  
34

35 This concept is expressly addressed in Section 8-106(d)(3), on control of a security  
36 entitlement, which achieves perfection of a security interest under Sections 9-106(a) and 9-  
37 314(a). It also applies to perfection by possession under Section 9-313(c) if a person other than  
38 the debtor or the secured party (or the secured party’s agent) is in possession of collateral. Under  
39 those provisions, however, effectiveness is conditioned in some circumstances on an  
40 “acknowledgment” by the person in control or possession. Under Section 9-313(c) the  
41 acknowledgment must be in a signed record. These provisions appear to derive from practices  
42 involving bailees of tangible property, such as goods, chattel paper, and certificated securities.  
43 See Section 9-313, Comment 4.  
44

45 Subsection (e) likewise provides for control by a person through another person’s  
46 acknowledgement that is has control on behalf of the person. Subsection (e) is patterned on



1 Section 9-313(c), but like Section 8-~~103~~106(d)(3), subsection (e) omits the requirement in  
2 Section 9-313(c) that an acknowledgment be made in a signed record. Although best practices  
3 would suggest the wisdom of relying on a signed record to evidence such an acknowledgment,  
4 subsection (e) would permit proof by other means. Under subsection (e) for an acknowledgement  
5 by another person to be effective to confer control on a person, the other person making the  
6 acknowledgment must be one “other than the transferor of an interest in the electronic record” to  
7 the person. The rationale for this limitation is discussed in Comment 9, below.

8  
9 ~~Subsection (e) qualifies this method of obtaining control by providing that the~~  
10 ~~acknowledging person must be one “other than the transferor of an interest in the electronic~~  
11 ~~record.”~~

12 The combined operation of subsections (b)(2) and (e) ensure that the continuance of  
13 various existing practices would not prevent or cause the loss of control. For example, a person  
14 in control may wish to grant another person the power to approve or disapprove a transfer of  
15 control on the system. Alternatively, a person in control may wish to permit a system  
16 administrator or the system itself to transfer control to another person under specified conditions  
17 without participation by the person in control. And, of course, a person in control may wish to  
18 delegate the power to transfer control to an agent or fiduciary.

19  
20 Provisions substantially similar to subsection (e) are included in Section 7-106 (control of  
21 electronic documents of title), Section 8-106(d)(3) (control of security entitlement), 9-104  
22 (control of deposit accounts), 9-105 (control of authoritative electronic copies of records  
23 evidencing chattel paper), and 9-105A (control of electronic money).

24  
25 **9. Shared powers under subsection (b)(2) and control through another person**  
26 **under subsection (e): Limitations related to transferors and transferees of interests in**  
27 **controllable electronic records.** Subsection (c)(2)(B) disqualifies a transferee (which includes a  
28 secured party in a secured transaction) of an interest in a controllable electronic record (or  
29 controllable account or controllable payment intangible) from the benefit of a shared power  
30 under subsection (b)(2) when the transferor retains a blocking power. In similar fashion, under  
31 subsection (e), an acknowledgment by a transferor of an interest in a controllable electronic  
32 record (or controllable account or controllable payment intangible) that the transferor has control  
33 for the benefit of a person is ineffective to confer control on the person. Each of these limitations  
34 is premised on the view that the transferor has not been divested sufficiently of its powers over  
35 the relevant controllable electronic record so as to warrant treating the transferee as a secured  
36 party having a security interest perfected by control or as having the requisite control to be a  
37 qualifying purchaser.

38  
39 In the case of subsection (c)(2)(B), the transferor has retained a blocking power over the  
40 transferee’s exercise of a power. In the case of subsection (e), the transferor remains in control  
41 and has merely acknowledged that its control is for the transferee’s benefit. Although the concept  
42 of shared control is newly introduced in the UCC, holding possession or control for another is  
43 not. Section 9-313(c) expressly provides in this context that an acknowledging person having  
44 possession of goods must be a person “other than the debtor.” for a secured party to take  
45 possession through the acknowledging person. The official comments to Section 8-106 are to the  
46 same effect in the context of control of a security entitlement. Section 8-106(d)(3), Comment 4.

1 The same policy that underpins the inapplicability of this method of control to an  
2 acknowledgment by a debtor applies as well to a transferor that is not an Article 9 debtor.  
3 Control is intended to be a proxy for and a functional equivalent of the transfer of physical  
4 possession of goods. In general, a person can obtain control through control by an agent, ~~as noted~~  
5 ~~above. However, but under subsection (e)~~ an acknowledgment by a debtor or transferor that ~~acts~~  
6 ~~as an agent~~ acknowledges control on behalf of a secured party or other transferee would be  
7 ineffective. This corresponds to the policy underlying Section 9-313 that “the debtor cannot  
8 qualify as an agent for the secured party for purposes of the secured party’s taking possession.”  
9 Section 9-313, Comment 3.

10  
11 ~~———— The combined operation of subsections (b)(2) and (c) ensure that the continuance of~~  
12 ~~various existing practices would not prevent or cause the loss of control. For example, a person~~  
13 ~~in control may wish to grant another person the power to approve or disapprove a transfer of~~  
14 ~~control on the system. Alternatively, a person in control may wish to permit a system~~  
15 ~~administrator to transfer control to another person under specified conditions without~~  
16 ~~participation by the person in control. And, of course, a person in control may wish to delegate~~  
17 ~~the power to transfer control to an agent or fiduciary.~~

18  
19 ~~———— Provisions substantially similar to subsection (e) are proposed to be included in Section~~  
20 ~~7-106 (control of electronic documents of title), 9-104 (control of deposit accounts), 9-105~~  
21 ~~(control of authoritative electronic copies of records evidencing chattel paper), and 9-105A~~  
22 ~~(control of electronic money) and in a proposed conforming modification to Section 8-106(d)(3)~~  
23 ~~(control of security entitlement).~~

24  
25 ~~———— 9~~

26 Notwithstanding these limitations, they would not impair the continued perfection by  
27 control upon a secured party’s assignment of a perfected-by-control security interest in a  
28 controllable electronic record to a successor secured party. The following example illustrates.

29  
30 **Example 8.** Debtor (D) buys a CER and obtains control. D then grants a security interest  
31 in the CER to Secured Party A (SPA) to secure D’s obligation to SPA and transfers to  
32 SPA control of the CER (*not* pursuant to shared control with D or pursuant to subsection  
33 (e)). SPA then assigns to Secured Party B (SPB) the secured obligation owed by D to  
34 SPA.

35  
36 As to perfection of the security interest granted by D, perfection by control is not  
37 affected even if SPA retains powers over the CER (as between SPA and SPB) following  
38 the assignment to SPB. The security interest remains perfected. This is consistent with  
39 the policy underlying 9-310(c)—an assignment of a security interest should not require  
40 the assignee to refile or take an assignment of record of a filed financing statement in  
41 favor of the assignor for protection against a debtor’s creditors and transferees.

42  
43 The economic interest being assigned by SPA to SPB is primarily the *right to payment or*  
44 *performance* of the obligation of D that is secured by the CER. If the transfer of the secured  
45 obligation by SPA to SPB itself creates a security interest securing an obligation (e.g., owed by  
46 SPA to SPB), then SPB should perfect the security interest granted by SPA (which is distinct



1 from the security interest in the CER granted by D and assigned by SPA to SPB). The method of  
2 perfection will depend on the nature of the secured obligation—the type of collateral—being  
3 assigned. Is the right to payment an instrument, an account, or a payment intangible? Or is  
4 performance of the secured obligation pursuant to another type of general intangible? SPB  
5 should file a financing statement against SPA, as debtor, or take possession of the instrument, if  
6 applicable. However, as to the underlying collateral securing the assigned obligation—the  
7 CER—attachment and perfection of SPB’s security interest in the obligation of D owed to SPA  
8 would also constitute attachment and perfection as to the security interest in the CER securing  
9 that obligation. Sections 9-203(g); 9-308(e); see also 1 Restatement (Second) of Contracts § 340,  
10 Comment b (“b. Security follows the debt. Where a secured claim is assigned, the collateral is  
11 ordinarily assigned as well.”).

12  
13 If the transfer by SPA to SPB is an outright transfer (a sale) of an account, a payment  
14 intangible, or a promissory note, the transfer creates a security interest and the analysis in the  
15 preceding paragraph applies (except that the security interest arising from the sale of a payment  
16 intangible or promissory note is automatically perfected under Section 9-309(a)(3) and (4)). If  
17 the transfer is a sale of is another type of general intangible or instrument that is secured by the  
18 CER, then non-Article 9 law applies to the transfer. However, the same result may occur under  
19 the common-law rule that the collateral (the CER) follows a secured obligation that is  
20 transferred. See Sections 9-203, Comment 9; 9-308, Comment 6.

21  
22 For obvious business reasons, SPB may not wish to allow SPA to remain in control of the  
23 CER and may require SPA to transfer control to it as a condition to the transaction.  
24 Alternatively, SPB may obtain control through sharing powers with SPA or through SPA’s  
25 acknowledgement pursuant to subsection (e). It is true that SPA’s assignment to SPB of D’s  
26 secured obligation carried with it the collateral—the CER—securing the obligation. But such a  
27 derivative acquisition (through the operation of Sections 9-203(g) and 9-308(e)) by SPB would  
28 not be a transfer by SPA of “an interest in” the CER within the meaning of the limitations  
29 imposed in subsections (c)(2)(B) or (e). The operation of these rules, providing that collateral  
30 follows the transfer of a secured obligation, are based on the premise that any necessary public  
31 notice provided in connection with the assignment of the obligation provides, in turn, sufficient  
32 public notice with respect to the underlying collateral. It follows that the policy to be  
33 implemented by subsections (c)(2)(B) and (e) is not implicated by such an assignment.

34  
35 **10. No requirement to acknowledge, no duties, and no requirement to confirm**  
36 **acknowledgment.** Subsections (f) and (g) derive from Section 9-313(f) and (g). Subsection (f)  
37 makes clear that a person that has control under this section has no duty to acknowledge that it  
38 has or will obtain control on behalf of another person. Arrangements for a person to  
39 acknowledge that it has or will obtain control on behalf of another person are not standardized.  
40 Accordingly, subsection (g) leaves to the agreement of the parties and to any other applicable  
41 law any duties of a person that does acknowledge that it has or will obtain control on behalf of  
42 another person and provides that a person making an acknowledgment is not required to confirm  
43 the acknowledgment to another person.

44  
45 For example, subsection (e) would apply to give control to a person, Alpha, when another  
46 person, Beta, has control of a controllable electronic record and acknowledges that it has control

1 on behalf of Alpha. However, under subsection (f), Beta is not required to so acknowledge. And  
2 under subsection (g), even if Beta does so acknowledge, Beta owes no duty to Alpha unless Beta  
3 agrees or other law so provides, and Beta is not required to confirm its acknowledgment to any  
4 other person.

5  
6 **Section 12-106. Discharge of Account Debtor on Controllable Account or**  
7 **Controllable Payment Intangible.**

8 (a) **[Discharge of account debtor.]** An account debtor on a controllable account or  
9 controllable payment intangible may discharge its obligation by paying:

10 (1) the person having control of the controllable electronic record that evidences  
11 the controllable account or controllable payment intangible; or

12 (2) except as provided in subsection (b), a person that formerly had control of the  
13 controllable electronic record.

14 (b) **[Content and effect of notification.]** Subject to subsection (d), an account debtor  
15 may not discharge its obligation by paying a person that formerly had control of the controllable  
16 electronic record if the account debtor receives a notification that:

17 (1) is signed by a person that formerly had control or the person to which control  
18 was transferred;

19 (2) reasonably identifies the controllable account or controllable payment  
20 intangible;

21 (3) notifies the account debtor that control of the controllable electronic record  
22 that evidences the controllable account or controllable payment intangible was transferred;

23 (4) identifies the transferee, in any reasonable way, including by name,  
24 identifying number, cryptographic key, office, or account number; and

25 (5) provides a commercially reasonable method by which the account debtor is to  
26 pay the transferee.

1           (c) **[Discharge following effective notification.]** After receipt of a notification that  
2     complies with subsection (b), the account debtor may discharge its obligation by paying in  
3     accordance with the notification and may not discharge the obligation by paying a person that  
4     formerly had control.

5           (d) **[When notification ineffective.]** Subject to subsection (h), notification is ineffective  
6     under subsection (b):

7                 (1) unless, before the notification is sent, an account debtor and the person that, at  
8     that time, had control of the controllable electronic record that evidences the controllable account  
9     or controllable payment intangible agree in a signed record to a commercially reasonable method  
10    by which a person may furnish reasonable proof that control has been transferred;

11                (2) to the extent an agreement between an account debtor and seller of a payment  
12    intangible limits the account debtor's duty to pay a person other than the seller and the limitation  
13    is effective under law other than this article; or

14                (3) at the option of an account debtor, if the notification notifies the account  
15    debtor to:

16                         (A) divide a payment;

17                         (B) make less than the full amount of an installment or other periodic  
18    payment; or

19                         (C) pay any part of a payment by more than one method or to more than  
20    one person.

21           (e) **[Proof of transfer of control.]** Subject to subsection (h), if requested by the account  
22    debtor, the person giving the notification under subsection (b) seasonably shall furnish  
23    reasonable proof, using the agreed method, that control of the controllable electronic record has

1 been transferred. Unless the person complies with the request, the account debtor may discharge  
2 its obligation by paying a person that formerly had control, even if the account debtor has  
3 received a notification under subsection (b).

4 (f) **[What constitutes reasonable proof.]** A person furnishes reasonable proof that  
5 control has been transferred if the person demonstrates, using the agreed method, that the  
6 transferee has the power to:

7 (1) avail itself of substantially all the benefit from the controllable electronic  
8 record;

9 (2) prevent others from availing themselves of substantially all the benefit from  
10 the controllable electronic record; and

11 (3) transfer the powers under in paragraphs (1) and (2) to another person.

12 (g) **[Rights not waivable.]** Subject to subsection (h), an account debtor may not waive or  
13 vary its rights under subsections (d)(1) and (e) or its option under subsection (d)(3).

14 (h) **[Rule for individual under other law.]** This section is subject to law other than this  
15 article which establishes a different rule for an account debtor who is an individual and who  
16 incurred the obligation primarily for personal, family, or household purposes.

#### 17 **Official Comment**

18 1. **Source.** These provisions derive from Section 3-602, which governs the discharge  
19 of a person obligated on a negotiable instrument, and Section 9-406, ~~(a) – (c)~~, which governs the  
20 discharge of an account debtor, including a person obligated on an account or payment  
21 intangible.

22  
23 2. **The basic rules.** This section applies only to an account debtor that has  
24 undertaken to pay the person that has control of the controllable electronic record that evidences  
25 the obligation to pay. See Section 9-102 (defining “controllable account” and “controllable  
26 payment intangible”). Section 9-406 would continue to apply in other respects and to all other  
27 account debtors. As to the relationship between this section and Section 9-406, see Comment 5.

28  
29 Under subsection (a)(1), an account debtor may discharge its obligation on the

1 controllable account or controllable payment intangible by paying the person that has control of  
2 the related controllable electronic record at the time of payment. Subsections (a)(2) and (b)  
3 would remove from an account debtor the burden of determining who has control of the related  
4 controllable electronic record at any given time—a burden that, with respect to some controllable  
5 electronic records, an account debtor may be unable to satisfy. Under subsection (a)(2), subject  
6 to subsection (b), an account debtor may discharge its obligation by paying a person that  
7 formerly had control of the related controllable electronic record, which presumably would  
8 include the initial obligee.

9  
10 Subsection (b) reflects the fact that a person to which control has been transferred may  
11 not wish to take the risk that the account debtor will discharge its obligation by paying the  
12 transferor. Subsection (b) would protect the transferee by providing that if the account debtor  
13 receives an effective notification that control has been transferred, the account debtor may  
14 discharge its obligation by paying in accordance with the notification and may not discharge its  
15 obligation by paying a person that formerly had control. The notification must be signed by a  
16 person formerly having control or by the transferee.

17  
18 To be effective under subsection (b), a notification must reasonably identify the  
19 controllable account or controllable payment intangible, notify the account debtor that control of  
20 the controllable electronic record that evidences the controllable account or controllable payment  
21 intangible was transferred, identify the transferee in any reasonable way, and provide a  
22 commercially reasonable method by which the account debtor is to make payments to the  
23 transferee. A change in the identity of the person to which the account debtor must make  
24 payment should not, and typically will not, impose a significant burden on the account debtor.  
25 However, one can imagine a method of making payment that would be burdensome, e.g., making  
26 a payment through a trading platform or payment service with which the account debtor does not  
27 have an account. For this reason, the designated method of making payment must be  
28 “commercially reasonable.”

29  
30 3. **“Reasonable proof.”** As noted above, this section derives in large part from  
31 Section 9-406, which provides for notification that an account or payment intangible has been  
32 assigned. Account debtors that have received notification of an assignment under Section 9-406  
33 almost always make payments in accordance with the notice. Recognizing that an account debtor  
34 may be uncertain whether a notification is legitimate, Section 9-406 affords to an account debtor  
35 the right to request proof that the account or payment intangible was assigned. [See generally,](#)  
36 [Section 9-406, Comment 4.](#)

37  
38 Subsection (e) contains a similar provision. On the account debtor’s request, the person  
39 giving the notification must seasonably furnish reasonable proof that control of the controllable  
40 electronic record has been transferred. If the person does not comply with the request, the  
41 account debtor may ignore the notification and discharge its obligation by paying a person  
42 formerly in control.

43  
44 “Reasonable proof” requires evidence that would be understood by a typical account  
45 debtor to whom it is proffered as demonstrating to a reasonably high probability that control of  
46 the controllable electronic record has been transferred to the transferee. Subsection (f) provides a

1 safe harbor for providing reasonable proof. It enables a person to satisfy the account debtor's  
2 request by demonstrating that the transferee has the power to avail itself of substantially all the  
3 benefit from the controllable electronic record, to prevent others from availing themselves of  
4 substantially all the benefit from the controllable electronic record, and to transfer these powers  
5 to another person. This demonstration would not necessarily prove that a person actually has  
6 control of a controllable electronic record because it need not show that the transferee held the  
7 last two powers exclusively. Nevertheless, such a demonstration would constitute "reasonable  
8 proof" under subsection (f). A person that has control should have little difficulty providing this  
9 proof, as a person cannot have control unless it can readily identify itself as having the requisite  
10 powers. See Section 12-105(a)(2).

11  
12 ~~Reasonable proof that is seasonably furnished by a person other than the person that~~  
13 ~~gave the notification would constitute compliance with the account debtor's request.~~

14  
15 Subsection (e) requires that reasonable proof be provided "using the agreed method."  
16 Subsection (f) requires that a person use "the agreed method" to demonstrate that the transferee  
17 has the specified powers. "Agreed method" refers to the commercially reasonable method to  
18 which the parties agreed, in a signed record, before the notification was sent. If parties did not so  
19 agree, the notification is ineffective under subsection (d)(1).

20  
21 An account debtor may agree to participate in a system providing for the control of  
22 controllable accounts or controllable payment intangibles. If the system is programmed to  
23 provide for notification to the account debtor upon the transfer of control, the account debtor's  
24 agreement and the operation of the system may satisfy the requirements of subsections (d)(1),  
25 (e), and (f).

26  
27 4. **Additional considerations for account debtors.** The requirement in subsection  
28 (e) that reasonable proof be furnished using the "agreed method" provides considerable  
29 protection for account debtors upon receipt of a notification of assignment and making a request  
30 for proof. There are, however, other considerations that are of importance to account debtors but  
31 are beyond the scope of the frameworks provided by Articles 9 and 12. One such consideration is  
32 the potential involvement of pseudonymous payees, which may raise issues such as compliance  
33 with anti-money laundering regulations and sanctions compliance. These are examples of issues  
34 that a well-structured program for controllable accounts and controllable payment intangibles  
35 might address.

36  
37 5. **Relationship to Section 9-406.** Section 9-406 governs the discharge of the  
38 obligation of an account debtor. Section 9-406 carves out of its scope transactions to the extent  
39 covered by this section. See Section 9-406:[\(1\)](#).

#### 40 41 **Section 12-107. Governing Law.**

42 (a) **[Governing law: general rule.]** Except as provided in subsection (b), the local law of  
43 a controllable electronic record's jurisdiction governs a matter covered by this article.

1           (b) **[Governing law: Section 12-106.]** For a controllable electronic record that evidences  
2 a controllable account or controllable payment intangible, the local law of the controllable  
3 electronic record's jurisdiction governs a matter covered by Section 12-106 unless an effective  
4 agreement determines that the local law of another jurisdiction governs.

5           (c) **[Controllable electronic record's jurisdiction.]** The following rules determine a  
6 controllable electronic record's jurisdiction under this section:

7                   (1) If the controllable electronic record, or a record attached to or logically  
8 associated with the controllable electronic record and readily available for review, expressly  
9 provides that a particular jurisdiction is the controllable electronic record's jurisdiction for  
10 purposes of this article or [the Uniform Commercial Code], that jurisdiction is the controllable  
11 electronic record's jurisdiction.

12                   (2) If paragraph (1) does not apply and the rules of the system in which the  
13 controllable electronic record is recorded are readily available for review and expressly provide  
14 that a particular jurisdiction is the controllable electronic record's jurisdiction for purposes of  
15 this article or [the Uniform Commercial Code], that jurisdiction is the controllable electronic  
16 record's jurisdiction.

17                   (3) If paragraphs (1) and (2) do not apply and the controllable electronic record,  
18 or a record attached to or logically associated with the controllable electronic record and readily  
19 available for review, expressly provides that the controllable electronic record is governed by the  
20 law of a particular jurisdiction, that jurisdiction is the controllable electronic record's  
21 jurisdiction.

22                   (4) If paragraphs (1) through (3) do not apply and the rules of the system in which  
23 the controllable electronic record is recorded are readily available for review and expressly

1 provide that the controllable electronic record or the system is governed by the law of a  
2 particular jurisdiction, that jurisdiction is the controllable electronic record’s jurisdiction.

3 (5) If paragraphs (1) through (4) do not apply, the controllable electronic record’s  
4 jurisdiction is the District of Columbia.

5 (d) **[Applicability of Article 12.]** If subsection (c)(5) applies and Article 12 is not in  
6 effect in the District of Columbia without material modification, the governing law for a matter  
7 covered by this article is the law of the District of Columbia as though Article 12 were in effect  
8 in the District of Columbia without material modification. In this subsection, “Article 12” means  
9 [Uniform Commercial Code—Controllable Electronic Records (with Conforming Amendments  
10 to Articles 1 and 9), 2022 Official Text], which is available at [indicate where and how the  
11 official text may be found].

12 (e) **[Relation of transaction to controllable electronic record’s jurisdiction not**  
13 **necessary.]** To the extent subsections (a) and (b) provide that the local law of the controllable  
14 electronic record’s jurisdiction governs matters covered by this article, that law governs even if a  
15 matter or transaction does not bear any relation to the controllable electronic record’s  
16 jurisdiction.

17 (f) **[Rights of purchasers determined at time of purchase.]** The rights acquired by a  
18 purchaser or a qualifying purchaser under Section 12-104 are governed by the law applicable  
19 under this section at the time of purchase.

20 ***Legislative Note:*** The definition of “Article 12” in subsection (d) should cite the official “title”  
21 of the official text of Article 12 and should indicate where and how the official text is made  
22 available to the public. See, e.g., TRADES Regulations, 31 CFR 357.2, defining “Revised Article  
23 8.”

## 24 Official Comment

25 1. **Source.** The provisions of Section 12-107 (as well as Sections 9-306A and 9-  
26  
27



306B) derive from Sections 8-110 and 9-305 on law governing perfection and priority of security interests in investment property and the relevance of a securities intermediary's jurisdiction and a commodity intermediary's jurisdiction.

2. **The basic rule: -Law governing matters covered by Article 12.** Subsection (a) states the basic rule that the local law of the controllable electronic record's jurisdiction governs the matters covered by this ~~article~~Article. The "matters covered by" this ~~article~~Article are relatively narrow and discrete, albeit enormously important. If the choice-of-law rule provided by this section points to a jurisdiction that has adopted Article 12, those matters would include the interpretation and application of Article 12, including its definitions. In general, issues that would be determined by the provisions of this ~~article~~Article are to be determined under the law that is applicable as determined by this section. These would include the rights of purchasers and property claimants more generally with respect to controllable electronic records, controllable accounts, and controllable payment intangibles to the extent dealt with by this ~~article~~Article—issues addressed by section 12-104. The rights and obligations of account debtors, to the extent dealt with by section 12-106, also would be matters covered. Matters not covered by this ~~article~~Article, including matters as to which this ~~article~~Article expressly provides are covered by other law, are not within the scope of this section.

3. **Practical limitations on determination of governing law.** This section relating to the law governing the matters covered by this ~~article~~Article must confront substantial practical limitations. These limitations arise primarily from two factors. First, as described below, this section relies primarily on a "waterfall" of alternatives for determining a controllable electronic record's jurisdiction. The waterfall depends on express provisions of a controllable electronic record or the system in which it is recorded. Many electronic records and systems that currently exist do not contain these provisions. As explained in Comment 6, the expectation is that over time electronic records and related systems will adopt these provisions in reliance on this section, thereby creating certainty as to the governing law. Second, in the absence of these provisions, at the bottom of the waterfall the controllable electronic record's jurisdiction is the District of Columbia (DC). See Comment 6.

4. **Governing law for Section 12-106.** Subsection (b) provides an exception to the general rule of subsection (a) that "the local law of a controllable electronic record's jurisdiction governs the matters covered by this ~~article~~Article." The exception recognizes that an account debtor's rights and duties generally are governed by the law applicable to the underlying contract between the account debtor and an assignor, and not by the law applicable to the agreement between the assignor (debtor) and the assignee (secured party)—a security agreement. See Section 9-401, Comment 3. Subsection (b) recognizes that an effective agreement (i.e., one effective under Section 1-301(a)) between the account debtor and assignor may choose a different law to cover the matters covered by Section 12-106 (i.e., the account debtor's rights and duties addressed in that section).

5. **Determination of controllable electronic record's jurisdiction.** The basic rule that the law of a controllable electronic record's jurisdiction governs the matters covered by Article 12 might be viewed as a rough proxy for the traditional role of the location of tangible asset (e.g., goods) in determining the applicable law (*lex rei sitae*). Drawing on the analogous

provisions in Sections 8-110 and 9-305 in the context of a security entitlement or securities account or a commodity contract or commodity account, under subsection (c) it is the controllable electronic record itself, records attached thereto or associated therewith, or the system in which the controllable electronic record is recorded that determines the controllable electronic record's jurisdiction and, thereby, the governing law. Subsection (c) provides a "waterfall" of rules based on provisions that identify a particular jurisdiction as the controllable electronic record's jurisdiction or alternatively that provide the governing law for a controllable electronic record or the system in which the record is recorded. As to subsection (e), see Section 8-110, Comment 5A.

Paragraphs (1) through (4) of the subsection (c) waterfall each relies on information available from a controllable electronic record, an attached or logically associated record, or rules of a system in which the record is recorded. A controllable electronic record's jurisdiction is determined by one of these sources that "expressly provide[s]" that a jurisdiction is the controllable electronic record's jurisdiction or that a particular jurisdiction's law is the governing law. These paragraphs refer to attached or logically associated records or system rules that are "readily available." They also assume that the controllable electronic record is itself readily available to anyone choosing to deal with the record. These provisions are based on the assumption that the relevant express provision will be available to an interested person without the imposition of unreasonable burdens.

**6. Bottom of the waterfall: District of Columbia.** Currently, many controllable electronic records, associated records, and systems in which such records are recorded do not identify the "controllable electronic record's jurisdiction" or the governing law (some permitted systems being exceptions). (One hopes that once Article 12 and accompanying amendments are widely adopted, systems will adapt and the waterfall will become more generally viable for identifying a controllable electronic record's jurisdiction.) Consequently, subsection (c)(5) addresses a problem that does not normally exist in the context of Sections 8-110 and 9-305. The likely choice for the bottom of the waterfall ordinarily might be the location of the debtor. That approach would follow the role of the location of a debtor under Sections 9-301 and 9-307. However, that location may not readily be determined by parties to a transaction, primarily because in many cases involving controllable electronic records the transferor is not known to or easily discoverable by a purchaser. See Prefatory Note 1 to Article 12. Consequently, Subsection (c)(5) resolves this dilemma by providing that the controllable electronic record's jurisdiction is DC.

**7. District of Columbia as controllable electronic record's jurisdiction.** The designation of DC as the controllable electronic record's jurisdiction assumes that DC will have adopted Article 12 and the conforming amendments to Articles 1 and 9 in substantially the uniform version. This is a plausible assumption based on the history of adoptions in that jurisdiction. Subsection (d) addresses the unlikely situation that DC might not so adopt Article 12 or might later adopt materially non-uniform amendments. Subsection (d) is patterned loosely (but as closely as feasible) on the TRADES Regulations, 31 CFR § 357.11(d), for U.S. Treasury securities.

The term "Article 12" is defined in subsection (d) as the officially promulgated version of

1 Article 12 and conforming amendments. ~~The official comments will explain that in~~[In](#)  
2 determining whether DC has enacted Article 12 without material modification a tribunal should  
3 consider the materiality of any provision in the context of the issue or issues before it. A  
4 modification of a provision that would be material in another context should be disregarded if it  
5 would have no bearing on the issue or issues before the tribunal.  
6

7       8.       **Relevant time for determination of governing law.** Subsection (f) provides that  
8 the rights of purchasers are governed by the applicable law as of the time of purchase. Note that  
9 Sections 8-110 and 9-305 do not contain an analogous rule with respect to a securities  
10 intermediary's jurisdiction. However, Section 8-110(c) does provide a similar rule for the  
11 delivery of a security certificate and adverse claims. As to the timing of the determination of the  
12 governing law for other issues under Article 12, such as the rights and duties of account debtors  
13 under Section 12-106, the section does not specify a time. As with most statutory provisions  
14 relating to governing law, courts are free to determine the appropriate relevant time taking into  
15 account the relevant facts and the nature of the issues involved.

1 ANNEX A

2  
3 **TRANSITION PROVISIONS FOR 2022 AMENDMENTS**  
4 **TO UNIFORM COMMERCIAL CODE—EMERGING TECHNOLOGIES**

5 **Prefatory Note to Annex A—Transition Provisions**

6 Unlike previous UCC revisions, the Emerging Technologies amendments pose special  
7 challenges. The amendments add a new Article 12, covering new classes of property, and  
8 provide extensive revisions to Article 9. They also include amendments to every other UCC  
9 article (save Article 6). Consequently, earlier transition provisions do not provide an adequate  
10 template for addressing such a broad set of amendments. However, this annex draws  
11 substantially on Article 9, Part 7, the transition provisions applicable to the ~~1999 revisions~~ [1998](#)  
12 [Revisions](#) to Article 9. In particular, the substantial amendments to Article 9 and the new Article  
13 12 require special attention to post-effective date perfection and priority issues.

14  
15 A uniform law as complex as these Emerging Technologies amendments necessarily  
16 gives rise to difficult problems and uncertainties during the transition to the new law. As is  
17 customary for uniform laws, these amendments are based on the general assumption that all  
18 States will have enacted substantially identical versions. While always important, uniformity is  
19 particularly important to the success of these amendments, especially those to Article 9 and the  
20 new Article 12 and conforming amendments relating to each.

21  
22 Article 9, Part 7, provided that several material changes in the law would be given effect  
23 one year after a “uniform” effective date. (As it turned out, all but a few states enacted the  
24 ~~1999~~ [1998](#) amendments with the uniform effective date.). However, for practical reasons many  
25 states may wish to provide an effective date for this act that is consistent with their usual timing  
26 for effectiveness of legislation. Consequently, this annex does not provide for a uniform effective  
27 date but does provide for a uniform adjustment date on which several material provisions (in  
28 particular, new priority rules that would override pre-effective-date established priorities) would  
29 apply. However, if the uniform adjustment date is less than one year after the effective date for a  
30 state’s adoption of these amendments, then the state should adopt an adjustment date that is one  
31 year after the state’s effective date. In these official comments to this annex, references to the  
32 “adjustment date” mean the uniform adjustment date or such later date. The minimum of a one-  
33 year period between the effective date and the adjustment date is important. It is intended  
34 primarily to provide sufficient time for a person to achieve perfection or priority of a security  
35 interest following the effective date or for a person with an established priority in property to  
36 protect its priority before the priority may otherwise be lost on the adjustment date.

37  
38 The law, other than the Uniform Commercial Code, of a state adopting this act  
39 determines the time of day on the state’s effective date on which this act takes effect.

40  
41 ***Legislative Note:***

42  
43 ~~†~~ *A state should insert in each place where “[the effective date of this act]” appears in the text*  
44 *of this Annex, the actual date on which this act takes effect, as specified in Section 4-101.*

1 ~~2.~~ A state should insert in each place where “[the adjustment date]” appears in the text of the  
2 statute, either (i) “[January] [July] 1, 2025” or, (ii) if later, the date that is one year after the  
3 actual date on which this act takes effect.  
4

5 ~~3.~~ A state should codify Parts 1 through 3 of this annex as a part of the state’s [Uniform  
6 Commercial Code].  
7

8 ~~4.~~ A state (i) should insert in Part 4 (Section 4-101) of this Annex the actual date on which this  
9 act takes effect and (ii) should not codify Part 4.  
10

## 11 PART 1

### 12 GENERAL PROVISIONS AND DEFINITIONS

#### 13 Section A-101. Short Title.

14 This Annex may be cited as Uniform Commercial Code—Transition Provisions for 2022  
15 Amendments to Uniform Commercial Code—Emerging Technologies.

#### 16 Section A-102. Definitions.

17 (a) [Annex A Definitions.] In this annex:

18 (1) “Article 12” means Article 12 of [the Uniform Commercial Code].

19 (2) “Article 12 property” means a controllable account, a controllable electronic  
20 record, and a controllable payment intangible.

21 (b) [Definitions in other articles.] The following definitions in [the Uniform  
22 Commercial Code] apply to this annex.

23 “Controllable account”. Section 9-102

24 “Controllable electronic record”. Section 12-102

25 “Controllable payment intangible”. Section 9-102

26 “Electronic money”. Section 9-102.

27 “Financing statement”. Section 9-102.

28 (c) [Article 1 definitions and principles.] Article 1 contains general definitions and

principles of construction and interpretation applicable throughout this annex.

## Official Comment

**Subsection headings.** Subsection headings are not a part of the official text itself and have not been approved by the sponsors.

## PART 2

### GENERAL TRANSITION PROVISION

#### Section A-201. Saving Clause.

Except as provided in Part 3, a transaction validly entered into before [the effective date of this act] and the rights, duties, and interests flowing from the transaction remain valid thereafter and may be terminated, completed, consummated, or enforced as required or permitted by law other than [the Uniform Commercial Code] or, if applicable, [the Uniform Commercial Code], as though this act had not taken effect.

## Official Comment

1. **Source.** This Section is drawn from former Section 10-102(2) (now withdrawn).

2. **In general: Prospective application.** This section is a savings clause that provides in general for the prospective application of the amendments to the Uniform Commercial Code and the preservation of the validity of pre-effective-date transactions and the rights, duties, and interests flowing from those transactions. Part 3 provides [important](#) exceptions to this prospective application for Articles 9 and new Article 12.

3. **Prospective application: Examples.**

*“Conspicuous.”* Section 1-201(b)(10) provides a revised definition of “conspicuous” and [revised Comment 10 provides](#) extensive new ~~official comments~~ [commentary](#). The ~~new~~ [revised](#) definition applies to a record that becomes a part of the relevant transaction after the effective date.

*“Hybrid transaction” and “hybrid lease.”* Revisions to Sections 2-102 and 2A-102 address a sale of goods that is a part of a “hybrid transaction” and a lease of goods that is part of a “hybrid lease.” See Sections 2-106(5) (defining “hybrid transaction”) and 2A-103(1)(h.1) (defining “hybrid lease”). These revisions apply to transactions entered into after the effective date.

4. **Revisions reflecting continuation of pre-effective-date precedents.** Several

revisions are intended to clarify and reaffirm understandings of pre-effective-date interpretations of the Uniform Commercial Code and are intended to modify some pre-effective-date judicial interpretations. Examples include (i) the amendment to Section 3-104, which clarifies that neither a choice-of-law nor a choice-of-forum clause prevents a promise from being a negotiable instrument, (ii) the amendments to Section 4A-201, which indicate that a security procedure may impose an obligation on both the receiving bank and the customer and may involve the use of symbols, sounds, or biometrics, (iii) the clarifying revision of Section 5-116, (iv) the new definitions of “assignee” and “assignor” in Section 9-102(a)(7A) and (7B), and (v) clarification of the attachment of a security interest in consumer goods as proceeds or commingled goods and in a commercial tort claim as proceeds in Section 9-204(c). However, this transition rule will be important in situations in which the controlling pre-effective-date case law is not consistent with the amended provisions.

### PART 3

#### TRANSITION PROVISIONS FOR ARTICLES 9 AND 12

##### Section A-301. Saving Clause.

(a) **[Pre-effective-date transactions, liens, or interests.]** Except as provided in this part, Article 9 as amended by this act and Article 12 apply to a transaction, lien, or other interest in property, even if the transaction, lien, or interest was entered into, created, or acquired before **[the effective date of this act]**.

(b) **[Continuing validity]** Except as provided in subsection (c) and Sections A-302 through A-306:

(1) a transaction, lien, or interest in property that was not governed by [the Uniform Commercial Code], was validly entered into, created, or transferred before **[the effective date of this act]**, and would be subject to Article 9 as amended by this act or Article 12 if it had been entered into, created, or transferred after **[the effective date of this act]**, including the rights, duties, and interests flowing from the transaction, lien, or interest in property, remains valid after **[the effective date of this act]**; and

(2) the transaction, lien, or interest in property may be terminated, completed, consummated, and enforced as required or permitted by this act or by the law that would apply if

1 this act had not taken effect.

2 (c) **[Pre-effective-date proceedings.]** This act does not affect an action, case, or  
3 proceeding commenced before **[the effective date of this act]**.

#### 4 **Official Comment**

5  
6 1. **Source.** This section derives from Section 9-702.

7  
8 2. **Pre-effective-date transactions, liens, and interests.** Subsection (a) contains the  
9 general rule that Article 9 as amended by this act (as used in these official comments to Annex  
10 A, “revised Article 9”) and Article 12 generally apply to transactions, liens (including security  
11 interests), and interests in property, even if entered into, created, or acquired before the effective  
12 date. Thus, for example, secured transactions entered into under Article 9 before amendment by  
13 this act (as used in these official comments to Annex A, “former Article 9”) must be terminated,  
14 completed, consummated, and enforced under this act. However, other provisions in this part  
15 provide exceptions to this general rule.

16  
17 3. **Pre-effective-date transactions not governed by pre-effective-date Uniform**  
18 **Commercial Code.** Subsection (b) is an exception to the general rule. It applies to valid, pre-  
19 effective-date transactions, liens, and other interests in property that were not governed by the  
20 former Uniform Commercial Code but would be governed by this act if they had been entered  
21 into or created after this act takes effect. Under subsection (b), these valid transactions, such as  
22 the sale of a controllable electronic record, retain their validity under this ~~article~~[act](#) and may be  
23 terminated, completed, consummated, and enforced as required or permitted by the law that  
24 would apply had this act not taken effect or, to the extent not inconsistent with that law, this act.

25  
26 3. **Judicial proceedings commenced before effective date.** As is usual in transition  
27 provisions, this subsection (c) provides that this this act, does not affect litigation pending on the  
28 effective date.

#### 29 **Section A-302. Security Interest Perfected Before Effective Date.**

30  
31 (a) **[Continuing perfection: perfection requirements satisfied.]** A security interest that  
32 is enforceable and perfected immediately before **[the effective date of this act]** is a perfected  
33 security interest under this act if, on **[the effective date of this act]**, the applicable requirements  
34 for enforceability and perfection under this act are satisfied without further action.

35 (b) **[Continuing perfection: perfection requirements not satisfied.]** If, immediately  
36 before **[the effective date of this act]**, a security interest is enforceable and perfected, but the



1 applicable requirements for enforceability or perfection under this act, are not satisfied on **[the**  
2 **effective date of this act]**, the security interest:

3 (1) is a perfected security interest until the earlier of the time perfection would  
4 have ceased under the law in effect immediately before **[the effective date of this act]** or [the  
5 adjustment date];

6 (2) remains enforceable thereafter only if the security interest satisfies the  
7 requirements for enforceability under Section 9-203 before the [the adjustment date]; and

8 (3) remains perfected thereafter only if the applicable requirements for perfection  
9 under this act are satisfied before the [the adjustment date].

#### 10 **Official Comment**

11  
12 1. **Source.** This section derives from Section 9-703.

13  
14 2. **Perfected security interests under former Article 9 and revised Article 9.** This  
15 section deals with security interests that are perfected under former Article 9 immediately before  
16 this act takes effect. Subsection (a) provides, not surprisingly, that if the security interest would  
17 be a perfected security interest under revised Article 9 (i.e., if the transaction satisfies revised  
18 Article 9's requirements for enforceability (attachment) and perfection), no further action need  
19 be taken for the security interest to be a perfected security interest.

20  
21 **Example 1:** A pre-effective-date security agreement and financing statement covered "all  
22 accounts and general intangibles now owned or hereafter acquired." After the effective  
23 date the debtor acquired controllable accounts, controllable electronic records, and  
24 controllable payment intangibles. The security interest in the after-acquired collateral is  
25 enforceable and perfected under both former and revised Article 9. The controllable  
26 accounts are accounts, the controllable electronic records and controllable payment  
27 intangibles are general intangibles, and filing is an appropriate method of perfection for  
28 that collateral under both versions of Article 9.

29  
30 Other examples of methods of perfection under former Article 9 that also would achieve  
31 perfection under revised Article 9 include [filing a financing statement and perfection by control](#)  
32 in electronic documents under former and amended Section 7-106 ~~and perfection in electronic~~, [in](#)  
33 chattel paper under former Section 9-105 ~~and perfection~~, in chattel paper evidenced by  
34 authoritative electronic records under amended Section 9-105.

35  
36 3. **Security interests enforceable and perfected under former Article 9 but**  
37 **unenforceable or unperfected under revised Article 9.** Subsection (b) deals with security

1 interests that are enforceable and perfected under former Article 9 immediately before this act  
2 takes effect but do not satisfy the requirements for enforceability (attachment) or perfection  
3 under revised Article 9. These security interests are perfected security interests until the earlier of  
4 the time perfection would have ceased under the law in effect immediately before this act takes  
5 effect and the adjustment date. If the security interest satisfies the requirements for attachment  
6 and perfection within that period, the security interest remains continuously perfected thereafter.  
7 If the security interest satisfies only the requirements for attachment within that period, the  
8 security interest becomes unperfected on the adjustment date.

10 **Example 2:** A pre-effective-date security agreement signed by Debtor in favor of  
11 Secured Party covers, among other things, “all money . . . and general intangibles now  
12 owned or hereafter acquired.” Secured Party filed a proper financing statement in the  
13 appropriate filing office covering “All personal property.” Debtor owns electronic  
14 money, spitcoin, issued by the government of El Cuspidouro. Under former Article 9 the  
15 electronic money might be characterized as a general intangible if “money” were to be  
16 construed (at least for purposes of Article 9) to include only tangible money as to which  
17 perfection is possible only by possession. See former Section 9-312(b)(3). Alternatively,  
18 even if the spitcoin is money, perfection might be possible by filing under the baseline  
19 rule of Section 9-310, inasmuch as the spitcoin (an intangible) cannot be possessed.  
20 Assume, therefore, that under former Article 9 Secured Party’s security interest in the  
21 spitcoin is perfected by filing. Assume also that spitcoin can be subjected to control under  
22 Section 9-105A. As to the spitcoin owned by the debtor before the effective date, under  
23 subsection (b) the security interest would remain perfected until the adjustment date but  
24 would become unperfected under revised Article 9 on the adjustment date unless earlier  
25 perfected by control. This is so because a security interest in electronic money that can be  
26 subject to control under Section 9-105A, such as spitcoin, may be perfected only by  
27 control under revised Article 9. Sections 9-312(b)(4); 9-314(a). The security interest in  
28 any spitcoin acquired by the debtor after the effective date would be unperfected until the  
29 secured party obtains control.

31 **Example 3:** Secured Party has a pre-effective-date security interest in a security  
32 entitlement perfected by control pursuant to Sections 9-106 and 8-106(d)(3), based on  
33 control held by Kontroal Phreeque LLC (KP) on behalf of Secured Party. Even in the  
34 highly unlikely event that following the effective date the secured party could not prove  
35 that KP acknowledged its control on behalf of the secured party in conformity with  
36 revised Section 8-106(d)(3), its security interest would nevertheless remain perfected  
37 beyond the adjustment date. Perfection by control for a security entitlement under Section  
38 9-106 depends on control under 8-106 and, under Section A-301(a), Part 3 of this annex,  
39 including subsection (b), does not apply to transactions under Article 8- because Section  
40 A-301(a) applies only to Articles 9 and 12. The rules under pre-effective date Article 8  
41 continue to apply to the pre-effective date transaction. As to financial assets acquired and  
42 becoming a part of the security entitlement after the effective date, however, revised  
43 Articles 8 and 9 would apply. Secured Party could perfect its security interest in those  
44 financial assets through a complying acknowledgment by KP or by filing. This means for  
45 a securities account involving active trading, for example, the secured party should ensure  
46 compliance with the revised Article 8 control requirements at or before the effective date

1 so as to ensure perfection in post-effective date-acquired financial assets.

2  
3 **4. Interpretation of pre-effective-date security agreements.** Section 9-102 defines  
4 “security agreement” as “an agreement that creates or provides for a security interest.” Under  
5 Section ~~1-201(3)~~ 1-201(b)(3), an “agreement” is a “bargain of the parties in fact.” If parties to a  
6 pre-effective-date security agreement describe the collateral by using a term defined in former  
7 Article 9 in one way and defined in revised Article 9 in another way, in most cases it should be  
8 presumed that the bargain of the parties contemplated the meaning of the term under former  
9 Article 9. Definitions of terms relating to collateral which have been amended in revised Article  
10 9 are “account,” chattel paper,” “instrument,” “money,” and “general intangible.” A different  
11 result might be appropriate, for example, if a security agreement explicitly contemplated future  
12 changes in the Article 9 definitions of types of collateral—e.g., “‘Accounts’ means ‘accounts’ as  
13 defined in the Uniform Commercial Code Article 9 of [State X], *as that definition may be*  
14 *amended from time to time.*” Whether a different interpretive approach is appropriate in any  
15 given case depends on the bargain of the parties, as determined by applying ordinary principles  
16 of contract law.

17  
18 **Section A-303. Security Interest Unperfected Before Effective Date.**

19 A security interest that is enforceable immediately before **[the effective date of this act]**  
20 but which was unperfected at that time:

21 (1) remains an enforceable security interest until the **[the adjustment date]**;

22 (2) remains enforceable thereafter if the security interest becomes enforceable  
23 under Section 9-203 on **[the effective date of this act]** or before the **[the adjustment date]**; and

24 (3) becomes perfected:

25 (A) without further action, on **[the effective date of this act]** if the  
26 applicable requirements for perfection under this act are satisfied before or at that time; or

27 (B) when the applicable requirements for perfection are satisfied if the  
28 requirements are satisfied after that time.

29 **Official Comment**

30  
31 **1. Source.** This Section derives from Section 9-704.

32  
33 **2. Pre-effective-date enforceable but unperfected security interests.** This section  
34 deals with security interests that are enforceable but unperfected (i.e., subordinate to the rights of  
35 a person who becomes a lien creditor) under former Article 9 or other applicable law

1 immediately before this act takes effect. These security interests remain enforceable until the  
2 adjustment date, and thereafter if the appropriate steps for attachment under revised Article 9 are  
3 taken before the adjustment date. [See Section A-304\(c\)](#) (This section’s treatment of  
4 enforceability is the same as that of Section A-302.) The security interest becomes a perfected  
5 security interest on the effective date if, at that time, the security interest satisfies the  
6 requirements for perfection (which include the requirements for attachment) under revised  
7 Article 9. If the security interest does not satisfy the requirements for perfection until sometime  
8 thereafter, it becomes a perfected security interest at that later time.  
9

10 **Example 1:** Prior to the effective date Debtor obtained a loan from Secured Party and  
11 signed a security agreement covering “all cryptocurrencies now owned or hereafter  
12 acquired.” The security interest attached to various cryptocurrencies owned by Debtor,  
13 including 1,000 happicoins held by debtor on the happicoins blockchain platform. Debtor  
14 then transferred the 1,000 happicoins to Secured Party on the blockchain. Although the  
15 happicoins are general intangibles, Secured Party failed to file a financing statement  
16 necessary to perfect its security interest under former Article 9.  
17

18 Under revised Article 9, the happicoins would be controllable electronic records and the  
19 transfer of the happicoins to Secured Party would give Secured Party “control” of the  
20 happicoins as provided in Section 12-105. Before revised Article 9 (i.e., including revised  
21 Sections 9-107A and 9-314) and Article 12 became effective, Secured Party’s security  
22 interest was unperfected as noted above. Upon the effective date, however, the security  
23 interest became perfected by control as a result of the pre-effective-date transfer of  
24 control to Secured Party.  
25

26 **Example 2.** Prior to the effective date Debtor obtained a loan from Secured Party and  
27 signed a security agreement covering certain specified deposit accounts and “all  
28 documents and chattel paper now owned or hereafter acquired by Debtor.” The security  
29 interest attached to the deposit accounts and to various documents and chattel paper  
30 owned by Debtor. Persons in control of certain electronic chattel paper, electronic  
31 documents, and deposit accounts included in the collateral acknowledged that they had  
32 control of that collateral on behalf of Secured Party. Assuming that an agency  
33 relationship cannot be established between these acknowledging persons and Secured  
34 Party, it is perhaps arguable that Secured Party’s security interest in the relevant collateral  
35 was unperfected because Secured Party did not have control under former Sections 7-  
36 106, 9-104, and 9-105. However, because the pre-effective-date acknowledgments would  
37 give Secured Party control under the revised sections, its security interest, even if not  
38 perfected pre-effective date, became perfected by control on the effective date.  
39

#### 40 **Section A-304. Effectiveness of Actions Taken Before Effective Date.**

41 (a) **[Pre-effective-date action; attachment and perfection before adjustment date.]** If  
42 action, other than the filing of a financing statement, is taken before **[the effective date of this**  
43 **act]** and the action would have resulted in perfection of the security interest had the security

1 interest become enforceable before **[the effective date of this act]**, the action is effective to  
2 perfect a security interest that attaches under this act before [the adjustment date]. An attached  
3 security interest becomes unperfected on [the adjustment date] unless the security interest  
4 becomes a perfected security interest under this act before [the adjustment date].

5 (b) **[Pre-effective-date filing.]** The filing of a financing statement before **[the effective**  
6 **date of this act]** is effective to perfect a security interest on **[the effective date of this act]** to the  
7 extent the filing would satisfy the applicable requirements for perfection under this act.

8 (c) **[Pre-effective-date enforceability actions.]** The taking of an action before **[the**  
9 **effective date of this act]** is sufficient for the enforceability of a security interest on **[the**  
10 **effective date of this act]** if the action would satisfy the applicable requirements for  
11 enforceability under this act.

## 12 Official Comment

13  
14 1. **Source.** Subsections (a) and (b) of this Section derive from Section 9-705.  
15 Subsection (c) is new.

16  
17 2. **General.** This section addresses primarily the situation in which the perfection  
18 step or requirement for enforceability is taken under former Article 9 or other applicable law  
19 before the effective date of this act, but the security interest does not attach until after that date.

20  
21 3. **Perfection other than by filing.** Subsection (a) applies when the perfection step  
22 is a step other than the filing of a financing statement. If the step that would be a valid perfection  
23 step under former Article 9 or other law is taken before this act takes effect, and if a security  
24 interest attaches before the adjustment date, then the security interest becomes a perfected  
25 security interest upon attachment. However, the security interest becomes unperfected on the  
26 adjustment date unless the requirements for attachment and perfection under revised Article 9 are  
27 satisfied within that period.

28  
29 4. **Perfection by filing: ineffective filings made effective.** Subsection (b) deals  
30 with financing statements that were filed under former Article 9 and which would not have  
31 perfected a security interest under the former Article, but which would perfect a security interest  
32 under revised Article 9. Under subsection (b), such a financing statement is effective to perfect a  
33 security interest to the extent it complies with revised Article 9. Subsection (b) applies regardless  
34 of the reason for the filing. When this act takes effect, the filing becomes effective to perfect a  
35 security interest assuming the filing satisfies the perfection requirements under revised Article

9).

**Example 1.** Prior to the effective date Debtor obtained a loan from Secured Party and signed a security agreement covering, among other collateral, “money,” “accounts,” “chattel paper,” and “general intangibles.” Secured Party filed a financing statement covering “all assets.” If, under the applicable former Article 9 as interpreted by the courts, electronic currency was “money” as defined in former Section 1-201 even though as an intangible it could not be possessed, then under the applicable former Section 9-312(b)(3), filing a financing statement was not an effective method of perfection. Assume, however, that under revised Articles 1 and 9, the electronic currency is not “money,” and is instead a general intangible. Under revised Article 9, filing is an effective method of perfection. Upon the effective date of revised Article 9, the security interest became perfected by the pre-effective-date filed financing statement.

**Example 2.** Prior to the effective date Debtor obtained a loan from Secured Party and signed a security agreement covering, among other collateral, “accounts,” “chattel paper,” and “general intangibles.” Secured Party filed a financing statement covering “accounts.” Under the applicable former Article 9, a certain right to payment was chattel paper because it was a lease of specific goods, even though the transaction also covered, and the lessee’s monetary obligation also related to, various other assets and various services. Because the filed financing statement covered only accounts, the security interest in the chattel paper was unperfected. Under revised Article 9, however, the right to payment was an “account,” and not chattel paper, because the lessee’s right to possession and use of the goods was not “the predominant purpose of the transaction.” Section 9-102(a)(11)(B)(ii). Upon the effective date the security interest became perfected by the pre-effective-date filed financing statement covering accounts.

#### 5. **Enforceability of security interest: unenforceable security interest made enforceable.**

**Example 3.** Under the facts of Example 1, Section A-303, Comment 2, instead of ~~authenticating~~signing a security agreement Debtor agreed orally to grant to Secured Party a security interest in the happicoins. It follows that under former Article 9 Secured Party’s security interest was unenforceable and did not attach to the happicoins for want of ~~an authenticated~~a signed security agreement. Former Section 9-203(b)(3)(A). However, upon the effective date of revised Article 9, Secured Party had control of the happicoins under revised Article 9. Sections 12-105. At that time the security interest became enforceable and attached under Sections 9-107A and 9-203(b)(3)(D) and also was perfected by control.

#### **Section A-305. Priority.**

(a) **[Determination of priority.]** Subject to subsections (b) and (c), this act determines the priority of conflicting claims to collateral.

(b) **[Established priorities.]** Subject to subsection (c), if the relative priorities of claims to collateral were established before **[the effective date of this act]**, Article 9 as in effect prior to **[the effective date of this act]** determines priority.

(c) **[Determination of certain priorities on adjustment date.]** On [the adjustment date], to the extent the relative priorities determined by Article 9 as amended by this act modify the relative priorities established before **[the effective date of this act]**, the relative priorities of claims to Article 12 property and electronic money which were established before **[the effective date of this act]** cease to apply.

### Official Comment

1. **Source.** This section derives from Section 9-709.

2. **Law governing priority and established priorities.** Ordinarily, revised Article 9 determines the priority of conflicting claims to collateral under subsection (a). However, when the relative priorities of the claims were established before the effective date, former Article 9 governs under subsection (b). Subsection (c) provides an exception to subsection (b).

**Example 1.** In 2021, prior to the effective date, Debtor obtained a loan from Secured Party and signed a security agreement covering “all cryptocurrency and money now owned or hereafter acquired.” The security interest attached to various cryptocurrencies owned by Debtor, including 1,000 happicoins held by Debtor on the happicoins blockchain platform. Secured Party promptly filed a financing statement covering “all general intangibles, including cryptocurrencies, now owned or hereafter acquired by Debtor.” In 2022, also prior to the effective date, Debtor obtained a loan from Lender and signed a security agreement covering “all cryptocurrency now owned or hereafter acquired.” Although the happicoins are general intangibles, Lender failed to file a financing statement. Because the priorities of the claims were established before the effective date, former Article 9 governs. Secured Party’s perfected security interest has priority over Lender’s unperfected security interest under former Section 9-322(a)(2).

**Example 2.** The facts are the same as in Example 1, except that Debtor transferred control of the 1,000 happicoins to Lender on the blockchain in 2022 *before* the effective date. Because Lender failed to file a financing statement and control was not a method of perfection under former Article 9, Lender’s security interest was unperfected immediately prior to the effective date. However, because under revised Article 9 the happicoins are controllable electronic records and Lender has “control” of the happicoins under Section 12-105, Lender’s security interest became perfected on the effective date. Nevertheless, because the priorities of Secured Party’s and Lender’s security interests were established

1 before the effective date, Secured Party’s security interest continues to have priority after  
2 the effective date. (However, see Example 4 for the shift of priority on the adjustment  
3 date.)  
4

5 **Example 3.** The facts are the same as in Example 1, except that in 2023, *after* the  
6 effective date, Debtor transferred control of the 1,000 happicoins to Lender on the  
7 blockchain. Under revised Article 9, the happicoins were controllable electronic records  
8 and the transfer of control of the happicoins gave Lender “control” of the happicoins as  
9 provided in Section 12-105. The affirmative step of transferring control established anew  
10 the relative priority of the conflicting claims after the effective date. Revised Article 9  
11 determines priority and Lender’s security interest has priority under Section 9-326A-  
12 [\(without any deferral until the adjustment date\)](#). Moreover, Lender also may also have  
13 priority over other property claims as a qualifying purchaser under Section 12-104(e).  
14

15 One consequence of the rule on established priorities in subsection (b) is that the mere taking  
16 effect of this act does not of itself adversely affect the priority of conflicting claims to collateral,  
17 as Example 2 illustrates. However, as Example 3 illustrates, relative priorities that are  
18 “established” before the effective date do not necessarily remain unchanged following the  
19 effective date. Of course, unlike priority contests among security interests, some priorities are  
20 established permanently, e.g., the rights of a buyer of property who took free of a security  
21 interest under former Article 9.  
22

### 23 3. Modification of established priorities on adjustment date. 24

25 Subsection (c) provides an exception to the respect that subsection (b) affords to pre-  
26 effective-date established priorities, but only for security interests in Article 12 property—  
27 controllable accounts, controllable electronic records, and controllable payment intangibles—and  
28 electronic money.  
29

30 **Example 4.** The facts are the same as in Example 2. Lender’s security interest became  
31 perfected by control on the effective date, Secured Party’s established priority continued  
32 to apply under subsection (b). Under subsection (c), however, on the adjustment date the  
33 priorities shifted. Secured Party’s established priority ceased to apply and Lender’s  
34 perfection by control gave Lender priority under revised Section 9-326A.  
35

### 36 4. Transfers of collateral after the effective date. 37

38 **Example 5.** The facts are the same as in Example 2. In 2023, *after* the effective date,  
39 Debtor acquired an additional 500 happicoins. The security interests of both Secured  
40 Party and Lender attached to the happicoins pursuant to the after-acquired property  
41 clauses in their respective security agreements. Secured Party’s security interest was  
42 perfected by its earlier financing statement filing. Lender then perfected its security  
43 interest by Debtor’s transfer of control of the happicoins to Lender. Lender’s security  
44 interest [in the additional happicoins](#) perfected by control gave Lender priority [as to those](#)  
45 [happicoins](#) under Section 9-326A. Unlike the situation in Example 2, however, as to the  
46 newly acquired happicoins the priorities were not established prior to the effective date.



1 Before the effective date neither creditor could have had a “perfected” security interest in  
2 happicoins in which Debtor had not yet acquired rights.

3  
4 **Example 6.** The facts are the same as in Example 1. In 2023, *after* the effective date,  
5 Debtor transferred 750 spitcoins, an electronic money, to Beier. Beier then obtained  
6 control of the spitcoins under Section 9-105A. Secured Party’s security interest in the  
7 spitcoins, which were either money not capable of being possessed or general intangibles  
8 under former Article 9, are assumed to be perfected by filing. See Section A-302,  
9 Comment 3, Example 2. Because there was no wrongful collusion with Debtor (indeed,  
10 Beier had no knowledge or notice of Secured Party’s security interest), Beier took the  
11 spitcoin free of Secured Party’s security interest under Section 9-332(b).  
12

### 13 **Section A-306. Priority of Claims When Priority Rules of Article 9 Do Not**

#### 14 **Apply.**

15 (a) **[Determination of priority.]** Subject to subsections (b) and (c), Article 12 determines  
16 the priority of conflicting claims to Article 12 property when the priority rules of Article 9 as  
17 amended by this act do not apply.

18 (b) **[Established priorities.]** Subject to subsection (c), when the priority rules of Article 9  
19 as amended by this act do not apply and the relative priorities of claims to Article 12 property  
20 were established before **[the effective date of this act]**, law other than Article 12 determines  
21 priority.

22 (c) **[Determination of certain priorities on adjustment date]** When the priority rules of  
23 Article 9 as amended by this act do not apply, to the extent the relative priorities determined by  
24 this act modify the relative priorities established before **[the effective date of this act]**, the  
25 relative priorities of claims to Article 12 property which were established before **[the effective**  
26 **date of this act]** cease to apply on [the adjustment date].

#### 27 **Official Comment**

- 28  
29 1. **Source.** This section derives from Section 9-709 and, in part, from Section 8-510.  
30  
31 2. **Applicability of this section to Article 12 property.** Although this section  
32 applies to Article 12 property (controllable accounts, controllable electronic records, and

controllable payment intangibles) when the priority rules of Article 9 do not apply, it applies primarily to controllable electronic records. Its application to controllable accounts and controllable payment intangibles is quite limited because Article 9 applies to most sales of accounts and payment intangibles (as well as to security interests in that property that secure an obligation). Section 9-109(a)(3). There is a very limited exclusion from the scope of Article 9 for sales of accounts and payment intangibles in connection with sales of the business out of which they arose. Section 9-109(d)(4).

3. **Law governing priority and established priorities.** Ordinarily, when the priority rules of Article 9 do not apply, Article 12 determines the priority of conflicting claims to Article 12 property under subsection (a). However, when the relative priorities of the claims were established before the effective date, under subsection (b) law other than Article 12 governs. Subsection (c) provides an exception to subsection (b).

4. **Law governing priority and established priorities.**

**Example 1.** In 2021, prior to the effective date, Aiko owned 500 happicoins (a cryptocurrency consisting of controllable electronic records) over which Aiko had control (within the meaning of Section 12-105, [which was not yet effective](#)) on the happicoins blockchain. In December 2021 Aiko sold the 500 happicoins to Barbara for \$10,000 cash. Aiko provided Barbara with a signed memorandum acknowledging the sale and Aiko's receipt of the purchase price and agreeing to hold the happicoins for Barbara pending Barbara's further instructions.

In January 2022 (also prior to the effective date), Aiko sold the same 500 happicoins to Molly for \$12,000 cash. Aiko provided Molly with a signed memorandum similar to the one Aiko had provided to Barbara. Assume that, under the non-Uniform Commercial Code applicable law, Barbara remained the owner of the happicoins and under that law Molly obtained no interest in the happicoins pursuant to the purported sale because Aiko had retained no interest and had nothing to transfer to Molly. Because the priorities of the claims of Aiko, Barbara, and Molly were established before the effective date, under subsection (a) those priorities remained in effect after the effective date [and Barbara remains the owner of the happicoins](#).

**Example 2.** The facts are the same as in Example 1, except that *before* the effective date, Aiko transferred control of the happicoins to Molly on the happicoins blockchain. Again, assume that under the non-Uniform Commercial Code applicable law that transfer [of control](#) had no legal effect. After the effective date the relative priorities are unchanged from those described in Example 1 because the relative priorities were established before the effective date and subsection (b) applies.

**Example 3.** The facts are the same as in Example 1, except that *after* the effective date, Aiko transferred control of the happicoins to Molly on the happicoins blockchain. Under Article 12, the happicoins were controllable electronic records and the transfer of control of the happicoins gave Molly "control" of the happicoins as provided in Section 12-105. Because (it is assumed) Molly met the requirements for a "qualifying purchaser" under

1 Section 12-104(e), Molly acquired the happicoins free of Barbara’s property claim. The  
2 affirmative step of transferring control after the effective date established anew the  
3 relative priority of the conflicting claims after the effective date. Under Section A-301(a),  
4 Article 12 applies to the pre-effective-date transactions and property interests and  
5 subsection (a) of this section applies.  
6

7 **5. Modification of established priorities on adjustment date.** Subsection (c)  
8 provides an exception to the respect that subsection (b) affords to pre-effective-date established  
9 priorities.  
10

11 **Example 4.** The facts are the same as in Example 2. However, on the adjustment date the  
12 established priorities change. Because (it is assumed) Molly met the requirements for a  
13 “qualifying purchaser” under Section 12-104(e), on the adjustment date Molly acquired  
14 the happicoins free of Barbara’s property claim. Under Section A-301(a), Article 12  
15 applies to the pre-effective-date transactions and property interests and subsection (a) of  
16 this section applies.  
17

18 **6. Transfers after the effective date.**  
19

20 **Example 5.** The facts are the same as in Example 1, except that *after* the effective date  
21 Aiko sold ~~and~~ the happicoins to Jacob, for value, and also transferred control of the  
22 happicoins to Jacob on the happicoins blockchain. Because (it is assumed) Jacob met the  
23 requirements for a “qualifying purchaser” under Section 12-104(e), Jacob acquired the  
24 happicoins free of both Barbara’s and Molly’s property claims. Note that Jacob took the  
25 happicoins free of conflicting claims in the post-effective date acquisition immediately  
26 upon acquisition as a qualifying purchaser. Jacob’s priority was established after the  
27 effective date and was not deferred until the adjustment date, as was the case for Molly’s  
28 rights in Example 4.  
29

## 30 **PART 4**

### 31 **GENERAL PROVISIONS**

#### 32 **Section A-401. Effective Date.**

33 This act takes effect on **[the effective date of this act]**.

34 **Legislative Note:** *This [part] [section] is not to be codified as a part of [the Uniform*  
35 *Commercial Code.*