

D R A F T
FOR APPROVAL

Uniform Commercial Code and Emerging Technologies

Uniform Law Commission

MEETING IN ITS ONE-HUNDRED-AND-THIRTY-FIRST YEAR
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National Conference of Commissioners on Uniform State Laws

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June 27, 2022

Uniform Commercial Code and Emerging Technologies

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UNIFORM COMMERCIAL CODE AND EMERGING TECHNOLOGIES

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1 **UNIFORM COMMERCIAL CODE AND EMERGING TECHNOLOGIES**

2 **2022 ULC ANNUAL MEETING DRAFT**

3 **Submitted to the ULC Annual Meeting**
4 **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 these numbering conventions will be retained for these sections and*
17 *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 ***Notes on 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 official comments. Reporter’s Notes have been retained only to provide*
25 *background or otherwise to aid in the discussion of the draft (e.g., explaining that some sections*
26 *that are not being revised are included for convenience in reviewing related revisions to the*
27 *official comments).*
28

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

34 **Prefatory Note to 2022 ULC Annual Meeting Draft**
35

36 This Prefatory Note first describes the background of the project on Emerging
37 Technologies and the Uniform Commercial Code (UCC) and the work to date. It then provides a
38 brief overview of the revisions to the UCC. Additional Prefatory Notes are provided below for
39 the amendments relating to payments (Articles 3, 4, and 4A), investment securities (Article 8),
40 secured transactions (Article 9), and controllable electronic records (new Article 12).
41

42 1. *Background*

1 The Uniform Commercial Code has been enacted in all 50 states, the District of
2 Columbia, Puerto Rico, and the U.S. Virgin Islands. Since its widespread enactment in the
3 1960s, the UCC has been periodically revised to address changes in commercial practices.
4

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

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

21 The Drafting Committee has held the following meetings:

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

35 The Chair and Reporter along with Drafting Committee members Neil B. Cohen and
36 Steven O. Weise presented a draft to the ALI Council meeting on January 20, 2022, which was
37 approved by the Council with the usual caveats. In addition, several small working groups have
38 met remotely (and continue to meet) to discuss specific topics and to hear the views of various
39 stakeholder groups. Since the 2021 ULC Annual Meeting, the Chair, Vice Chair, Reporters, and
40 several members of the Drafting Committee have presented educational programs addressing the
41 ongoing revision process to groups including the Loan Syndication and Trading Association, the
42 ABA Business Law Section, the American College of Commercial Finance Lawyers, the
43 Association of Commercial Finance Attorneys, and the New York City Bar Association. The
44 Chair, Reporter and several members of the Drafting Committee participated in ALI Members
45 Consultative Group meetings on October 1, 2021, and April 25, 2022. Members of the Drafting
46 Committee will continue to reach out to industry groups and other stakeholders and plan to

1 continue participating in CLE presentations to educate members of the bar and others.

2
3 The work of the Drafting Committee has focused primarily on the following areas
4 concerning the UCC: digital assets (controllable electronic records), electronic money, chattel
5 paper, “bundled” or “hybrid” transactions (consisting of the sale or lease of goods together with
6 the sale, lease, or licensing of other property and the provision of services as an integrated
7 transaction), documents of title, payment systems, miscellaneous UCC amendments, and
8 consumer issues.

9
10 The ALI approved Tentative Draft No. 1 (April 2022) of the Uniform Commercial Code
11 and Emerging Technologies, subject to the usual caveats, at its annual meeting on May 18, 2022.
12 The Committee expects to complete the amendments and present them for a final reading and
13 approval at the July 2022 ULC annual meeting.

14 15 *2. Overview of UCC Revisions*

16
17 The Drafting Committee’s charge is broad, and the resulting revisions are expansive.

18 19 *a. New UCC Article 12 – Controllable electronic records, controllable accounts,* 20 *controllable payment intangibles*

21
22 The revisions include a new UCC Article 12 that governs the transfer of property rights
23 in certain intangible digital assets (“controllable electronic records”) that have been or may be
24 created and may involve the use of new technologies. These assets include, for example, certain
25 types of (non-fiat) virtual currency and nonfungible tokens (NFTs). “Control” of controllable
26 electronic records is a central organizing concept under Article 12. Controllable electronic
27 records are defined to include only those electronic records that can be subjected to control.
28 Control is the functional equivalent of “possession” of a controllable electronic record and a
29 necessary condition for protection as a good faith purchaser for value (a “qualifying purchaser”)
30 of a controllable electronic record. Article 12 confers an attribute of negotiability on controllable
31 electronic records because a qualifying purchaser takes its interest free of conflicting property
32 claims.

33
34 Controllable electronic records also provide a mechanism for evidencing certain rights to
35 payment—controllable accounts and controllable payment intangibles. An account debtor
36 (obligor) on such a right to payment agrees to make payments to the person that has control of
37 the controllable electronic record that evidences the right to payment. Assignments and other
38 aspects of these rights to payment are governed by revisions to UCC Article 9, discussed below.
39 Because a qualifying purchaser of a controllable account or controllable payment intangible will
40 take free of competing property claims, these rights to payment also would have this attribute of
41 negotiability. Article 12 also provides some special rules with respect to the payment obligations
42 and conditions of discharge of account debtors on controllable accounts and controllable
43 payment obligations.

44
45 Article 12 includes a choice-of-law rule for the matters that it covers in connection with
46 transactions in controllable electronic records.

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

2
3 b. *Secured transactions amendments – UCC Article 9*
4

5 *Article 12 conforming amendments.* The revisions include extensive amendments to UCC
6 Article 9. Several of these amendments address security interests in controllable electronic
7 records and in the rights to payment that are embedded in, or tethered to, controllable electronic
8 records—controllable accounts and controllable payment intangibles. Perfection (i.e., essentially,
9 enforceability against third-parties) of security interests in these assets may be achieved by a
10 secured party obtaining control of the asset or filing a financing statement in the appropriate
11 jurisdiction’s filing office. A security interest perfected by control has priority over a security
12 interest perfected by filing. The revisions also provide special rules for the law governing
13 perfection and priority for security interests in controllable electronic records, controllable
14 accounts, and controllable payment intangibles. These rules draw on the Article 12 choice-of-law
15 rule.
16

17 *Chattel paper.* UCC Article 9 affords special treatment to “chattel paper” (e.g.,
18 installment sale contracts and personal property leases). The revisions redefine “chattel paper”
19 and update the Article 9 provisions applicable to this type of collateral. The revised definition
20 resolves uncertainty that has arisen under the previous definition and more accurately reflects the
21 distinction between the seller’s or lessor’s right to payment and the record (e.g., installment sale
22 contract or lease) evidencing that right. The revised definition also resolves uncertainty that has
23 arisen when goods are leased as part of a hybrid transaction involving services or non-goods
24 property as well as goods. The revisions address additional issues relating to hybrid transactions,
25 mentioned in 2.d., below, and provide an amended definition of “control” of an authoritative
26 electronic copy of a record evidencing chattel paper, which reflects a more accurate and
27 technologically flexible approach than the previous definition.
28

29 *Money.* The revisions include a revised definition of “money” in Article 1, which applies
30 throughout the UCC unless otherwise provided. They also include amendments that define
31 “electronic money” and provide a definition of “control” of electronic money that tracks the
32 corresponding definition for control of controllable electronic records. Perfection of a security
33 interest in electronic money (a subset of money) as original collateral must be by control, not
34 filing. The revisions provide a revised Article 9 definition of “money” that excludes deposit
35 accounts (which could in the future be adopted by a government as money) and money in an
36 electronic form that cannot be subjected to control. The revisions also update the take-free rules
37 for transferees of money—both electronic money and tangible money—and transferees of funds
38 from deposit accounts.
39

40 *Control through another person.* Revisions to the provisions on control in Sections 9-104
41 (control of deposit accounts), 9-105 (control of authoritative electronic copy of record
42 evidencing chattel paper), and 9-105A (control of electronic money) and a conforming
43 modification to Section 8-106(d)(3) (control of security entitlement) address control through the
44 acknowledgment of a person in control. For similar provisions, see Sections 7-106 (control of
45 electronic document of title) and 12-105 (control of controllable electronic record). For a
46 discussion of these revisions, see Section 12-105, Comment 8.

1 For a more detailed description of the Article 9 amendments, see the Prefatory Note to
2 Article 9 Amendments.

3
4 *c. Payments amendments – UCC Articles 3 (negotiable instruments), 4 (bank*
5 *deposits and collections), and 4A (funds transfers)*
6

7 These amendments include several revisions to Articles 3, 4 and 4A. The amendments
8 relate to negotiability, remote deposit capture, statements of account, the scope of Article 4A
9 (definition of payment order), and security procedures. The amendments also replace references
10 to a “writing” with references to a “record.” Many of the changes are to the official comments
11 and are intended to further clarify the black letter text.
12

13 For a more detailed description of the payments amendments, see the Prefatory Note to
14 Payments Amendments.

15
16 *d. Other emerging technologies-related amendments*
17

18 The revisions contain a revised definition of “conspicuous” in Article 1 and a revised and
19 an updated official comment on that term. They also add to Article 1 the standard definition of
20 “electronic” used by the ULC and adopt revised definitions of “send” and “sign” in Article 1,
21 which address records other than writings.
22

23 The revisions amend Sections 2-102 and 2A-102 and related definitions to clarify the
24 scope of Articles 2 and 2A with respect to hybrid transactions. They also include amendments to
25 several provisions of Articles 2 and 2A to change previous references to a “writing” or “written”
26 communication to refer instead to a “record.”
27

28 The revision proposes a revised Section 7-106, defining “control” for electronic
29 documents of title. The revised section retains the general rule and the safe harbor under the
30 previous provision and adds an additional safe harbor along the lines of the revised section on
31 control of chattel paper. The revisions also include amendments to the official comments to
32 several provisions of Articles 7 and 9, in particular to clarify the treatment of nonnegotiable
33 documents of title.
34

35 Finally, the revisions include several amendments to the official comments to Article 8
36 (investment securities), in particular to make clear that a controllable electronic record may be a
37 “financial asset” credited to a securities account.
38

39 *e. Miscellaneous amendments*
40

41 The revisions contain new definitions in Article 9 of the terms “assignee” and “assignor,”
42 which conform to the descriptions in the official comments, and amend the definition of
43 “person” to include a protected series established under non-UCC law.
44

45 The revisions amend Section 5-116 to cure an ambiguity relating to the separate status of
46 bank branches in the current provision and to reject incorrectly decided case law arising from

1 that ambiguity.

2
3 *f. Official Comments.* The revisions include amended official comments to many
4 sections. None of the revisions to official comments will be finalized until completion of the
5 usual processes for the preparation of official comments.
6

7 In the preparation of amended official comments consideration will be given to removing
8 references to obsolete and withdrawn uniform laws except as may be necessary or useful to
9 explain particular issues.
10

11 *3. Organization of amendments.*
12

13 Revised provisions of the UCC text and comments appear in the order that they would
14 appear in the UCC—beginning with Article 1 and continuing through Article 12. Following
15 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 ~~it~~ 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.

The supplemental principles of law and equity to which subsection (b) refers may evolve over time to take into account developments in technology. 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 not “agents” under the law of agency) . The supplementation recognized by subsection (b) should reflect this evolution.

1 * * *

2
3 **Reporter's Note**

4
5 *No change.* No change is proposed to Section 1-103, which is provided for convenience.

6
7 * * *

8 **Section 1-107. Section Captions.**

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

10
11 **Official Comment**

12 * * *

13
14 1. Section captions are a part of the text of the Uniform Commercial Code, and not
15 mere surplusage. This is not the case, however, with respect to subsection headings appearing in
16 Article 9 Articles 9 and 12 and Annex A (Transition Provisions). See Comment 3 to Section
17 Section 9-101, Comment 3 ("subsection headings are not a part of the official text itself and have
18 not been approved by the sponsors."); Section 12-101, Comment; Section A-101, Comment.

19
20 **Reporter's Note**

21
22 *No change.* No change is proposed to Section 1-107, which is provided for convenience.

23
24 * * *

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

26 * * *

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

29 * * *

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

33 * * *

34 (10) "Conspicuous", with reference to a term, means so written, displayed, or

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

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

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

10 * * *

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

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

1 is inscribed on a tangible medium.

2 (16A) “Electronic” means relating to technology having electrical, digital,
3 magnetic, wireless, optical, electromagnetic, or similar capabilities.

4 * * *

5 (21) “Holder” means:

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

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

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

12 * * *

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

19 * * *

20 (27) “Person” means an individual, corporation, business trust, estate, trust,
21 partnership, limited liability company, association, joint venture, government, governmental
22 subdivision, agency, or instrumentality, public corporation, or any other legal or commercial
23 entity. The term includes a protected series, however denominated, of an entity if the protected

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

4 * * *

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

8 * * *

9 (36) “Send”, in connection with a ~~writing~~, record, or ~~notice~~ notification means:

10 (A) to deposit in the mail, ~~or~~ deliver for transmission, or transmit by any
11 other usual means of communication, with postage or cost of transmission provided for, ~~and~~
12 ~~properly addressed and, in the case of an instrument, to an address specified thereon or otherwise~~
13 ~~agreed, or if there be none~~ addressed to any address reasonable under the circumstances; or

14 (B) ~~in any other way to cause to be received any record or notice~~
15 ~~within the time it would have arrived if properly sent~~ to cause the record or notification to be
16 received within the time that it would have been received if properly sent under subparagraph
17 (A).

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

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

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

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

2 * * *

3 **Legislative Note:**

4
5 A state should review and adjust any of its other statutes or regulations that rely on or refer to
6 the definition of “money” in the state’s Uniform Commercial Code, subsection (b)(24), to take
7 account of the amendment to that definition.

8
9 A state should enact the amendment to subsection (b)(27) whether the state has enacted the
10 Uniform Protected Series Act (2017) or otherwise recognizes a protected series under its law.
11 Because the amendment applies only under the enacting state’s Uniform Commercial Code,
12 inclusion of the amendment does not require the enacting state to recognize a limit on liability of
13 a protected series organized under the law of another jurisdiction or a limit on liability of the
14 entity that established the protected series. The amendment clarifies the status of a protected
15 series as a “person” under the choice-of-law and substantive law rules of the enacting state’s
16 Uniform Commercial Code.

17
18 **Official Comment**

19
20 * * *

21
22 3. “Agreement.” Derived from former Section 1-201. As used in the Uniform
23 Commercial Code the word is intended to include full recognition of usage of trade, course of
24 dealing, course of performance and the surrounding circumstances as effective parts thereof, and
25 of any agreement permitted under the provisions of the Uniform Commercial Code to displace a
26 stated rule of law. Whether an agreement has legal consequences is determined by applicable
27 provisions of the Uniform Commercial Code and, to the extent provided in Section 1-103, by the
28 law of contracts. Concerning developments in technology, including, e.g., contract formation in
29 electronic environments, automated transactions, and electronic agents, see Section 1-103,
30 Comment 2.

31
32 * * *

33
34 10. “Conspicuous.” Derived from former Section 1-201(10). This definition states the
35 general standard that to be conspicuous a term ought to be noticed by a reasonable person against
36 which the term is to operate. Whether a term is conspicuous is an issue for the court.
37 ~~Subparagraphs (A) and (B) set out several methods for making a term conspicuous. Requiring~~
38 ~~that a term be conspicuous blends a notice function (the term ought to be noticed) and a planning~~
39 ~~function (giving guidance to the party relying on the term regarding how that result can be~~
40 ~~achieved). Although these paragraphs indicate some of the methods for making a term attention-~~
41 ~~calling, the test is whether attention can reasonably be expected to be called to it. The statutory~~
42 ~~language should not be construed to permit a result that is inconsistent with that test. Whether the~~
43 appearance and presentation of a particular term satisfy this standard is determined by reference
44 to the totality of the circumstances and requires a case-by-case analysis.

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

7
8 The definition has been revised by deleting the statutory examples relating to the
9 appearance of type and instead indicating in the comments a broader universe of factors that are
10 applicable to both written and electronic presentations. This approach is intended to be both
11 more protective of consumers and more useful to drafters by providing more clarity and
12 flexibility in the methods that may be used to call attention to a term.

13
14 The attributes of a reasonable person against which a term is to operate can vary
15 depending upon the nature of the transaction and the market in which the transaction occurs. For
16 example, assume that a merchant of goods wishes to enter into a transaction for the sale or lease
17 of goods which does not include an implied warranty of merchantability or fitness for particular
18 purpose. Depending on the particular transaction, the person against which the term excluding
19 implied warranties is to operate may be a large business buyer or lessee, a small business, or a
20 consumer. Similarly, the determination of whether a term is conspicuous may, depending on the
21 context, yield a different conclusion when the term is used in a standard form agreement than
22 when terms of the agreement are the subject of negotiation or discussion.

23
24 Terms presented in an online record raise issues that differ in some respects from the
25 issues associated with presenting the same terms in a writing. For example, how a term appears
26 depends to some extent on the equipment and settings of the person presented with the term.

27
28 The test of whether a term is conspicuous remains constant notwithstanding the different
29 contexts referenced above. A term is conspicuous if its appearance and presentation are such that
30 it ought to be noticed by a reasonable person against which the term is to operate. If the term is
31 in a standard form intended for use in many agreements, the determination of whether the term is
32 conspicuous may be made with reference to typical likely parties to the agreements, taking into
33 account all aspects of the transaction, the range of likely equipment and settings used by such
34 parties, and the education, sophistication, disabilities, and other attributes of such parties. If the
35 term is not in a standard form, the determination of whether it is conspicuous should be made
36 with reference to a reasonable person in the position of the actual person against which it is to
37 operate.

38
39 Factors relevant to whether a term is conspicuous include, but are not limited to, the
40 following:

41
42 (i) The use of headings and text that contrast with the surrounding text. For example, a
43 term is likely to be conspicuous if it is introduced by a heading in uppercase letters equal to or
44 greater in size than the surrounding text. Similarly, a term is likely to be conspicuous if set out in
45 language in the body of a record or display in larger type than the surrounding text, or in
46 contrasting type, font, or color to the surrounding text of the same size, or set off from

1 surrounding text of the same size by symbols or other marks that call attention to the language.
2 However, even with those characteristics, for a term to be conspicuous the overall statutory test
3 must always be met. For example, even if in bold, uppercase letters, a term might not be
4 conspicuous if placed among other terms also in bold, uppercase letters so there is no contrast
5 with the surrounding text or if the application of other factors causes the term not to be provided
6 such that a reasonable person against which it is to operate ought to have noticed it.

7
8 (ii) The placement of the term in the record. A term appearing at, or hyperlinked from,
9 text at the beginning of a record, or near the place where the person against which the term is to
10 operate must signify assent, is more likely to be conspicuous than a term in the middle of a
11 lengthy record absent the use of a method reasonably designed to draw the person's attention to
12 the term in middle of the record (for example, by providing separate reasonable notice of the
13 term before presenting the record containing the term to the person for assent or forcing the
14 person to stop on a screen highlighting the term during the presentation of the record for assent).

15
16 (iii) If terms are available only through the use of a hyperlink, in addition to the
17 placement of the hyperlink as described above, factors to be considered include whether there is
18 language drawing attention to the hyperlink and describing its function, and the size and color of
19 the text used for the hyperlink and any related language.

20
21 (iv) The language of the heading, if any. A misleading heading – such as the heading
22 “Warranty” for a paragraph that contains a disclaimer of warranties – might cause a reasonable
23 person to fail to notice the language that would disclaim warranties, so that the term would not
24 be conspicuous.

25
26 (v) The effort needed to access the term. The process and flow of the display and
27 presentation is also relevant. For example, a term accessible only by triggering multiple
28 hyperlinks is less likely to be conspicuous than a term accessible from a single hyperlink.

29
30 (vi) Whether the person against which the term is to operate must separately assent to or
31 acknowledge the term. Obtaining separate assent or acknowledgment of a term is generally
32 sufficient to make the term conspicuous.

33
34 As noted above, the evolution of technology has led to an evolution in the ways in which
35 terms in an electronic record are displayed or presented. A term displayed or presented in a novel
36 way utilizing emerging technologies is, of course, conspicuous if the effect of the display or
37 presentation is that a reasonable person against which the term is to operate ought to have
38 noticed it.

39
40 This definition deals only with requirements that a term be conspicuous (or noted
41 conspicuously) that are stated in particular provisions of the Uniform Commercial Code. Other
42 protective doctrines designed to assure that assent is meaningful that are part of general contract
43 law may also apply. See Section 1-103(b).

44
45 * * *
46

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

8
9 16. “Document of title.” * * *

10
11 * * *

12
13 A document of title may be either tangible or electronic. ~~Tangible Traditional paper~~
14 ~~documents of title should be construed to mean traditional paper documents.~~ are “tangible
15 documents of title.” Electronic documents of title are documents that are stored in an electronic
16 medium instead of in tangible form. ~~The concept of an electronic medium should be construed~~
17 ~~liberally to include electronic, digital, magnetic, optical, electromagnetic, or any other current or~~
18 ~~similar emerging technologies.~~ “Electronic” is defined in paragraph 16A. As to reissuing a
19 document of title in an alternative medium, see Article 7, Section 7-105. Control for electronic
20 documents of title is defined in Article 7 (Section 7-106).

21
22 16A. “Electronic.” The basic nature of most current technologies and the need for a
23 recognized, single term warrants the use of “electronic” as the defined term. The definition is
24 intended to ensure that the Uniform Commercial Code will be applied broadly as new technologies
25 develop. The term must be construed broadly in light of developing technologies in order to validate
26 commercial transactions regardless of the medium used by the parties to document them. Current
27 legal requirements for “writings” can be satisfied by almost any tangible media, whether paper, other
28 fibers, or even stone. The purpose and applicability of the Uniform Commercial Code covers
29 intangible media that are technologically capable of storing, transmitting, and reproducing
30 information in human perceivable form, but which lack the tangible aspect of paper, papyrus, or
31 stone.

32
33 * * *

34
35 20. “Good faith.” * * *

36
37 Over time, however, amendments to the Uniform Commercial Code brought the Article 2
38 merchant concept of good faith (subjective honesty and objective commercial ~~reasonableness~~ fair
39 dealing) into other Articles. First, Article 2A explicitly incorporated the Article 2 standard. See
40 Section ~~2A-103(7)~~. Then, other Articles broadened the applicability of that standard by adopting
41 it for all parties rather than just for merchants. ~~See, e.g., Sections 3-103(a)(4), 4A-105(a)(6), 7-~~
42 ~~102(a)(6), 8-102(a)(10), and 9-102(a)(43).~~ Finally, Articles 2 and 2A were amended so as to
43 apply the standard to non-merchants as well as merchants. ~~See Sections 2-103(1)(j), 2A-~~
44 ~~103(1)(m).~~ All of these definitions are comprised of two elements-honesty in fact and the
45 observance of reasonable commercial standards of fair dealing. Only revised Article 5 defines
46 “good faith” solely in terms of subjective honesty, and only Article 6 (in the few states that have
47 not chosen to delete the Article) is without a definition of good faith. * * *

1 * * *

2
3 Thus, the definition of “good faith” in this section merely confirms what has been the
4 case for a number of years as Articles of the UCC have been amended
5

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

11 * * *

12
13 24. “Money.” ~~Substantively identical to former Section 1-201. The test is that of~~
14 ~~sanction of government, whether by authorization before issue or adoption afterward, which~~
15 ~~recognizes the circulating medium as a part of the official currency of that government. The~~
16 ~~narrow view that money is limited to legal tender is rejected. The definition of “money” applies~~
17 ~~to the term only as used in the Uniform Commercial Code. The definition does not determine~~
18 ~~whether an asset constitutes “money” for other purposes. Only something currently authorized or~~
19 ~~adopted as a medium of exchange by a government can be money. As further elaborated in the~~
20 ~~second sentence of the definition, adoption by a government may occur through establishment by~~
21 ~~an intergovernmental organization or pursuant to an agreement between governments. Coins and~~
22 ~~paper currency formerly issued by a government but currently owned and traded only for their~~
23 ~~numismatic or historical value, and not as a medium of exchange, are not money.~~
24

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

34 Although the term “money” is used in several articles, the definition is particularly
35 significant under Article 9. Under an earlier version of this definition, money was generally
36 understood to include only tangible coins, bills, notes, and the like, although the statutory text
37 did not explicitly so limit the term. This worked well under Article 9, which provided that the
38 only method of perfecting a security interest in money as original collateral was by taking
39 possession. See former Section 9-312(b)(3). The revised definition of money in Section 1-
40 201(b)(24) is broader and includes both “tangible money” and “electronic money” (new types of
41 collateral under Article 9). As under the former provision, a security interest in tangible money
42 as original collateral may be perfected only by possession. Section 9-322(b)(3). A security
43 interest in electronic money as original collateral may be perfected only by control.
44 Section 9-102(a)(31A) (defining “electronic money”); 9-312(b)(4) (perfection by control for
45 electronic money). The definition of “money” for purposes of Article 9 (a subset of this
46 definition) is more limited than the definition in this section—the Article 9 definition excludes

1 deposit accounts and money in electronic form that cannot be subjected to control under Section
2 9-105A. See Section 9-102(a)(54A).

3
4 Examples: The following examples illustrate the definition of “money.”

5
6 **Example 1:** Nation A enacts legislation authorizing or adopting an existing crypto
7 currency (spitcoin), created on a private blockchain, as a medium of exchange. Because
8 spitcoin was recorded and transferable in a system that existed and operated for that
9 crypto currency before the electronic record was authorized or adopted by Nation A,
10 spitcoin does not become “money” as a result of Nation A’s legislation.

11
12 **Example 2:** Nation B creates a new crypto currency (beebuck) and authorizes or adopts it
13 as a medium of exchange. Beebuck is “money.” Beebuck is not recorded and transferable
14 in a system that existed and operated for that crypto currency before the electronic record
15 was authorized or adopted by Nation B.

16
17 **Example 3:** Nation C enacts legislation authorizing or adopting as a medium of exchange
18 beebuck, the crypto currency previously adopted by Nation B in Example 2. Although
19 beebuck is recorded and transferable in a system that existed and operated for beebuck
20 before it was authorized or adopted by Nation C, beebuck was *already* money when
21 authorized or adopted by Nation C. Consequently, beebuck is “money.” Nation C’s
22 action had no relevance or effect on the characterization of beebuck as money.

23
24 * * *

25
26 27. ~~“Person.” The former definition of this word has been replaced with the standard~~
27 ~~definition used in acts prepared by the National Conference of Commissioners on Uniform State~~
28 ~~Laws. This definition recognizes the wide range of subjects that can enjoy legal rights and~~
29 ~~possess legal duties, including the catchall residual category of “any other legal or commercial~~
30 ~~entity.” See, e.g., JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 27 (Roland~~
31 ~~Gray rev., 2d ed., The MacMillan Co. 1931) (“a ‘person’ is a subject of legal rights and duties”).~~
32 ~~For additional authorities, see Permanent Editorial Board for the UCC, Commentary No. 23,~~
33 ~~Protected Series Under the Uniform Protected Series Act (2017), n. 5.~~

34
35 The second sentence of the definition provides needed clarity as to the status of a
36 protected series for purposes of the Uniform Commercial Code. Several states have enacted
37 statutes that provide for protected series within a limited liability company or other
38 unincorporated organization. These statutes afford rights and impose duties upon a protected
39 series and generally empower a protected series to conduct its own activities under its own name.
40 The types of protected series that are included as persons under the definition include, but are not
41 limited to, those established under the Uniform Protected Series Act.

42
43 Providing that a protected series is a “person” for purposes of the enacting state’s
44 Uniform Commercial Code will expressly permit a protected series, whether created under the
45 law of the enacting state or of another jurisdiction, to be a “seller” or a “buyer” under Article 2, a
46 “lessor” or a “lessee” under Article 2A, or an “organization” and a “debtor” under Article 9, and,

1 if the law under which the protected series is organized requires a public filing for the protected
2 series to be recognized under that law, a “registered organization” under Article 9.

3
4 * * *

5
6 33. “Representative.” ~~Derived from former Section 1-201. Reorganized, and form~~
7 ~~changed from “includes” to “means.”~~ Concerning developments in technology, including, e.g.,
8 contract formation in electronic environments, automated transactions, and electronic agents, see
9 Section 1-103, Comment 2.

10
11 * * *

12
13 36. “Send.” ~~Derived from former Section 1-201. Compare “notifies.”~~ The definition
14 of “send” adopts former Section 9-102(a)(75). The explicit statement in the previous text of this
15 definition on the appropriateness of sending to an agreed upon address or to an “address
16 reasonable under the circumstances” was limited to “the case of an instrument.” The definition
17 no longer includes that limitation relating to an instrument. Moreover, nothing in the definition
18 limits the effectiveness of sending a record or notification to an address that has been agreed
19 upon by affected persons.

20
21 37. “Signed.” “Sign.” ~~Derived from former Section 1-201. Former Section 1-201~~
22 ~~referred to “intention to authenticate”; because other articles now use the term “authenticate,” the~~
23 ~~language has been changed to “intention to adopt or accept.”~~ The latter formulation is derived
24 from the definition of “authenticate” in Section 9-102(a)(7). This provision refers only to
25 writings, because the term “signed,” as used in some articles, refers only to writings. The
26 definition of “sign” is broad—it encompasses the authentication or adoption of all records, not
27 just writings. The definition replaces the definition of “signed” in earlier texts of this Article.
28 This provision definition also makes it clear that, as the term terms “sign,” “signed,” is or
29 “signature” are used in the Uniform Commercial Code, a complete signature is not necessary.
30 The A symbol may be printed, stamped or written on, or electronically attached or associated
31 with, a record; it It may be by initials or by thumbprint or by electronic symbol, sound, or
32 process. It may be on any part of the document a writing or other record and in appropriate cases
33 may be found in a billhead or letterhead. No catalog of possible situations can be complete and
34 the court must use common sense and commercial experience in passing upon these matters. The
35 question always is whether the symbol, sound, or process was executed or adopted by the party
36 with present intention to authenticate or adopt or accept the writing record.

37
38 A “writing,” which necessarily is in tangible form, must exist at the time it is signed and
39 must be signed by the execution or adoption of a tangible symbol to qualify as a signed writing. A
40 writing signed by use of an electronic symbol, sound, or process would not be a signed writing.
41 Moreover, if an electronic record is electronically signed and subsequently printed in tangible form,
42 the resulting writing does not constitute a signed writing.

43
44 Concerning developments in technology, including, e.g., contract formation in electronic
45 environments, automated transactions, and electronic agents, see also Section 1-103, Comment 2.

* * *

Reporter's Note

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

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

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

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

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

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

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

* * *

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

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

(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

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

2
3 **Changes from former law:** Unchanged from former Section 1-201, which was derived from
4 Sections 25, 26, 27, 191, Uniform Negotiable Instruments Law; Section 76, Uniform Sales Act;
5 Section 53, Uniform Bills of Lading Act; Section 58, Uniform Warehouse Receipts Act; Section
6 22(1), Uniform Stock Transfer Act; Section 1, Uniform Trust Receipts Act. These provisions are
7 substantive rather than purely definitional. Accordingly, they have been relocated from former
8 Section 1-201 to this section.
9

10 1. ~~All the~~ Historically, most Uniform Acts in the commercial law field ~~(except the~~
11 ~~Uniform Conditional Sales Act)~~ have carried definitions of “value.” ~~All those~~ Those definitions
12 provided that value was any consideration sufficient to support a simple contract, including the
13 taking of property in satisfaction of or as security for a pre-existing claim. Subsections (1), (2),
14 and (4) in substance continue the definitions of “value” in the earlier acts. Subsection (3) makes
15 explicit that “value” is also given in a third situation: where a buyer by taking delivery under a
16 pre-existing contract converts a contingent into a fixed obligation.
17

18 This definition is not applicable to Articles 3 and 4, but the express inclusion of
19 immediately available credit as value follows the separate definitions in those articles. See
20 Sections 4-208, 4-209, 3-303. A bank or other financing agency which in good faith makes
21 advances against property held as collateral becomes a bona fide purchaser of that property even
22 though provision may be made for charge-back in case of trouble. Checking credit is
23 “immediately available” within the meaning of this section if the bank would be subject to an
24 action for slander of credit in case checks drawn against the credit were dishonored, and when a
25 charge-back is not discretionary with the bank, but may only be made when difficulties in
26 collection arise in connection with the specific transaction involved. Article 12 adopts the Article
27 3 definition. See Section 12-102(a)(4).
28

29 * * *

30 **Section 1-301. Territorial Applicability; Parties’ Power to Choose Applicable**
31 **Law.**

32 (a) Except as otherwise provided in this section, when a transaction bears a reasonable
33 relation to this state and also to another state or nation the parties may agree that the law either of
34 this state or of such other state or nation shall govern their rights and duties.

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

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

(1) Section 2-402;

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

(3) Section 4-102;

(4) Section 4A-507;

(5) Section 5-116;

[(6) Section 6-103;]

(7) Section 8-110;

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

(9) Section 12-107.

* * *

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

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

Official Comment

* * *

Changes from former law: This section changes former law in two respects. First, former Section 1-107, requiring the “delivery” of a “written waiver or renunciation” merges the separate concepts of the aggrieved party's agreement to forego rights and the manifestation of that agreement. This section separates those concepts, and explicitly requires agreement of the aggrieved party. ~~Second, the revised section reflects developments in electronic commerce by providing for memorialization in an authenticated record. In this context, a party may “authenticate” a record by (i) signing a record that is a writing or (ii) attaching to or logically associating with a record that is not a writing an electronic sound, symbol or process with the present intent to adopt or accept the record. Sections 1-201(b)(37) and 9-102(a)(7).~~

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

6
7 2. Consistent with the revised definition of “sign” in Section 1-201, the cognate term
8 “signed” replaces the reference to “authenticated” in the previous text of this section.

9
10 * * *

11 12 **ARTICLE 2**

13 **SALES**

14 * * *

15 ~~**Section 2-102. Scope; Certain Security and Other Transactions Excluded from**~~
16 ~~**this Article.**~~

17 ~~Unless the context otherwise requires, this Article applies to transactions in goods; it does~~
18 ~~not apply to any transaction which although in the form of an unconditional contract to sell or~~
19 ~~present sale is intended to operate only as a security transaction nor does this Article impair or~~
20 ~~repeal any statute regulating sales to consumers, farmers or other specified classes of buyers.~~

21 **Section 2-102. Scope; Certain Security and Other Transactions Excluded from**
22 **this Article.**

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

26 (2) In a hybrid transaction:

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

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

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

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

1 whole, and applied only the former in a hybrid transaction.

2
3 Subsection (2) codifies aspects of the predominant purpose test and the bifurcation
4 approach, establishing a two-tiered test. If the sale-of-goods aspects of a hybrid transaction
5 predominate, then Article 2 applies. If the other aspects of the hybrid transaction predominate,
6 then the provisions of Article 2 which relate primarily to the sale of goods, as opposed to the
7 transaction as a whole, apply. This approach has the benefit, for example, of ensuring that a
8 person acquiring ownership of goods in a transaction in which the sale-of-goods aspects do not
9 predominate is a buyer that benefits from the warranty provisions of this Article and may have a
10 right to recover the goods from the seller and thereby may qualify as a buyer in ordinary course
11 of business under Section 1-201(b)(9).

12
13 3. It is important to note that, notwithstanding the frequent reference (under prior
14 case law) to the predominant *purpose* of a hybrid transaction, subsection (2) asks which aspect of
15 the transaction predominates without requiring a finding of the “purpose” of either or both
16 parties (although that purpose, when evident, may be a relevant factor in deciding which aspect
17 predominates). Relevant factors in determining whether the sale-of-goods aspects of a hybrid
18 transaction predominate include the language of the agreement and the portion of the total price
19 that is attributable to the sale of goods, although neither is determinative. An agreed-upon
20 allocation of a portion of the total price to the sale of goods is ordinarily binding on the parties.
21 Other relevant factors include the nature of the seller’s business (i.e., whether the seller is in the
22 business of selling goods of that kind) and, as previously noted, the buyer’s purpose in entering
23 into the transaction. Because the definition of “goods” expressly includes “specially
24 manufactured goods,” services involved in manufacturing goods are normally attributable to the
25 sale-of-goods aspects of the transaction. Services in designing specially manufactured goods,
26 however, would not normally be attributable to the sale-of-goods aspects of the transaction.

27
28 4. If the sale-of-goods aspects of a hybrid transaction predominate, then this Article
29 applies to the transaction. However, the application of this Article to a hybrid transaction does
30 not preclude the application of principles of law and equity to supplement the provisions of this
31 Article, see Section 1-103(b), nor does it preclude, in appropriate circumstances, the application
32 of other law to the non-sale-of-goods aspects of the transaction. Whether it is appropriate to
33 apply such other law will depend in part on what purposes the other law is designed to achieve
34 and whether application of the other law would be likely to interfere with the application of this
35 Article.

36
37 **Example 1.** Owner hires Contractor to replace the roof on a structure. As part of
38 the transaction, Contractor promises to remove the existing shingles and install
39 new shingles, which Contractor is providing. The transaction is a hybrid
40 transaction because it involves the passing of title to the new shingles and the
41 provision of services. If the sale-of-goods aspects of the transaction predominate,
42 this Article applies to the transaction.

43
44 **Example 2.** Same facts as in Example 1. Even if the sale-of-goods aspects of the
45 transaction predominate, other law might apply to the services aspects of the
46 transaction. For example, if applicable law regulates the provision of roofing

1 services, such as by requiring the roofer to be licensed, requiring specified
2 disclosures, requiring or implying a warranty with respect to the quality of
3 services, or giving the property owner a brief period of time to cancel the contract,
4 such other law might apply.

5
6 **Example 3.** In a single transaction, Seller agrees to sell a warehouse full of goods
7 to Buyer. The transaction includes the goods contained in the warehouse, the
8 warehouse itself, and the real property on which the warehouse is situated.
9 Assume the goods aspects of the transaction predominate. The application of this
10 Article to the transaction does not preclude the application of real property law to
11 the real-property aspects of the transaction. Accordingly, whether the sale of the
12 real property complies with the applicable requirements of real property law is
13 determined by law other than this Article. Other law will also determine whether
14 consummation of the sale of the real property is a condition to the parties'
15 obligations to buy and sell the goods.

16
17 5. If the sale-of-goods aspects of a hybrid transaction do not predominate, under
18 subsection (3), the provisions of this Article relating primarily to the sale of goods, as opposed to
19 the transaction as a whole, apply. These provisions include those relating to warranties under
20 Sections 2-212, 2-313, 2-314, 2-315, 2-316, 2-317, 2-318; tender of delivery and risk of loss
21 under Sections 2-503, 2-504, 2-509, 2-510; acceptance, rejection, and cure under Sections 2-508,
22 2-601, 2-602, 2-603, 2-604, 2-605, 2-606; and remedies for non-delivery of the goods or for
23 tender of nonconforming goods under Sections 2-711, 2-712, 2-713, 2-714, 2-715, 2-716. In
24 contrast, the provisions of this Article dealing with the transaction as a whole do not apply.
25 These provisions include those relating to: the requirement of a signed record, Section 2-201;
26 contract formation, Sections 2-204 through 2-207; and whether consideration is needed to
27 modify the agreement, Section 2-209.

28
29 **Example 4.** Owner sends a purchase order to Contractor offering to hire
30 Contractor to replace the roof on a structure. The proposed transaction involves
31 Contractor removing the existing shingles and installing new shingles, which
32 Contractor is to provide. Contractor responds with a confirmation purporting to
33 accept but containing additional and different terms. The transaction is a hybrid
34 transaction because it involves the passing of title to the new shingles and the
35 provision of services. If the sale-of-goods aspects of the transaction do not
36 predominate, this Article does not apply to determine whether a contract was
37 formed. That issue is governed by other law.

38
39 **Example 5.** Under the facts of Example 1, assume that the sale-of-goods aspects
40 of the transaction do not predominate. The agreement provides that the job will be
41 completed by December 31. Due to unforeseen circumstances affecting the
42 availability of supplies and labor, the job is not completed by the agreed-upon
43 deadline. Whether Contractor's failure to perform on time is excused is
44 determined by general contract law, rather than by this Article (Section 2-615).

45
46 **Example 6.** Under the facts of Example 1, assume that the sale-of-goods aspects

1 of the transaction do not predominate. A dispute between the parties arises and
2 during litigation one party seeks to admit evidence of usage of trade to
3 supplement or explain the parties' written agreement. If the proffered evidence
4 relates to the sale-of-goods aspects of the transaction, the parol evidence rule in
5 this Article, Section 2-202 applies. If the proffered evidence relates to the other
6 aspects of the transaction or to the transaction as a whole, other law will govern
7 the admissibility of the evidence.
8

9 **Example 7.** Restaurateur hires Remodeler to remodel Restaurateur's kitchen. The
10 transaction requires Remodeler to supply a new oven meeting detailed
11 specifications, but the services aspects of the transaction predominate. The oven
12 supplied does not meet a minor aspect of those specifications (but does
13 substantially satisfy the specifications as a whole). Whether Restaurateur may
14 reject the oven (or must retain it subject to price adjustment), whether
15 Restaurateur has a right to cover by purchasing a substitute oven, and the measure
16 of Restaurateur's damages for the oven's nonconformity to the specifications are
17 determined by this Article.
18

19 **Example 8.** Restaurateur hires Remodeler to remodel Restaurateur's kitchen by a
20 specified completion date. The transaction requires Remodeler to supply a new
21 oven, but the services aspects of the transaction predominate. Remodeler breaches
22 by failing to complete the project by the specified date. The measure of
23 Restaurateur's damages for Remodeler's failure to timely complete the project is
24 not determined by this Article.
25

26 6. The rules of subsections (1) and (2) are essentially gap fillers that apply
27 when the parties' agreement is silent on what legal rules govern the different aspects of
28 their transaction. In general, parties are free to preclude the application of this Article to
29 the aspects of their transaction that are not about the sale of goods.
30

31 **Example 9.** Robotics Manufacturer contracts to design, build, and sell customized
32 robotics to Car Maker. The transaction includes a sale of goods and the provision
33 of services and is therefore a hybrid transaction. The parties may, in their
34 agreement, provide that Article 2 does not govern the services aspects of the
35 transaction.
36

37 As Example 9 illustrates, parties may agree that Article 2 will not govern non-goods aspects of a
38 hybrid transaction, even though the sale-of-goods aspects predominate. But an opt-out of the
39 Article 2 rules should not apply to matters that relate to the transaction as a whole, such as
40 contract formation and enforceability. For example, in a situation such as Example 9, if the sale-
41 of-goods aspect of the agreement is unenforceable for failure to satisfy the Section 2-201 Statute
42 of Frauds, it would make little sense to hold parties to the services aspects of their agreement
43 when the provision of services is clearly dependent on the existence of the sale-of-goods aspect.
44 Of course, even when this article applies, its provisions may be varied by agreement to the extent
45 provided in section 1-302.
46

1 * * *

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

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

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

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

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

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

21 (a) the provision of services;

22 (b) a lease of other goods; or

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

24 **Official Comment**
25

1 * * *

2
3 **Purposes of Changes and New Matter:**

4
5 1. Subsection (1): “Contract for sale” is used as a general concept throughout this
6 Article, but the rights of the parties do not vary according to whether the transaction is a present
7 sale or a contract to sell unless the Article expressly so provides.
8

9 2. Subsection (2): It is in general intended to continue the policy of requiring exact
10 performance by the seller of his obligations as a condition to his right to require acceptance.
11 However, the seller is in part safeguarded against surprise as a result of sudden technicality on
12 the buyer’s part by the provisions of Section 2–508 on seller’s cure of improper tender or
13 delivery. Moreover, usage of trade frequently permits commercial leeways in performance and
14 the language of the agreement itself must be read in the light of such custom or usage and also,
15 prior course of dealing, and in a long-term contract, the course of performance.
16

17 3. Subsections (3) and (4): These subsections are intended to make clear the
18 distinction carried forward throughout this Article between termination and cancellation.
19

20 4. In some transactions, the passing of title to goods from the seller to the buyer in
21 return for a price is part of a larger transaction. The other aspects of the transaction might involve
22 the seller providing services to the buyer, the seller leasing other goods to the buyer, or the seller
23 transferring to the buyer rights to property other than goods. Such a transaction is a “hybrid
24 transaction,” as defined in subsection (5). Section 2-102 indicates the extent to which this Article
25 applies to a hybrid transaction.
26

27 5. A hybrid transaction is a single transaction. If contracting parties enter into
28 separate agreements at the same time, each agreement creating a separate transaction, each
29 transaction must be evaluated separately to determine if it is a hybrid transaction.
30

31 **Example 1.** To sell an ongoing business, Seller and Buyer enter into three
32 separate written agreements: (i) a sale of goods used in the business; (ii) an
33 agreement for Seller to provide consulting services to Buyer for a period of six
34 months; and (iii) a sale of intangible assets associated with the business. Each
35 agreement creates a separate transaction. None of those transactions involves both
36 a sale of goods and the provision of services, the lease of other goods, or the sale,
37 lease, or license of property other than goods. Thus, none of the separate
38 transactions constitutes a hybrid transaction.
39

40 **Example 2.** To sell an ongoing business, Seller and Buyer enter into two separate
41 written agreements: (i) a sale of goods and intangible assets used in the business;
42 and (ii) an agreement for Seller to provide consulting services to Buyer for a
43 period of six months, and not to compete with Buyer for a period of one year. The
44 agreement to sell goods and intangible assets creates a hybrid transaction. The
45 agreement for consulting services, a separate transaction, is not a hybrid
46 transaction.

1
2 Even when contracting parties enter into a single agreement involving both a sale of goods
3 and a sale, lease, or license of other property or the provision of services, the elements of
4 the single agreement may be so independent that they create separate transactions. In that
5 case, no hybrid transaction would exist merely because the separate transactions arose out of
6 the same agreement.

7
8 **Example 3.** Farmer A and Farmer B sign a written agreement pursuant to which
9 Farmer A will sell a tractor to Farmer B and Farmer A will board and feed Farmer
10 B's cattle until the cattle are sold. The agreement specifies a price for the tractor,
11 which is due upon delivery, and specifies a mechanism for determining the price
12 for Farmer A's services, which is to be paid when the cattle are sold. The parties
13 would have entered into an agreement to buy and sell the tractor even if they had
14 not entered into an agreement to board and feed the cattle, and vice-versa. Two
15 separate transactions arise from the single agreement, neither of which is a hybrid
16 transaction. Article 2 applies to the sale of the tractor. Other law applies to the
17 agreement to board and feed the cattle.

18
19 **Example 4.** In a single record, Landscaper agrees to sell plants to Homeowner
20 and to install the plants on Homeowner's property. The agreement specifies a
21 total price but provides no mechanism for determining what portion of the price is
22 allocable to the sale of plants and what portion is allocable to the installation
23 services. Because the terms of the agreement relating to the sale of goods and
24 those relating to services are not severable, the transaction is a hybrid transaction.

25
26 * * *

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

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

35 (2) Between merchants if within a reasonable time a ~~writing~~ record in confirmation of the
36 contract and sufficient against the sender is received and the party receiving it has reason to

1 know its contents, it satisfies the requirements of subsection (1) against ~~such~~ the party unless
2 ~~written a record containing~~ a notice of objection to its contents is given within 10 days after it is
3 received.

4 * * *

5 **Official Comment**

6 * * *

7
8
9 ~~Purposes of Changes: The changed phraseology of this~~ **Purposes:** This section is intended to
10 make it clear that:

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

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

32
33 Only three definite and invariable requirements as to the ~~memorandum~~ record are made
34 by this subsection. First, it must evidence a contract for the sale of goods; second, it must be
35 “signed”, a word which includes any authentication which identifies the party to be charged; and
36 third, it must specify a quantity.

37 * * *

38
39
40 3. Between merchants, failure to answer a ~~written confirmation of~~ record confirming
41 a contract within ten days of receipt is tantamount to a writing record under subsection (2) and is
42 sufficient against both parties under subsection (1). The only effect, however, is to take away

1 from the party who fails to answer the defense of the Statute of Frauds; the burden of persuading
2 the trier of fact that a contract was in fact made orally prior to ~~the written confirmation giving a~~
3 record confirming a contract is unaffected. Compare the effect of a failure to reply under Section
4 2-207.

5
6 4. Failure to satisfy the requirements of this section does not render the contract void
7 for all purposes, but merely prevents it from being judicially enforced in favor of a party to the
8 contract. For example, a buyer who takes possession of goods as provided in an oral contract
9 which the seller has not meanwhile repudiated, is not a trespasser. Nor would the Statute of
10 Frauds provisions of this section be a defense to a third person who wrongfully induces a party to
11 refuse to perform an oral contract, even though the injured party cannot maintain an action for
12 damages against the party so refusing to perform.

13
14 5. The requirement of “signing” is discussed in ~~the Comment to~~ Section 1-201,
15 Comment 37.

16
17 6. ~~It~~ For purposes of subsection (1), it is not necessary that the ~~writing~~ record be
18 delivered to anybody. It need not be signed by both parties but it is, of course, not sufficient
19 against one who has not signed it. Prior to a dispute no one can determine which party’s signing
20 of the memorandum may be necessary but from the time of contracting each party should be
21 aware that to him it is signing by the other which is important.

22
23 7. If the making of a contract is admitted in court, either in a written pleading, by
24 stipulation or by oral statement before the court, no additional ~~writing~~ record is necessary for
25 protection against fraud. Under this section it is no longer possible to admit the contract in court
26 and still treat the Statute as a defense. However, the contract is not thus conclusively
27 established. The admission so made by a party is itself evidential against him of the truth of the
28 facts so admitted and of nothing more; as against the other party, it is not evidential at all.

29
30 8. In furtherance of medium neutrality, references to “writing” and “written” in the
31 former section have been changed to refer to a “record.”

32
33 * * *

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

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

1 (a) by course of performance, course of dealing, or usage of trade (Section 1-303);
2 and
3 (b) by evidence of consistent additional terms unless the court finds the ~~writing~~
4 record to have been intended also as a complete and exclusive statement of the terms of the
5 agreement.

6 **Official Comment**

7
8 * * *

9 **Purposes:**

10
11 1. This section definitely rejects:

12
13 (a) Any assumption that because a ~~writing~~ record has been worked out which is
14 final on some matters, it is to be taken as including all the matters agreed upon;

15
16 (b) The premise that the language used has the meaning attributable to such
17 language by rules of construction existing in the law rather than the meaning which arises out of
18 the commercial context in which it was used; and

19
20 (c) The requirement that a condition precedent to the admissibility of the type of
21 evidence specified in paragraph (a) is an original determination by the court that the language
22 used is ambiguous.

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

32
33 3. Under paragraph (b) consistent additional terms, not reduced to ~~writing~~ a record,
34 may be proved unless the court finds that the ~~writing~~ record was intended by both parties as a
35 complete and exclusive statement of all the terms. If the additional terms are such that, if agreed
36 upon, they would certainly have been included in the ~~document~~ record in the view of the court,
37 then evidence of their alleged making must be kept from the trier of fact.

38
39 4. In furtherance of medium neutrality, references to a “writing” in the former
40 section have been changed to refer to a “record.”

1 * * *

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

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

6 **Official Comment**

7 * * *

8
9 3. In furtherance of medium neutrality, the reference to a “writing” in the former
10 section has been changed to refer to a “record.”

11 * * *

12
13 **Section 2-205. Firm Offers.**

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

19 **Official Comment**

20
21 * * *

22
23 ~~Purposes of Changes:~~ **Purposes:**

24
25 1. This section is intended to modify the former rule which required that “firm
26 offers” be sustained by consideration in order to bind, and to require instead that they must
27 merely be characterized as such and expressed in signed ~~writings~~ records.

28
29 2. The primary purpose of this section is to give effect to the deliberate intention of a
30 merchant to make a current firm offer binding. The deliberation is shown in the case of an
31 individualized document by the merchant’s signature to the offer, and in the case of an offer
32 included on a form supplied by the other party to the transaction by the separate signing of the
33 particular clause which contains the offer. “Signed” here also includes authentication but the

1 reasonableness of the authentication herein allowed must be determined in the light of the
2 purpose of the section. The circumstances surrounding the signing may justify something less
3 than a formal signature or initialing but typically the kind of authentication involved here would
4 consist of a minimum of initialing of the clause involved. A handwritten memorandum on the
5 writer's letterhead purporting in its terms to "confirm" a firm offer already made would be
6 enough to satisfy this section, although not subscribed, since under the circumstances it could not
7 be considered a memorandum of mere negotiation and it would adequately show its own
8 authenticity. Similarly, an authorized telegram will suffice, and this is true even though the
9 original draft contained only a typewritten signature. See generally Section 1-201(b)(37)
10 (defining "sign") and Comment 37. However, despite settled courses of dealing or usages of the
11 trade whereby firm offers are made by oral communication and relied upon without more
12 evidence, such offers remain revocable under this Article since authentication by a ~~writing~~ record
13 is the essence of this section.

14
15 3. In furtherance of medium neutrality, the references to a "writing" or "writings"
16 have been changed to refer to a "record" or "records."

17
18 * * *

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

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

25 (2) The additional terms are to be construed as proposals for addition to the contract.
26 Between merchants such terms become part of the contract unless:

- 27 (a) the offer expressly limits acceptance to the terms of the offer;
28 (b) they materially alter it; or
29 (c) notification of objection to them has already been given or is given within a
30 reasonable time after notice of them is received.

31 (3) Conduct by both parties which recognizes the existence of a contract is sufficient to
32 establish a contract for sale although the writings of the parties do not otherwise establish a
33 contract. In such case the terms of the particular contract consist of those terms on which the

writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

Official Comment

* * *

8. Notwithstanding references in this section and throughout this 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 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.

Reporter’s Note

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

* * *

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

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

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

* * *

Official Comment

* * *

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

The Statute of Frauds provisions of this Article are expressly applied to modifications by subsection (3). Under those provisions the “delivery and acceptance” test is limited to the goods

1 which have been accepted, that is, to the past. "Modification" for the future cannot therefore be
2 conjured up by oral testimony if the price involved is \$500.00 or more since such modification
3 must be shown at least by a signed memo. And since a memo is limited in its effect to the
4 quantity of goods set forth in it there is safeguard against oral evidence.

5
6 Subsection (2) permits the parties in effect to make their own Statute of Frauds as regards
7 any future modification of the contract by giving effect to a clause in a signed agreement which
8 expressly requires any modification to be by signed writing or other signed record. But note that
9 if a consumer is to be held to such a clause on a form supplied by a merchant it must be
10 separately signed.

11
12 4. Subsection (4) is intended, despite the provisions of subsections (2) and (3), to
13 prevent contractual provisions excluding modification except by a signed ~~writing~~ record from
14 limiting in other respects the legal effect of the parties' actual later conduct. The effect of such
15 conduct as a waiver is further regulated in subsection (5).

16
17 5. In furtherance of medium neutrality, the reference to a signed "writing" has been
18 supplemented to refer as well to a signed "record."

19
20 * * *

21 **Section 2-316. Exclusion or Modification of Warranties.**

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

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

33 (3) Notwithstanding subsection (2)

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

5 (b) when the buyer before entering into the contract has examined the goods or
6 the sample or model as fully as he desired or has refused to examine the goods there is no
7 implied warranty with regard to defects which an examination ought in the circumstances to have
8 revealed to him; and

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

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

14 **Official Comment**

15 * * *

16 10. As to the use of a record other than a writing and communications that are not
17 written, see Section 2-207, Comment 8. Whether a term is conspicuous, including a term in a
18 record other than a writing, is discussed in Section 1-201, Comment 10.
19

20 **Reporter's Note**

21
22 *No change.* No change is proposed to Section 2-316, which is provided for convenience.
23

24 * * *

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

26
27 (1) The buyer's failure to state in connection with rejection a particular defect which is
28 ascertainable by reasonable inspection precludes him from relying on the unstated defect to

1 justify rejection or to establish breach

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

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

5 (2) Payment against documents made without reservation of rights precludes recovery of
6 the payment for defects apparent in the documents.

7 **Official Comment**

8
9 * * *

10
11 5. 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 2-605, which is provided for convenience.

17
18 * * *

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

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

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

27 (3) Where a tender has been accepted

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

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

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

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

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

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

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

20 **Official Comment**

21 * * *

22
23 9. As to the use of a record other than a writing and communications that are not
24 written, see Section 2-207, Comment 8.

25 * * *

1 **Reporter's Note**

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

4
5 * * *

6 **Section 2-609. Right to Adequate Assurance of Performance.**

7 (1) A contract for sale imposes an obligation on each party that the other's expectation of
8 receiving due performance will not be impaired. When reasonable grounds for insecurity arise
9 with respect to the performance of either party the other may in writing demand adequate
10 assurance of due performance and until he receives such assurance may if commercially
11 reasonable suspend any performance for which he has not already received the agreed return.

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

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

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

19 **Official Comment**

20 * * *

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

23
24 **Reporter's Note**

25
26 *No change.* No change is proposed to Section 2-609, which is provided for convenience.

27
28 * * *

29
30 **Section 2-616. Procedure on Notice Claiming Excuse.**

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

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

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

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

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

13 Official Comment

14 1. * * *

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

18 Reporter's Note

19
20
21 *No change.* No change is proposed to Section 2-616, which is provided for convenience.

22 * * *

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

24
25 (1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for
26 cash including payment for all goods theretofore delivered under the contract, and stop delivery
27 under this Article (Section 2-705).

28 (2) Where the seller discovers that the buyer has received goods on credit while insolvent

1 he may reclaim the goods upon demand made within ten days after the receipt, but if
2 misrepresentation of solvency has been made to the particular seller in writing within three
3 months before delivery the ten day limitation does not apply. Except as provided in this
4 subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent
5 misrepresentation of solvency or of intent to pay.

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

9 **Official Comment**

10 * * *

11 4. 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 **Reporter's Note**

14 *No change.* No change is proposed to Section 2-702, which is provided for convenience.
15

16 * * *

17 **ARTICLE 2A**

18 **LEASES**

19 * * *

20 **Section 2A-102. Scope.**

21 (1) This Article applies to any transaction, regardless of form, that creates a lease and, in
22 the case of a hybrid lease, it applies to the extent provided in subsection (2).

23 (2) In a hybrid lease:

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

25 (i) only the provisions of this Article which relate primarily to the lease-

of-goods aspects of the transaction apply, and the provisions that relate primarily to the transaction as a whole do not apply;

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

(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.

(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 the lease which do not relate to the lease of goods.

Official Comment

* * *

Purposes:

1. This 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 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 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, 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 governing consumer leases, as well as other state and federal statutes, that may further limit freedom of contract with respect to consumer leases.

1 3. A court may apply this Article by analogy to any transaction, regardless of form, that
2 creates a lease of personal property other than goods, taking into account the expressed
3 intentions of the parties to the transaction and any differences between a lease of goods and a
4 lease of other property. Such application has precedent as the provisions of the Article on Sales
5 (Article 2) have been applied by analogy to leases of goods. E.g., Hawkland, *The Impact of the*
6 *Uniform Commercial Code on Equipment Leasing*, 1972 Ill.L.F. 446; Murray, *Under the*
7 *Spreading Analogy of Article 2 of the Uniform Commercial Code*, 39 *Fordham L.Rev.* 447
8 (1971). Whether such application would be appropriate for other bailments of personal property,
9 gratuitous or for hire, should be determined by the facts of each case. See *Mieske v. Bartell Drug*
10 *Co.*, 92 Wash.2d 40, 46-48, 593 P.2d 1308, 1312 (1979).

11
12 Further, parties to a transaction creating a lease of personal property other than goods, or
13 another bailment of personal property, may provide by agreement that this Article applies.
14 Upholding the parties' choice is consistent with the spirit of this Article.

15
16 4. If the lease-of-goods aspects of a hybrid lease do not predominate, under subsection
17 (2)(a)(i) the provisions of this Article which relate primarily to the lease-of-goods aspects of the
18 transaction apply and those that relate primarily to the transaction as a whole do not apply. Under
19 subsection (2)(b), if the lease-of-goods aspects of a hybrid lease predominate, this Article applies
20 to the transaction.

21
22 5. Relevant factors in determining whether the lease-of-goods aspects of a hybrid lease
23 predominate include the language of the agreement and the portion of the total price that is
24 attributable to the lease of goods, although neither is determinative. An agreed-upon allocation of
25 a portion of the total price to the right to possession and use of the goods is ordinarily binding on
26 the parties, as is an agreement that the transaction includes or does not include a finance lease.

27
28 6. A finance lease, defined in Section 2A-103(1)(g), may be included in a hybrid lease in
29 which the lease-of-goods aspects of the transaction do not predominate. In such a situation,
30 subsection (2)(a)(ii) makes Section 2A-209 applicable to the transaction and subsection
31 (2)(a)(iii) addresses the application of Section 2A-407 to the promises made by the lessee under
32 the finance lease. That latter section applies to those promises that are consideration for the
33 lessee's right to possession and use of the leased goods. Whether a promise of a lessee so
34 qualifies is a question of fact but an agreed-upon allocation of a portion of the total price to the
35 right to possession and use of the leased goods is ordinarily binding on the parties. The fact that
36 subsection (2)(a)(ii) and (iii) expressly make Sections 2A-209 and 2A-407 applicable if the lease
37 is a finance lease does not prevent application of other provisions of this Article relating to
38 finance leases pursuant to subsection (2)(b).

39
40 **Example 1.** Lessor and Customer enter into a contract that provides for Lessor to:
41 (i) lease equipment to Customer; and (ii) provide to Customer a variety of
42 maintenance and consulting services. The services aspects of the transaction
43 predominate. Lessor did not select, manufacture, or supply the goods; instead, the
44 goods were selected by Customer, and Lessor acquired the goods from Supplier
45 for the sole purpose of leasing the goods to Customer. Assume that the lease
46 aspects of the transaction involve a finance lease under Section 2A-103(1)(g).

1 Pursuant to subsection (3)(a), Sections 2A-212 and 2A-213 apply. Under those
2 sections, because the lease aspect of the transaction is a finance lease, Lessor
3 makes no implied warranty of merchantability or implied warranty of fitness for
4 particular purpose. Pursuant to subsection (2)(a)(ii), Section 2A-209 applies to the
5 transaction. Under that section, all warranties made by Supplier to Lessor extend
6 to Customer.

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

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

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

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

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

43
44 * * *

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

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

2 * * *

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

4 (i) the provision of services;

5 (ii) a sale of other goods; or

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

7 * * *

8 Official Comment

9 * * *

10 (g) “Finance Lease”. * * *

11 * * *

12 * * *

13

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

19 * * *

20 * * *

21

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

27

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

30

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

services.

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

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

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

* * *

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

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

Official Comment

* * *

1. * * *

2. In furtherance of medium neutrality, the reference to a signed “written” waiver or renunciation has been changed to refer to a waiver in a signed “record.”

1 * * *

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

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

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

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

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

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

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

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

21 (b) if the party against whom enforcement is sought admits in that party's
22 pleading, testimony or otherwise in court that a lease contract was made, but the lease contract is
23 not enforceable under this provision beyond the quantity of goods admitted; or

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

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

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

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

7 (c) a reasonable lease term.

8 **Official Comment**

9 * * *

10 **Changes:**

11 1. This section is modeled on Section 2-201, with changes to reflect the differences
12 between a lease contract and a contract for the sale of goods. In particular, subsection (1)(b) adds
13 a requirement that the ~~writing~~ record "describe the goods leased and the lease term", borrowing
14 that concept, with revisions, from the provisions of Section 9-203(1)(a). Subsection (2), relying
15 on the statutory analogue in Section 9-110, sets forth the minimum criterion for satisfying that
16 requirement.
17
18

19 2. In furtherance of medium neutrality, the references to a "writing" have been
20 changed to refer to a "record."
21
22

23 * * *

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

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

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

31 (b) by evidence of consistent additional terms unless the court finds the ~~writing~~

1 record to have been intended also as a complete and exclusive statement of the terms of the
2 agreement.

3 **Official Comment**

4 * * *

5
6 In furtherance of medium neutrality, the references to a “writing” have been changed to
7 refer to a “record.”

8
9 * * *

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

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

14 **Official Comment**

15
16 * * *

17
18 In furtherance of medium neutrality, the references to a “writing” have been changed to
19 refer to a “record.”

20
21 * * *

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

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

28 **Official Comment**

29
30 * * *

31
32 In furtherance of medium neutrality, the reference to a signed “writing” has been changed

1 to refer to a signed “record.”

2
3 * * *

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

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

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

10 * * *

11 **Official Comment**

12
13 * * *

14
15 **Changes:**

16
17 1. Revised to reflect leasing practices and terminology, except that the provisions of
18 subsection 2-209(3) were omitted.

19
20 2. In furtherance of medium neutrality, the reference to a signed “writing” has been
21 changed to refer to a signed “record.”

22
23 * * *

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

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

29 (2) Subject to subsection (3), to exclude or modify the implied warranty of
30 merchantability or any part of it the language must mention “merchantability”, be by a writing,

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

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

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

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

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

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

21 Official Comment

22 * * *

23
24 **Purposes:**

1. * * *

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

* * *

Reporter's Note

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

* * *

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

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

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

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

1 increases the burden or risk imposed on, the other party to the lease contract within the purview
2 of subsection (4).

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

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

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

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

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

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

Official Comment

* * *

10. 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-303, which is provided for convenience.

* * *

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

(1) In this section:

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

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

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

(d) a mortgage is a "construction mortgage" to the extent it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the

1 land, if the recorded writing so indicates; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 **Official Comment**

13
14 * * *

15
16 7. As to the use of a record other than a writing and communications that are not written,
17 see Section 2A-103, Comment (g).

18
19 * * *

20 **Reporter's Note**

21
22
23 *No change.* No change is proposed to Section 2A-309, which is provided for
24 convenience.

25
26 * * *

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

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

29 (2) The interest of a lessor or a lessee under a lease contract entered into before the goods
30 became accessions is superior to all interests in the whole except as stated in subsection (4).

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

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

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

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

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

1 **Official Comment**

2 * * *

3 **Purposes:**

4 * * *

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

7
8 * * *

9
10 **Reporter's Note**

11
12 *No change.* No change is proposed to Section 2A-310, which is provided for
13 convenience.

14
15 * * *

16
17 **Section 2A-401. Insecurity: Adequate Assurance of Performance.**

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

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

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

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

29 (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):

(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.

Official Comment

* * *

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

3
4 **Reporter's Note**

5
6 *No change.* No change is proposed to Section 2A-406, which is provided for
7 convenience.

8 * * *

9
10 **Section 2A-514. Waiver of Lessee's Objections.**

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

14 (a) if, stated seasonably, the lessor or the supplier could have cured it (Section
15 2A-513); or

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

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

21 **Official Comment**

22 * * *

23 **Purposes:**

24 1. * * *

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

27 * * *

28
29 **Reporter's Note**
30

1 *No change.* No change is proposed to Section 2A-514, which is provided for
2 convenience.
3 * * *

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

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

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

15 (3) If a tender has been accepted:

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

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

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

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

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

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

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

13 Official Comment

14 * * *

15
16 4. As to the use of a record other than a writing and communications that are not
17 written, see Section 2A-103, Comment (g).

18 * * *

20 Reporter's Note

21
22
23 *No change.* No change is proposed to Section 2A-516, which is provided for
24 convenience.

25 * * *

27 Prefatory Note to 2022 Payments Amendments

28
29 The changes relating to payments address both statutory text and official comments and
30 concern the following five topics:

31
32 *Negotiability.* An amendment to Section 3-104 specifies that negotiability is not negated

1 by the inclusion of either a choice-of-law term or a choice-of-forum term in an instrument.

2
3 *Remote Deposit Capture.* Amendments to Sections 3-105 and 3-604, and to the official
4 comments to Sections 3-309 and 4-207, clarify that an instrument is “issued” if a drawer sends
5 an image of and information describing an item but never delivers the item.

6
7 *Scope of Article 4A – Definition of Payment Order.* An amendment to the official
8 comment to Section 4A-104 (which includes the comments to Section 4A-103) clarifies when an
9 instruction sent pursuant to a so-called “smart contract” constitutes a payment order.

10
11 *References to a “Writing.”* Amendments to Sections 4A-103, 4A-202, 4A-203, 4A-207,
12 4A-208, 4A-210, 4A-211 and 4A-305 change the references to a “writing” or “written” to a
13 “record.”

14
15 *Security Procedures.* Amendments to Sections 4A-201 and 4A-202, and to the official
16 comment to Section 4A-203, clarify that: (i) a security procedure may impose obligations on the
17 receiving bank, the customer, or both; (ii) a security procedure may require the use of symbols,
18 sounds, or biometrics; and (iii) a requirement that a payment order be sent from a known email
19 address, IP address, or phone number is not by itself a security procedure.

20 21 **ARTICLE 3**

22 **NEGOTIABLE INSTRUMENTS**

23 **Section 3-104. Negotiable Instrument.**

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

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

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

30 (3) does not state any other undertaking or instruction by the person promising or
31 ordering payment to do any act in addition to the payment of money, but the promise or order
32 may contain (i) an undertaking or power to give, maintain, or protect collateral to secure
33 payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose

1 of collateral, ~~or~~ (iii) a waiver of the benefit of any law intended for the advantage or protection of
2 an obligor, (iv) a term that specifies the law that governs the promise or order, or (v) an
3 undertaking to resolve in a specified forum a dispute concerning the promise or order.

4 * * *

5 Official Comment

6
7 1. The definition of “negotiable instrument” defines the scope of Article 3 since
8 Section 3-102 states: “This Article applies to negotiable instruments.” The definition in Section
9 3-104(a) incorporates other definitions in Article 3. An instrument is either a “promise,” defined
10 in Section 3-103(a)(12), or “order,” defined in Section 3-103(a)(8). A promise is a written
11 undertaking to pay money signed by the person undertaking to pay. An order is a written
12 instruction to pay money signed by the person giving the instruction. Thus, the term “negotiable
13 instrument” is limited to a signed writing that orders or promises payment of money. “Money” is
14 defined in Section 1-201(b)(24) and is not limited to United States dollars. It also includes a
15 medium of exchange established by a foreign government or monetary units of account
16 established by an intergovernmental organization or by agreement between two or more nations.
17 Five other requirements are stated in Section 3–104(a): First, the promise or order must be
18 “unconditional.” The quoted term is explained in Section 3-106. Second, the amount of money
19 must be “a fixed amount . . . with or without interest or other charges described in the promise or
20 order.” Section 3-112(b) relates to “interest.” Third, the promise or order must be “payable to
21 bearer or to order.” The quoted phrase is explained in Section 3-109. An exception to this
22 requirement is stated in subsection (c). Fourth, the promise or order must be payable “on demand
23 or at a definite time.” The quoted phrase is explained in Section 3-108. Fifth, the promise or
24 order may not state “any other undertaking or instruction by the person promising or ordering
25 payment to do any act in addition to the payment of money” with ~~three~~ five exceptions. The
26 quoted phrase is based on the first sentence of N.I.L. Section 5 which is the precursor of “no
27 other promise, order, obligation or power given by the maker or drawer” appearing in former
28 Section 3-104(1)(b). The words “instruction” and “undertaking” are used instead of “order” and
29 “promise” that are used in the N.I.L. formulation because the latter words are defined terms that
30 include only orders or promises to pay money. The first three exceptions stated in Section
31 3-104(a)(3) are based on and are intended to have the same meaning as former Section
32 3-112(1)(b), (c), (d), and (e), as well as N.I.L. § 5(1), (2), and (3). The final two exceptions stated
33 in Section 3-104(a)(3) deal with choice-of-law and choice-of-forum clauses. The latter of these
34 includes an agreement to arbitrate. Subsection (b) states that “instrument” means a “negotiable
35 instrument.” This follows former Section 3-102(1)(e) which treated the two terms as
36 synonymous.

37 * * *

38 Section 3-105. Issue of Instrument.

39
40
41 (a) “Issue” means:

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

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

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

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

Official Comment

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

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

* * *

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

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

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

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

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

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

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

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

19 **Official Comment**

20 * * *

21 4. The destruction of a check in connection with a truncation process in which
22 information is extracted from the check and an image of the check is made, and then such
23 information and image are transmitted for payment does not, by itself, prevent application of this
24 section. See Section 3-604 Comment 1.
25

26 **Example:** The payee of a check creates an image of the check, destroys the check, and

1 transmits the image and information derived from the check for payment. Due to an error
2 in transmission, the depository bank never receives the transmission. The payee may be
3 able to enforce the check if the payee can prove the terms of the check and otherwise
4 satisfy the requirements of this section. The result would be different if there were no
5 error in the transmission and the payor discharged its obligation on the check.

6
7 * * *

8 9 **Reporter's Note**

10
11 *No change.* No change is proposed to Section 3-309, which is provided for convenience.

12
13 * * *

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

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

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

21 **Official Comment**

22
23 1. ~~Obligation~~ This section provides the fundamental rule that an obligation on an
24 instrument depends on a signature that is binding on the obligor. The signature may be made by
25 the obligor personally or by an agent or other representative authorized to act for the obligor.
26 Signature by agents and other representatives is covered by Section 3-402. It is not necessary
27 that the name of the obligor appear on the instrument, so long as there is a signature that binds
28 the obligor. ~~Signature includes an indorsement. These obligations include those on an "order"~~
29 ~~(Section 3-103(a)(6)) and a "promise" (Section 3-103(a)(9)) and those of an "issuer," "maker,"~~
30 ~~or "drawer" (Sections 3-103(a)(5) and (7), 3-105(c), 3-412, and 3-414), an "acceptor" (Sections~~
31 ~~3-409 and 3-413), and an indorser (Sections 3-204(b) and 3-415).~~

32
33 2. ~~A signature may be handwritten, typed, printed or made in any other manner. It~~
34 ~~need not be subscribed, and may appear in the body of the instrument, as in the case of "I, John~~
35 ~~Doe, promise to pay ***" without any other signature. It may be made by mark, or even by~~
36 ~~thumbprint. It may be made in any name, including any trade name or assumed name, however~~
37 ~~false and fictitious, which is adopted for the purpose. Parol evidence is admissible to identify the~~
38 ~~signer, and when the signer is identified the signature is effective. Indorsement in a name other~~

1 ~~than that of the indorser is governed by Section 3-204(d).~~ Subsection (b) of the previous text of
2 ~~this section has been deleted as unnecessary in view of the revised definition of “sign.” See~~
3 ~~Section 1-201(b)(37) and Comment 37. Former subsection (b) provided examples of the means~~
4 ~~of making a signature with the present intention of authenticating a writing, such as by means of~~
5 ~~a device or machine, by the use of a trade name or assumed name, or by the use of a word, mark,~~
6 ~~or symbol. These means are encompassed by the broad, general terms of the revised definition of~~
7 ~~“sign.” A signature may appear in the body of the instrument, as in the case of “I, John Doe,~~
8 ~~promise to pay *** ” without any other signature. It may be made in any name, including a name~~
9 ~~other than a designated payee. However, to be signed an instrument (a writing) must exist at the~~
10 ~~time it is signed by the execution or adoption of a tangible symbol on the instrument. The~~
11 ~~deletion of former subsection (b) effected no change in the law.~~

12
13 ~~3. — This section is not intended to affect any other law requiring a signature by mark~~
14 ~~to be witnessed, or any signature to be otherwise authenticated, or requiring any form of proof.~~

15 16 **Reporter’s Note**

17
18 As explained in Comment 2, Subsection (b) was deleted because the revised definition of
19 “sign” made the subsection unnecessary and not because the provision had proved problematic.
20 In particular, its removal eliminated any implication that the revised definition was inadequate
21 for purposes of this Article

22
23 * * *

24 **Section 3-604. Discharge by Cancellation or Renunciation.**

25 (a) A person entitled to enforce an instrument, with or without consideration, may
26 discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such
27 as surrender of the instrument to the party, destruction, mutilation, or cancellation of the
28 instrument, cancellation or striking out of the party’s signature, or the addition of words to the
29 instrument indicating discharge, or (ii) by agreeing not to sue or otherwise renouncing rights
30 against the party by a signed record. The obligation of a party to pay a check is not discharged
31 solely by the destruction of the check in connection with a process in which information is
32 extracted from the check and an image of the check is made and, subsequently, the information
33 and image are transmitted for payment.

34 (b) Cancellation or striking out of an indorsement pursuant to subsection (a) does not

1 affect the status and rights of a party derived from the indorsement.

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

5 **Official Comment**

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

7
8 2. The destruction of a check in connection with a truncation process in which
9 information is extracted from the check and an image of the check is made, and then such
10 information and image are transmitted for payment is not within the scope of this section and
11 does not by itself discharge the obligation of a party to pay the instrument. The destruction of the
12 check also does not affect whether the check has been issued. See Section 3-105(a) and
13 Comment 1.

14
15 3. Former subsection (c) has been deleted as unnecessary in view of the revised
16 definition of “sign” in Section 1-201.

17
18 * * *

19 **ARTICLE 4**

20 **BANK DEPOSITS AND COLLECTIONS**

21 * * *

22 **Section 4-207. Transfer Warranties.**

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

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

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

27 (3) the item has not been altered;

28 (4) the item is not subject to a defense or claim in recoupment (Section 3-305(a))

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

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

Official Comment

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

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

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

Reporter's Note

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

ARTICLE 4A

FUNDS TRANSFERS

Section 4A-103. Payment Order – Definitions.

(a) In this Article:

(1) “Payment order” means an instruction of a sender to a receiving bank, transmitted orally, ~~electronically, or in writing~~ or in a record, to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary if:

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

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

(iii) the instruction is transmitted by the sender directly to the receiving

1 bank or to an agent, funds-transfer system, or communication system for transmittal to the
2 receiving bank.

3 * * *

4 **Official Comment**

5
6 1. This section is discussed in the Comment following Section 4A-104.

7
8 2. In furtherance of medium neutrality, the reference to “electronically, or in
9 writing” has been changed to refer to “in a record.”

10
11 **Section 4A-104. Funds Transfer – Definitions.**

12 In this Article:

13 (a) “Funds transfer” means the series of transactions, beginning with the
14 originator's payment order, made for the purpose of making payment to the beneficiary of the
15 order. The term includes any payment order issued by the originator's bank or an intermediary
16 bank intended to carry out the originator's payment order. A funds transfer is completed by
17 acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the
18 originator's payment order.

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

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

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

25 **Official Comment**

26 * * *

27
28
29 3. Further limitations on the scope of Article 4A are found in the three requirements

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

5
6 ~~For example,~~ **Example:** a New York bank may have issued a letter of credit in favor of
7 X, a California seller of goods to be shipped to the New York bank’s customer in New
8 York. The terms of the letter of credit provide for payment to X if documents are
9 presented to prove shipment of the goods. Instead of providing for presentment of the
10 documents to the New York bank, the letter of credit states that they may be presented to
11 a California bank that acts as an agent for payment. The New York bank sends an
12 instruction to the California bank to pay X upon presentation of the required documents.
13 The instruction is not covered by Article 4A because payment to the beneficiary is
14 conditional upon receipt of shipping documents. The function of banks in a funds transfer
15 under Article 4A is comparable to the role of banks in the collection and payment of
16 checks in that it is essentially mechanical in nature. The low price and high speed that
17 characterize funds transfers reflect this fact. Conditions to payment by the California
18 bank other than time of payment impose responsibilities on that bank that go beyond
19 those in Article 4A funds transfers. Although the payment by the New York bank to X
20 under the letter of credit is not covered by Article 4A, if X is paid by the California bank,
21 payment of the obligation of the New York bank to reimburse the California bank could
22 be made by an Article 4A funds transfer. In such a case there is a distinction between the
23 payment by the New York bank to X under the letter of credit and the payment by the
24 New York bank to the California bank. For example, if the New York bank pays its
25 reimbursement obligation to the California bank by a Fedwire naming the California bank
26 as beneficiary (see Comment 1 to Section 4A-107), payment is made to the California
27 bank rather than to X. That payment is governed by Article 4A and it could be made
28 either before or after payment by the California bank to X. The payment by the New
29 York bank to X under the letter of credit is not governed by Article 4A and it occurs
30 when the California bank, as agent of the New York bank, pays X. No payment order was
31 involved in that transaction. In this example, if the New York bank had erroneously sent
32 an instruction to the California bank unconditionally instructing payment to X, the
33 instruction would have been an Article 4A payment order. If the payment order was
34 accepted (Section 4A-209(b)) by the California bank, a payment by the New York bank
35 to X would have resulted (Section 4A-406(a)). But Article 4A would not prevent
36 recovery of funds from X on the basis that X was not entitled to retain the funds under the
37 law of mistake and restitution, letter of credit law or other applicable law.

38
39 An instruction to pay might be a component of a computer program or a transaction
40 protocol intended to execute automatically under specified circumstances. The fact that the
41 program or protocol itself is subject to a condition does not necessarily mean that an instruction
42 to pay issued pursuant to that program or protocol “state[s] a condition to payment of the
43 beneficiary” within the meaning of Section 4A-103(a)(1)(i). Whether the instruction does state
44 such a condition depends on what the instruction says when it is received by the receiving bank.
45 An instruction that neither grants discretion nor imposes a limitation on payment by the receiving
46 bank does not state a condition to payment. What distinguishes the prior example is that the New

1 York bank's instruction to the California bank did state a condition when the California bank
2 received it.

3
4 Similarly, an instruction that is subject to a condition when received by Bank A, and
5 which therefore does not constitute a payment order, does not become a payment order when the
6 condition is satisfied. However, if, after the condition is satisfied, Bank A sends the instruction to
7 Bank B without the stated condition, that second instruction could be a payment order if the
8 instruction otherwise complies with Section 4A-103(a).

9
10 * * *

11 **Reporter's Note**

12
13
14 *No change.* No change is proposed to Section 4A-104, which is provided for
15 convenience.

16
17 * * *

18 **Section 4A-201. Security Procedure.** "Security procedure" means a procedure
19 established by agreement of a customer and a receiving bank for the purpose of (i) verifying that
20 a payment order or communication amending or cancelling a payment order is that of the
21 customer, or (ii) detecting error in the transmission or the content of the payment order or
22 communication. A security procedure may impose an obligation on the receiving bank or the
23 customer and may require the use of algorithms or other codes, identifying words, ~~or~~ numbers,
24 symbols, sounds, biometrics, encryption, callback procedures, or similar security devices.
25 Comparison of a signature on a payment order or communication with an authorized specimen
26 signature of the customer or requiring a payment order to be sent from a known email address, IP
27 address, or phone number is not by itself a security procedure.

28 **Official Comment**

29
30 A large percentage of payment orders and communications amending or cancelling
31 payment orders are transmitted electronically and it is standard practice to use security
32 procedures that are designed to assure the authenticity of the message through steps designed to
33 assure the identity of the sender, the integrity of the message, or both. Security procedures can
34 also be used to detect error in the content of messages or to detect payment orders that are
35 transmitted by mistake as in the case of multiple transmission of the same payment order.

1 Security procedures might also apply to communications that are transmitted by telephone or in
2 ~~writing~~ a record. Section 4A-201 defines these security procedures. The second sentence of the
3 definition provides several examples of a security procedure, but this list is not exhaustive. The
4 inclusion of the phrase “or similar security devices” means that, as new technologies emerge,
5 what can be a security procedure will evolve. The definition of security procedure limits the term
6 to a procedure “established by agreement of a customer and a receiving bank.” The term does not
7 apply to procedures that the receiving bank may follow unilaterally in processing payment
8 orders. The question of whether loss that may result from the transmission of a spurious or
9 erroneous payment order will be borne by the receiving bank or the sender or purported sender is
10 affected by whether a security procedure was or was not in effect and whether there was or was
11 not compliance with the procedure. Security procedures are referred to in Sections 4A-202 and
12 4A-203, which deal with authorized and verified payment orders, and Section 4A-205, which
13 deals with erroneous payment orders.
14

15 Requiring that a payment order be sent from a known email, IP address or phone number
16 is not by itself a “security procedure” within the meaning of this section because it is possible to
17 make a payment order with a different origin appear to have been sent from such an address or
18 phone number. However, requiring that a payment order have such an apparent origin in
19 combination with other security protocols might be a security procedure.
20

21 **Section 4A-202. Authorized and Verified Payment Orders.**

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

25 (b) If a bank and its customer have agreed that the authenticity of payment orders issued
26 to the bank in the name of the customer as sender will be verified pursuant to a security
27 procedure, a payment order received by the receiving bank is effective as the order of the
28 customer, whether or not authorized, if (i) the security procedure is a commercially reasonable
29 method of providing security against unauthorized payment orders, and (ii) the bank proves that
30 it accepted the payment order in good faith and in compliance with the bank’s obligations under
31 the security procedure and any ~~written~~ agreement or instruction of the customer, evidenced by a
32 record, restricting acceptance of payment orders issued in the name of the customer. The bank is
33 not required to follow an instruction that violates ~~a written~~ an agreement evidenced by a record

1 with the customer or notice of which is not received at a time and in a manner affording the bank
2 a reasonable opportunity to act on it before the payment order is accepted.

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

14 * * *

15 Official Comment

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

17 2. In furtherance of medium neutrality, references to “written” and “writing” have
18 been changed to refer to a “record.”

20 Section 4A-203. Unenforceability of Certain Verified Payment Orders.

21 (a) If an accepted payment order is not, under Section 4A-202(a), an authorized order of a
22 customer identified as sender, but is effective as an order of the customer pursuant to Section
23 4A-202(b), the following rules apply:

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

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

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

Official Comment

* * *

3. Subsection (b) of Section 4A-202 is based on the assumption that losses due to fraudulent payment orders can best be avoided by the use of commercially reasonable security procedures, and that the use of such procedures should be encouraged. The subsection is designed to protect both the customer and the receiving bank. A receiving bank needs to be able to rely on objective criteria to determine whether it can safely act on a payment order. Employees of the bank can be trained to “test” a payment order according to the various steps specified in the security procedure. The bank is responsible for the acts of these employees. Subsection (b)(ii) requires the bank to prove that it accepted the payment order in good faith and “in compliance with the bank’s obligations under the security procedure.” If the fraud was not detected because the bank’s employee did not perform the acts required by the security procedure, the bank has not complied. Subsection (b)(ii) also requires the bank to prove that it complied with any agreement or instruction that restricts acceptance of payment orders issued in the name of the customer. If an agreement establishing a security procedure places obligations on both the sender and the receiving bank, the receiving bank need prove only that it complied with the obligations placed on the receiving bank. A customer may want to protect itself by imposing limitations on acceptance of payment orders by the bank. For example, the customer may prohibit the bank from accepting a payment order that is not payable from an authorized account, that exceeds the credit balance in specified accounts of the customer, or that exceeds some other amount. Another limitation may relate to the beneficiary. The customer may provide the bank with a list of authorized beneficiaries and prohibit acceptance of any payment order to a beneficiary not appearing on the list. Such limitations may be incorporated into the security procedure itself or they may be covered by a separate agreement or instruction. In either case, the

1 bank must comply with the limitations if the conditions stated in subsection (b) are met.
2 Normally limitations on acceptance would be incorporated into an agreement between the
3 customer and the receiving bank, but in some cases the instruction might be unilaterally given by
4 the customer. If standing instructions or an agreement state limitations on the ability of the
5 receiving bank to act, provision must be made for later modification of the limitations. Normally
6 this would be done by an agreement that specifies particular procedures to be followed. Thus,
7 subsection (b) states that the receiving bank is not required to follow an instruction that violates a
8 ~~written~~ an agreement evidenced by a record. The receiving bank is not bound by an instruction
9 unless it has adequate notice of it. ~~Subsections (25), (26), and (27) of Section 1-201 apply~~
10 Section 1-202 applies.

11
12 Subsection (b)(i) assures that the interests of the customer will be protected by providing
13 an incentive to a bank to make available to the customer a security procedure that is
14 commercially reasonable. If a commercially reasonable security procedure is not made available
15 to the customer, subsection (b) does not apply. The result is that subsection (a) applies and the
16 bank acts at its peril in accepting a payment order that may be unauthorized. Prudent banking
17 practice may require that security procedures be utilized in virtually all cases except for those in
18 which personal contact between the customer and the bank eliminates the possibility of an
19 unauthorized order. The burden of making available commercially reasonable security
20 procedures is imposed on receiving banks because they generally determine what security
21 procedures can be used and are in the best position to evaluate the efficacy of procedures offered
22 to customers to combat fraud. The burden on the customer is to supervise its employees to assure
23 compliance with the security procedure and to safeguard confidential security information and
24 access to transmitting facilities so that the security procedure cannot be breached.

25
26 4. The principal issue that is likely to arise in litigation involving subsection (b) is
27 whether the security procedure in effect when a fraudulent payment order was accepted was
28 commercially reasonable. In considering this issue, a court will need to consider the totality of
29 the security procedure, including each party's obligations under the procedure. The concept of
30 what is commercially reasonable in a given case is flexible. Verification entails labor and
31 equipment costs that can vary greatly depending upon the degree of security that is sought. A
32 customer that transmits very large numbers of payment orders in very large amounts may desire
33 and may reasonably expect to be provided with state-of-the-art procedures that provide
34 maximum security. But the expense involved may make use of a state-of-the-art procedure
35 infeasible for a customer that normally transmits payment orders infrequently or in relatively low
36 amounts. Another variable is the type of receiving bank. It is reasonable to require large money
37 center banks to make available state-of-the-art security procedures. On the other hand, the same
38 requirement may not be reasonable for a small country bank. A receiving bank might have
39 several security procedures that are designed to meet the varying needs of different customers.
40 The type of payment order is another variable. For example, in a wholesale wire transfer, each
41 payment order is normally transmitted electronically and individually. A testing procedure will
42 be individually applied to each payment order. In funds transfers to be made by means of an
43 automated clearing house many payment orders are incorporated into an electronic device such
44 as a magnetic tape that is physically delivered. Testing of the individual payment orders is not
45 feasible. Thus, a different kind of security procedure must be adopted to take into account the
46 different mode of transmission.

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

39
40 5. Subsection (b) generally allows a receiving bank to treat a payment order as
41 authorized by the customer if the bank accepts the payment order in good faith and in
42 compliance with the bank's obligations under a commercially reasonable, agreed-upon security
43 procedure. For this purpose, "good faith" requires the exercise of reasonable commercial
44 standards of fair dealing, see Section 4A-105(a)(6), not the absence of negligence. Consequently,
45 the bank has no duty, beyond that to which the bank has agreed, to investigate suspicious activity
46 or to advise its customer of such activity. However, a bank that obtains knowledge that a

1 customer's operations have been infiltrated or knowledge that the customer is the victim of
2 identity fraud might not be acting in good faith if the bank, without receiving some assurance
3 from the customer that the issue has been remediated, thereafter accepts a payment order.
4

5 5.6. The effect of Section 4A-202(b) is to place the risk of loss on the customer if an
6 unauthorized payment order is accepted by the receiving bank after verification by the bank in
7 compliance with a commercially reasonable security procedure. An exception to this result is
8 provided by Section 4A-203(a)(2). The customer may avoid the loss resulting from such a
9 payment order if the customer can prove that the fraud was not committed by a person described
10 in that subsection. Breach of a commercially reasonable security procedure requires that the
11 person committing the fraud have knowledge of how the procedure works and knowledge of
12 codes, identifying devices, and the like. That person may also need access to transmitting
13 facilities through an access device or other software in order to breach the security procedure.
14 This confidential information must be obtained either from a source controlled by the customer
15 or from a source controlled by the receiving bank. If the customer can prove that the person
16 committing the fraud did not obtain the confidential information from an agent or former agent
17 of the customer or from a source controlled by the customer, the loss is shifted to the bank.
18 "Prove" is defined in Section 4A-105(a)(7). Because of bank regulation requirements, in this
19 kind of case there will always be a criminal investigation as well as an internal investigation of
20 the bank to determine the probable explanation for the breach of security. Because a funds
21 transfer fraud usually will involve a very large amount of money, both the criminal investigation
22 and the internal investigation are likely to be thorough. In some cases, there may be an
23 investigation by bank examiners as well. Frequently, these investigations will develop evidence
24 of who is at fault and the cause of the loss. The customer will have access to evidence developed
25 in these investigations and that evidence can be used by the customer in meeting its burden of
26 proof.
27

28 6.7. The effect of Section 4A-202(b) may also be changed by an agreement meeting
29 the requirements of Section 4A-203(a)(1). Some customers may be unwilling to take all or part
30 of the risk of loss with respect to unauthorized payment orders even if all of the requirements of
31 Section 4A-202(b) are met. By virtue of Section 4A-203(a)(1), a receiving bank may assume all
32 of the risk of loss with respect to unauthorized payment orders or the customer and bank may
33 agree that losses from unauthorized payment orders are to be divided as provided in the
34 agreement.
35

36 7.8. In a large majority of cases the sender of a payment order is a bank. In many cases
37 in which there is a bank sender, both the sender and the receiving bank will be members of a
38 funds transfer system over which the payment order is transmitted. Since Section 4A-202(f) does
39 not prohibit a funds transfer system rule from varying rights and obligations under Section 4A-
40 202, a rule of the funds transfer system can determine how loss due to an unauthorized payment
41 order from a participating bank to another participating bank is to be allocated. A funds transfer
42 system rule, however, cannot change the rights of a customer that is not a participating bank.
43 Section 4A-501(b). Section 4A-202(f) also prevents variation by agreement except to the extent
44 stated.
45

46 9. In furtherance of medium neutrality, references to "written" and "writing" have

1 been changed to refer to a “record.”

2
3 * * *

4
5 **Section 4A-206. Transmission of Payment Order Through Funds-Transfer or**
6 **Other Communication System.**

7 (a) If a payment order addressed to a receiving bank is transmitted to a funds-transfer
8 system or other third-party communication system for transmittal to the bank, the system is
9 deemed to be an agent of the sender for the purpose of transmitting the payment order to the
10 bank. If there is a discrepancy between the terms of the payment order transmitted to the system
11 and the terms of the payment order transmitted by the system to the bank, the terms of the
12 payment order of the sender are those transmitted by the system. This section does not apply to a
13 funds-transfer system of the Federal Reserve Banks.

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

16 **Official Comment**

17
18 1. A payment order may be issued to a receiving bank directly by delivery of a
19 ~~writing or electronic device~~ record or by an oral ~~or electronic~~ communication. If an agent of the
20 sender is employed to transmit orders on behalf of the sender, the sender is bound by the order
21 transmitted by the agent on the basis of agency law. Section 4A-206 is an application of that
22 principle to cases in which a funds transfer or communication system acts as an intermediary in
23 transmitting the sender’s order to the receiving bank. The intermediary is deemed to be an agent
24 of the sender for the purpose of transmitting payment orders and related messages for the sender.
25 Section 4A-206 deals with error by the intermediary.

26
27 * * *

28 **Reporter’s Note**

29
30 *No change.* No change is proposed to Section 4A-206, which is provided for
31 convenience.

32
33 **Section 4A-207. Misdescription of Beneficiary.**

* * *

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

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

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

* * *

Official Comment

* * *

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

Section 4A-208. Misdescription of Intermediary Bank or Beneficiary's Bank.

* * *

(b) This subsection applies to a payment order identifying an intermediary bank or the beneficiary's bank both by name and an identifying number if the name and number identify

1 different persons.

2 (1) If the sender is a bank, the receiving bank may rely on the number as the
3 proper identification of the intermediary or beneficiary's bank if the receiving bank, when it
4 executes the sender's order, does not know that the name and number identify different persons.
5 The receiving bank need not determine whether the name and number refer to the same person or
6 whether the number refers to a bank. The sender is obliged to compensate the receiving bank for
7 any loss and expenses incurred by the receiving bank as a result of its reliance on the number in
8 executing or attempting to execute the order.

9 (2) If the sender is not a bank and the receiving bank proves that the sender,
10 before the payment order was accepted, had notice that the receiving bank might rely on the
11 number as the proper identification of the intermediary or beneficiary's bank even if it identifies
12 a person different from the bank identified by name, the rights and obligations of the sender and
13 the receiving bank are governed by subsection (b)(1), as though the sender were a bank. Proof of
14 notice may be made by any admissible evidence. The receiving bank satisfies the burden of proof
15 if it proves that the sender, before the payment order was accepted, signed a ~~writing~~ record
16 stating the information to which the notice relates.

17 * * *

18 Official Comment

19 In furtherance of medium neutrality, the reference to a "writing" has been changed to
20 refer to a "record."

21 * * *

23 Section 4A-210. Rejection of Payment Order.

24 (a) A payment order is rejected by the receiving bank by a notice of rejection transmitted
25 to the sender orally, ~~electronically~~, or in ~~writing~~ a record. A notice of rejection need not use any

1 particular words and is sufficient if it indicates that the receiving bank is rejecting the order or
2 will not execute or pay the order. Rejection is effective when the notice is given if transmission
3 is by a means that is reasonable in the circumstances. If notice of rejection is given by a means
4 that is not reasonable, rejection is effective when the notice is received. If an agreement of the
5 sender and receiving bank establishes the means to be used to reject a payment order, (i) any
6 means complying with the agreement is reasonable and (ii) any means not complying is not
7 reasonable unless no significant delay in receipt of the notice resulted from the use of the
8 noncomplying means.

9 * * *

10 **Official Comment**

11 * * *

12 5. In furtherance of medium neutrality, the reference to a “writing” has been
13 changed to refer to a “record.”
14

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

16 (a) A communication of the sender of a payment order cancelling or amending the order
17 may be transmitted to the receiving bank orally, ~~electronically~~, or in writing a record. If a
18 security procedure is in effect between the sender and the receiving bank, the communication is
19 not effective to cancel or amend the order unless the communication is verified pursuant to the
20 security procedure or the bank agrees to the cancellation or amendment.

21 * * *

22 **Official Comment**

23 * * *

24
25
26 2. Subsection (a) allows a cancellation or amendment of a payment order to be
27 communicated to the receiving bank “orally, ~~electronically~~, or in writing a record.” The quoted
28 phrase is consistent with the language of Section 4A-103(a) applicable to payment orders.

1 Cancellations and amendments are normally subject to verification pursuant to security
2 procedures to the same extent as payment orders. Subsection (a) recognizes this fact by
3 providing that in cases in which there is a security procedure in effect between the sender and the
4 receiving bank the bank is not bound by a communication cancelling or amending an order
5 unless verification has been made. This is necessary to protect the bank because under subsection
6 (b) a cancellation or amendment can be effective by unilateral action of the sender. Without
7 verification the bank cannot be sure whether the communication was or was not effective to
8 cancel or amend a previously verified payment order.

9
10 * * *

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

13
14 * * *

15
16 **Section 4A-305. Liability for Late or Improper Execution or Failure to Execute**
17 **Payment Order.**

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

23 (b) If execution of a payment order by a receiving bank in breach of Section 4A-302
24 results in (i) noncompletion of the funds transfer, (ii) failure to use an intermediary bank
25 designated by the originator, or (iii) issuance of a payment order that does not comply with the
26 terms of the payment order of the originator, the bank is liable to the originator for its expenses
27 in the funds transfer and for incidental expenses and interest losses, to the extent not covered by
28 subsection (a), resulting from the improper execution. Except as provided in subsection (c),
29 additional damages are not recoverable.

30 (c) In addition to the amounts payable under subsections (a) and (b), damages, including

1 consequential damages, are recoverable to the extent provided in an express ~~written~~ agreement of
2 the receiving bank, evidenced by a record.

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

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

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

16 Official Comment

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

1 subsection (a) by paying one day's interest to Beneficiary's Bank for the account of Beneficiary.

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

9
10 * * *

11
12 Subsection (c) allows the measure of damages in subsection (b) to be increased by an
13 express ~~written~~ agreement of the receiving bank, evidenced by a record. An originator's bank
14 might be willing to assume additional responsibilities and incur additional liability in exchange
15 for a higher fee.

16
17 3. Subsection (d) governs cases in which a receiving bank has obligated itself by
18 express agreement to accept payment orders of a sender. In the absence of such an agreement
19 there is no obligation by a receiving bank to accept a payment order. Section 4A-212. The
20 measure of damages for breach of an agreement to accept a payment order is the same as that
21 stated in subsection (b). As in the case of subsection (b), additional damages, including
22 consequential damages, may be recovered to the extent stated in an express ~~written~~ agreement of
23 the receiving bank, evidenced by a record.

24
25 4. Reasonable attorney's fees are recoverable only in cases in which damages are
26 limited to statutory damages stated in subsection (a), (b) and (d). If additional damages are
27 recoverable because provided for by an express ~~written~~ agreement, evidenced by a record,
28 attorney's fees are not recoverable. The rationale is that there is no need for statutory attorney's
29 fees in the latter case, because the parties have agreed to a measure of damages which may or
30 may not provide for attorney's fees.

31
32 5. The effect of subsection (f) is to prevent reduction of a receiving bank's liability
33 under Section 4A-305.

34
35 6. In furtherance of medium neutrality, references to a "written" agreement have
36 been changed to refer to an agreement "evidenced by a record."

37
38 * * *

39 40 ARTICLE 5

41 LETTERS OF CREDIT

42 * * *

43 Section 5-104. Formal Requirements.

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

4 Official Comment

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

14
15 2. The ~~authentication~~ requirement that a record be signed as specified in this section is
16 authentication or adoption only of the identity of the issuer, confirmer, or adviser. The reference
17 in the former text of this section to authentication by agreement of the parties or standard
18 practice referred to in Section 5-108(e) is no longer necessary because those forms of
19 authentication are subsumed by the revised and expanded definition of “sign” in Section 1-
20 201(b)(37), which is broad and flexible.

21
22 ~~An authentication agreement may be by system rule, by standard practice, or by direct~~
23 ~~agreement between the parties. The reference to practice is intended to incorporate future~~
24 ~~developments in the UCP and other practice rules as well as those that may arise spontaneously~~
25 ~~in commercial practice.~~

26
27 3. Many banking transactions, including the issuance of many letters of credit, are
28 now conducted mostly by electronic means. For example, S.W.I.F.T. is currently used to
29 transmit letters of credit from issuing to advising banks. The letter of credit text so transmitted
30 may be printed at the advising bank, stamped “original” and provided to the beneficiary in that
31 form. The printed document may then be used as a way of controlling and recording payments
32 and of recording and authorizing assignments of proceeds or transfers of rights under the letter of
33 credit. Nothing in this section should be construed to conflict with that practice.

34
35 To be a record sufficient to serve as a letter of credit or other undertaking under this
36 section, data must have a durability consistent with that function. Because consideration is not
37 required for a binding letter of credit or similar undertaking (Section 5-105) yet those
38 undertakings are to be strictly construed (Section 5-108), parties to a letter of credit transaction
39 are especially dependent on the continued availability of the terms and conditions of the letter of
40 credit or other undertaking. By declining to specify any particular medium in which the letter of
41 credit must be established or communicated, Section 5-104 leaves room for future developments.

42 * * *

1 **Section 5-116. Choice of Law and Forum.**

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

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

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

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

19 ~~(e)~~ (e) Except as otherwise provided in this subsection, the liability of an issuer,
20 nominated person, or adviser is governed by any rules of custom or practice, such as the Uniform
21 Customs and Practice for Documentary Credits, to which the letter of credit, confirmation, or
22 other undertaking is expressly made subject. If (i) this article would govern the liability of an
23 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.

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

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

1 3. The last sentence of former subsection (b) is now in a new subsection (c) and a
2 new subsection (d) has been added. These revisions were necessary to eliminate a potential
3 ambiguity arising from the first sentence of subsection (b). The first sentence has been construed
4 incorrectly as meaning that the last sentence, which recognizes the separateness of bank branches
5 for the specified purposes, is inapplicable when a governing law has been chosen pursuant to
6 subsection (a). These amendments reject that construction and reject decisions such as *Zeeco,*
7 *Inc. v. JPMorgan Chase Bank*, Case No. 17 -CV-384-JED-FHM, 2018 WL 1414119 (N.D. Okla.
8 Mar. 21, 2018), *amending opinion dated March 20, 2018, both opinions vacated*, 2019 WL
9 3543081, 2019 U.S. Dist. LEXIS 133756 (Feb. 8, 2019).

10
11 2. 4. Because the confirmer or other nominated person may choose different law from
12 that chosen by the issuer or may be located in a different jurisdiction and fail to choose law, it is
13 possible that a confirmer or nominated person may be obligated to pay (under their law) but will
14 not be entitled to payment from the issuer (under its law). Similarly, the rights of an
15 unreimbursed issuer, confirmer, or nominated person against a beneficiary under Section 5-109,
16 5-110, or 5-117, will not necessarily be governed by the same law that applies to the issuer's or
17 confirmer's obligation upon presentation. Because the UCP and other practice are incorporated
18 in most international letters of credit, disputes arising from different legal obligations to honor
19 have not been frequent. Since Section 5-108 incorporates standard practice, these problems
20 should be further minimized -- at least to the extent that the same practice is and continues to be
21 widely followed.

22
23 3. 5. This section does not permit what is now authorized by the nonuniform Section 5-
24 102(4) in New York. Under the current law in New York a letter of credit that incorporates the
25 UCP is not governed in any respect by Article 5. Under revised Section 5-116 letters of credit
26 that incorporate the UCP or similar practice will still be subject to Article 5 in certain respects.
27 First, incorporation of the UCP or other practice does not override the nonvariable terms of
28 Article 5. Second, where there is no conflict between Article 5 and the relevant provision of the
29 UCP or other practice, both apply. Third, practice provisions incorporated in a letter of credit
30 will not be effective if they fail to comply with Section 5-103(c). Assume, for example, that a
31 practice provision purported to free a party from any liability unless it were "grossly negligent"
32 or that the practice generally limited the remedies that one party might have against another.
33 Depending upon the circumstances, that disclaimer or limitation of liability might be ineffective
34 because of Section 5-103(c).

35
36 Even though Article 5 is generally consistent with UCP 500, it is not necessarily
37 consistent with other rules or with versions of the UCP that may be adopted after Article 5's
38 revision, or with other practices that may develop. The phrase in subsection 5-116(e), "rules of
39 custom or practice, such as the Uniform Customs and Practice for Documentary Credits,"
40 includes the International Standby Practices and the Uniform Rules for Demand Guarantees, as
41 well as the Supplement to the Uniform Customs and Practice for Documentary Credits for
42 Electronic Presentation. Rules of practice incorporated in the letter of credit or other undertaking
43 are those in effect when the letter of credit or other undertaking is issued. Except in the unusual
44 cases discussed in the immediately preceding paragraph, practice adopted in a letter of credit will
45 override the rules of Article 5 and the parties to letter of credit transactions must be familiar with
46 practice (such as future versions of the UCP) that is explicitly adopted in letters of credit.

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

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

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

* * *

ARTICLE 7

DOCUMENTS OF TITLE

Section 7-102. Definitions and Index of Definitions.

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

* * *

(9) “Person entitled under the document” means the holder, in the case of a negotiable document of title, or the person to which delivery of the goods is to be made by the terms of, or pursuant to instructions in a record under, a nonnegotiable document of title.

(10) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. [Reserved.]

(11) ~~“Sign” means, with present intent to authenticate or adopt a record:~~

~~(A) to execute or adopt a tangible symbol; or~~

~~(B) to attach to or logically associate with the record an electronic sound,~~

symbol, or process. [Reserved.]

* * *

Official Comment

* * *

6. “Person entitled under the document” is moved from former Section 7-403.

In the case of a negotiable document of title, the person entitled is the holder. See Section 1-201(b)(21) (defining “holder”). For a nonnegotiable document of title, the person entitled is the person provided in the terms of the document or instructions under the document. A transferee of a nonnegotiable document to which the document has been delivered acquires the transferee’s rights and rights that the transferor had actual authority to convey. Section 7-504(a). However, until but not after the bailee receives notice of a transfer, such a transferee’s rights are subject to those of persons identified in Section 7-504(b), including “as against the bailee, by good faith dealings of the bailee with the transferor.” Moreover, such a transferee is *not* a person entitled under the document unless so provided in the document or in instructions under the document.

Neither the definition nor the official comments to Article 7 provide an explanation of what constitutes an “instruction under” a nonnegotiable document. In practice the term is generally understood to include an instruction to the bailee, by the person named in the document, to deliver the goods to a transferee of the document or to another person. An instruction under a nonnegotiable document should be distinguished from a mere “notice” or “notification” to the bailee of a transfer or security interest, as contemplated by Sections 7-504(b) and 9-312(d)(2). However, an instruction could, functionally, also constitute such a notice.

* * *

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

* * *

Section 7-106. Control of Electronic Document of Title.¹

(a) **[General rule.]** A person has control of an electronic document of title if a system

¹ Subsection captions are included 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 employed for evidencing the transfer of interests in the electronic document reliably establishes
2 that person as the person to which the electronic document was issued or transferred.

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

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

8 (2) the authoritative copy identifies the person asserting control as:

9 (A) the person to which the document was issued; or

10 (B) if the authoritative copy indicates that the document has been
11 transferred, the person to which the document was most recently transferred;

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

14 (4) copies or amendments that add or change an identified ~~assignee~~ transferee of
15 the authoritative copy can be made only with the consent of the person asserting control;

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

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

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

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

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

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

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

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

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

12 (1) the authoritative electronic copy, a record attached to or logically associated
13 with the authoritative electronic copy, or a system in which the authoritative electronic copy is
14 recorded limits the use of the document of title or has a protocol that is programmed to cause a
15 change, including a transfer or loss of control; or

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

17 (e) [When power is not shared with another person.] A power of a person is not
18 shared with another person under subsection (d)(2) and the person's power is not exclusive if:

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

21 (2) 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 document of title.

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

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

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

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

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

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

Official Comment

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

~~Purpose:~~

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

2. ~~The~~ This section defines “control” for electronic documents of title. Subsections

1 ~~(a) and (b) and derives its rules~~ derive from the Uniform Electronic Transactions Act § Section
2 16 on transferrable records. Unlike under UETA § Section 16, however, a document of title may
3 be reissued in an alternative medium pursuant to Section 7-105. At any point in time in which a
4 document of title is in electronic form, the control concept of this section is relevant. As under
5 UETA § Section 16, the control concept embodied in this section provides the legal framework
6 for developing systems for electronic documents of title.

7
8 ~~2. 3.~~ 3. Control of an electronic document of title substitutes for the concept of
9 indorsement (for negotiable documents) and possession ~~in the tangible document of title context~~
10 (for tangible documents of title). See Section 7-501. A person with a tangible document of title
11 delivers the document by voluntarily transferring possession and a person with an electronic
12 document of title delivers the document by voluntarily transferring control. (Delivery is defined
13 in Section 1-201(b)(15)).

14
15 ~~3. 4.~~ 4. Subsection (a) sets forth the general rule that the “system employed for
16 evidencing the transfer of interests in the electronic document reliably establishes that person as
17 the person to which the electronic document was issued or transferred.” The key to having a
18 system that satisfies this test is that identity of *the* person to which the document was issued or
19 transferred must be reliably established. Of great importance to the functioning of the control
20 concept under subsection (a), as well as under the subsection (b) safe harbor, is to be able to
21 demonstrate and identify, at any point in time, *the person* entitled under the electronic document.
22 For example, a carrier may issue an electronic bill of lading by having the required information
23 in a database that is encrypted and accessible by virtue of a password. If the computer system in
24 which the required information is maintained identifies the person as *the* person to which the
25 electronic bill of lading was issued or transferred, that person has control of the electronic
26 document of title. That identification may be by virtue of passwords or other encryption
27 methods. Registry systems may satisfy this test. For example, see the electronic warehouse
28 receipt system established pursuant to 7 C.F.R. Part 735. This Article leaves to the market place
29 the development of sufficient technologies and business practices that will meet the test.

30
31 An electronic document of title is evidenced by a record consisting of information stored
32 in an electronic medium. Section 1-201(b)(16A) (defining “electronic”), (31) (defining
33 “record”). For example, a record in a computer database could be an electronic document of title
34 assuming that it otherwise meets the definition of document of title. To the extent that third
35 parties wish to deal in paper mediums, Section 7-105 provides a mechanism for exiting the
36 electronic environment by having the issuer reissue the document of title in a tangible medium.
37 Thus if a person entitled to enforce an electronic document of title causes the information in the
38 record to be printed onto paper without the issuer’s involvement in issuing the document of title
39 pursuant to Section 7-105, that paper is not a document of title.

40
41 4. 5. Subsection (a) sets forth the general test for control. ~~Subsection~~ Subsections (b)
42 and (c) sets set forth a safe harbor ~~test tests~~ that, if satisfied, ~~results result~~ in control under the
43 general test in subsection (a). ~~The test in subsection (b) is also used in Section 9-105 although~~
44 ~~Section 9-105 does not include the general test of subsection (a).~~ Under subsection (b), at any
45 point in time, a party should be able to identify the single authoritative copy which is unique and
46 identifiable as the authoritative copy. This does not mean that once created ~~that~~ the authoritative

1 copy need be static and never moved or copied from its original location. To the extent that
2 backup systems exist which result in multiple copies, the key to this idea is that at any point in
3 time, the one authoritative copy needs to be unique and identifiable.
4

5 Parties may not by contract provide that control exists. The test for control is a factual
6 test that depends upon whether the general test in subsection (a) or the safe harbor in subsection
7 (b) or subsection (c) is satisfied.
8

9 ~~5. 6.~~ Article 7 has historically provided for rights under documents of title and rights of
10 transferees of documents of title as those rights relate to the goods covered by the document.
11 Third parties may possess or have control of documents of title. While misfeasance or negligence
12 in failure to transfer or misdelivery of the document by those third parties may create serious
13 issues, this Article has never dealt with those issues as it relates to tangible documents of title,
14 preferring to leave those issues to the law of contracts, agency and tort law. In the electronic
15 document of title regime, third party registry systems ~~are just beginning to develop. It is very~~
16 ~~difficult to write rules regulating those third parties without some definitive sense of how the~~
17 ~~third party registry systems will be structured. Systems that are evolving to date tend to be~~
18 ~~“closed” systems in which all participants must sign on to the master agreement which provides~~
19 ~~for rights as against the registry system as well as rights among the members. In those closed~~
20 ~~systems, the document of title never leaves the system so the parties rely upon the master~~
21 ~~agreement as to rights against the registry for its failures in dealing with the document. This~~
22 ~~article contemplates that those “closed” systems will continue to evolve and that the control~~
23 ~~mechanism in this statute provides a method for the participants in the closed system to achieve~~
24 ~~the benefits of obtaining control allowed by this article. This article also contemplates that~~
25 ~~parties will evolve open systems where parties need not be subject to a master agreement. In an~~
26 ~~open system a party that is expecting to obtain rights through an electronic document may not be~~
27 ~~a party to the master agreement. continue to evolve. To the extent that open these systems evolve~~
28 ~~by use of the control concept~~ concepts contained in this section, the law of contracts, agency, and
29 torts as it applies to the registry’s misfeasance or negligence concerning the transfer of control of
30 the electronic document will allocate the risks and liabilities of the parties as that other law now
31 does so for third parties who hold tangible documents and fail to deliver the documents.
32

33 7. The subsection (c) “safe harbor” generally follows Section 12-105 for control of
34 controllable electronic records as well as revised Section 9-105 on control of chattel paper
35 evidenced by electronic records. See generally Sections 9-105 and 12-105 and Comments. It
36 differs from subsection (b), which (as noted above) is based on a “single authoritative copy” of
37 an electronic document of title and so is unavailable when the relevant record is maintained on a
38 blockchain or other distributed ledger. The utility of distributed ledger technology (including
39 blockchain technology) depends on there being multiple authoritative copies of an electronic
40 record. It is important to note that compliance with the conditions for control in subsection (c)
41 also would satisfy the conditions provided in subsection (b). However, subsection (b) was
42 retained out of an abundance of caution and to provide assurances that existing systems for
43 control of electronic documents of title continue to be viable. The conditions for “control” in
44 subsection (c) reflect the functions that possession serves with respect to writings, but in a more
45 accurate and technologically flexible way than do the conditions in subsection (b).
46

1 8. Under subsection (c), to obtain control of an electronic document of title a person
2 must be able to identify each electronic copy as authoritative or nonauthoritative and identify
3 itself as the person to which each authoritative electronic copy has been issued or transferred. In
4 addition, the person must have the exclusive power to prevent others from adding or changing an
5 identified person to which each authoritative electronic copy has been issued or transferred and
6 to transfer control of each authoritative copy. However, once it is established that a person has
7 received those powers, subsection (f) provides a presumption of exclusivity. Consequently, a
8 person asserting control need not prove exclusivity in order to make out a *prima facie* case.
9 Application of the presumption will be governed also by Section 1-206 (effects of a presumption
10 under the UCC) and applicable non-UCC law (including rules of procedure and evidence). In
11 addition, subsection (d) contains two qualifications of the term “exclusive” as used in subsection
12 (c)(3). A power can be “exclusive” under subsection (c)(3) even if one or both of these
13 qualifications apply.

14
15 Subsection (e) provides that in certain circumstances a power is not shared within the
16 meaning of subsection (d)(2), the relaxation of the exclusivity requirement provided by
17 subsection (d)(2) does not apply, and, consequently, a person’s power is not exclusive.
18 Subsection (e) provides that a person does not share an exclusive power with another person if
19 the person can exercise the power only with the other person’s cooperation (subsection (e)(1))
20 but the other person either (i) can exercise of the power without the person’s cooperation
21 (subsection (e)(2)(A)) or (ii) is the transferor to the person (transferee) of an interest in the
22 document of title (subsection (e)(2)(B)). It follows that a person to which subsection (e) applies
23 does not have control based on its exclusive powers (although it might have control through
24 another person under subsection (g), discussed below, or if another person having control is
25 acting as the person’s agent). As to the rationale for disqualifying a transferee (which includes a
26 secured party in a secured transaction) from a transferor to the transferee, as provided in
27 subsection (e)(2)(B), from the benefit of shared control under subsection (d)(2), and for
28 examples of the operation of subsection (e) (in the context of the similar provision in Section 12-
29 105), see Section 12-105, Comments 5 and 9.

30
31 9. Subsection (g) provides for a person to obtain control through the control of another
32 person. It follows revisions to the corresponding provisions for control of a security entitlement
33 (Section 8-106(d)(3)), control of deposit accounts (Section 9-104)(a)(4)), control of authoritative
34 electronic copies of records evidencing chattel paper (Section 9-105(g)), control of electronic
35 money (Section 9-105A(e)), and control of controllable electronic records (Section 12-105(e)).
36 For a brief discussion and background, see Section 12-105, Comment 8. Under subsection (g) for
37 an acknowledgement by another person to be effective to confer control on a person, the other
38 person making the acknowledgment must be one “other than the transferor of an interest in the
39 electronic record” to the person. The rationale for this limitation is discussed in Section 12-105,
40 Comment 9.

41
42 Subsections (h) and (i) derive from Section 9-313(f) and (g). Subsection (h) makes clear
43 that a person that has control under this section has no duty to acknowledge that it has or will
44 obtain control on behalf of another person. Arrangements for a person to acknowledge that it has
45 or will obtain control on behalf of another person are not standardized. Accordingly, subsection
46 (i) leaves to the agreement of the parties and to any other applicable law any duties of a person

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

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

18 A security interest in an electronic document of title, whether negotiable or
19 nonnegotiable, may be perfected by control. Section 9-314(a). But perfection of a security
20 interest by control in a nonnegotiable document does not perfect a security interest in goods
21 covered by the document and does not confer on a secured party or other purchaser the status of
22 a person entitled under the document. See Section 7-102(a)(9) (defining “person entitled under
23 the document”) and Comment 6. (On perfection of security interests in negotiable documents of
24 title and goods covered by negotiable and nonnegotiable documents of title, see generally
25 Section 9-312(a), (c), and (g) and Comment 7.) However, a system for control of electronic
26 documents in which bailees participate could be designed to provide that a transfer of control to a
27 purchaser constitutes a reissuance of the document in the name of a secured party under Section
28 9-312(d)(1) or a notice to the bailee of a security interest under Section 9-312(d)(2). A system
29 also could provide that a transfer of control constitutes an instruction under the document that
30 would make the transferee a person entitled under the document.

31 * * *

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

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

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

39 (2) damage to or delay, loss, or destruction of the goods for which the bailee is not

liable;

(3) previous sale or other disposition of the goods in lawful enforcement of a lien

or on a warehouse's lawful termination of storage;

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

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

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

(7) any other lawful excuse.

(b) A person claiming goods covered by a document of title shall satisfy the bailee's lien if the bailee so requests or if the bailee is prohibited by law from delivering the goods until the charges are paid.

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

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

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

Official Comment

* * *

5. In addition to compliance with subsection (b), Subsection subsection (c) conditions the bailee's duty to deliver the goods to a person entitled under a negotiable document on the surrender of possession or control of the document for cancellation or indication of partial deliveries. It also states the obvious duty of a bailee to take up a negotiable document or note

1 partial deliveries conspicuously thereon, and the result of failure in that duty. It is subject to only
2 one exception, that stated in subsection (a)(1) of this section and in Section 7-503(a). Subsection
3 (c) is limited to cases of delivery to a claimant; it has no application, for example, where goods
4 held under a negotiable document are lawfully sold to enforce the bailee's lien.

5
6 Subsection (c) does not specify any conditions on the duty of the bailee to deliver the
7 goods covered by a nonnegotiable document to a person entitled, other than the conditions
8 inherent in the definition of "person entitled under the document." See Section 7-102(a)(9)
9 (defining "person entitled under the document") and Comment 6.

10
11 6. When courts are considering subsection (a)(7), "any other lawful excuse," among
12 others, refers to compliance with court orders under Sections 7-601, 7-602 and 7-603.

13 **Reporter's Note**

14
15
16 *No change.* No change is proposed to Section 7-403, which is provided for convenience.

17
18 * * *

19 **Section 7-504. Rights Acquired in Absence of Due Negotiation; Effect of** 20 **Diversion; Stoppage of Delivery.**

21 (a) A transferee of a document of title, whether negotiable or nonnegotiable, to which the
22 document has been delivered but not duly negotiated, acquires the title and rights that its
23 transferor had or had actual authority to convey.

24 (b) In the case of a transfer of a nonnegotiable document of title, until but not after the
25 bailee receives notice of the transfer, the rights of the transferee may be defeated:

26 (1) by those creditors of the transferor which could treat the transfer as void under
27 Section 2-402 or 2A-308 ;

28 (2) by a buyer from the transferor in ordinary course of business if the bailee has
29 delivered the goods to the buyer or received notification of the buyer's rights;

30 (3) by a lessee from the transferor in ordinary course of business if the bailee has
31 delivered the goods to the lessee or received notification of the lessee's rights; or

32 (4) as against the bailee, by good-faith dealings of the bailee with the transferor.

* * *

Official Comment

* * *

2. As in the case of transfer--as opposed to "due negotiation"--of negotiable documents, subsection (a) empowers the transferor of a nonnegotiable document to transfer only such rights as the transferor has or has "actual authority" to convey. In contrast to situations involving the goods themselves the operation of estoppel or agency principles is not here recognized to enable the transferor to convey greater rights than the transferor actually has. Subsection (b) makes it clear, however, that the transferee of a nonnegotiable document may acquire rights greater in some respects than those of his transferor by giving notice of the transfer to the bailee. ~~New subsection~~ Subsection (b)(3) provides for the rights of a lessee in the ordinary course.

Note that a transferee of a nonnegotiable document that takes delivery of the document under subsection (a) would not, *ipso facto*, be a “person entitled under the document” with a right to receive delivery of the goods from the bailee under Section 7-403(a). See Section 7-102(a)(9) (defining “person entitled under the document”) and Comment 6.

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

* * *

Reporter's Note

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

* * *

ARTICLE 8

INVESTMENT SECURITIES

Prefatory Note to 2022 Article 8 Amendments

Amendments to the official comments to Section 8-102 primarily serve to make clear that digital assets such as controllable electronic records, controllable accounts, and controllable payment intangibles may be financial assets credited to a securities account under Article 8. Revised Section 8-103(h) provides that these assets may be financial assets only if Section 8-102(a)(9)(iii) applies. See also Section 12-102, Comment 2. The amendment to Section 8-106(d) on control through another person conforms that provision to amendments to Sections 7-106 (control of electronic documents of title), 9-104 (control of deposit accounts), and Section 9-105 (control of authoritative electronic copies of records evidencing chattel paper) and to

Sections 9-105A (control of electronic money) and 12-105 (control of controllable electronic records). The amendment to Section 8-303 conforms the text on the rights of a protected purchaser to the corresponding provision for a qualifying purchaser under Article 12. The revision of the official comment to Section 8-501 addresses certain circumstances in which both an intermediary and its customer have powers over financial assets. Under some circumstances such financial assets could be treated as being held directly by the customer and would not be included in a security entitlement. Comment 4 to Section 8-505 addresses distributions made with respect to financial assets as to which there is no issuer.

Section 8-102. Definitions and Index of Definitions.

* * *

(a) In this Article:

* * *

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

* * *

(6) “Communicate” means to:

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

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

* * *

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

(i) a security;

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

(iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other

1 person that the property is to be treated as a financial asset under this Article.

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

5 * * *

6 (14) "Securities intermediary" means:

7 (i) a clearing corporation; or

8 (ii) a person, including a bank or broker, that in the ordinary course of its
9 business maintains securities accounts for others and is acting in that capacity.

10 * * *

11 (16) "Security certificate" means a certificate representing a security.

12 * * *

13 (18) "Uncertificated security" means a security that is not represented by a
14 certificate.

15 * * *

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

17 "Controllable account". Section 9-102.

18 "Controllable electronic record". Section 12-102.

19 "Controllable payment intangible". Section 9-102.

20 * * *

21 Official Comment

22 * * *

23
24 4. "Certificated security." The term "certificated security" means a security that is
25 represented by a security certificate.

1 * * *

2
3 6. “Communicate.” The term “communicate” assures that the Article 8 rules will be
4 sufficiently flexible to adapt to changes in information technology. Sending a signed writing
5 always suffices as a communication, but the parties can agree that a different means of
6 transmitting information is to be used. Agreement is defined in Section 1-201(b)(3) as “the
7 bargain of the parties in fact as found in their language or by implication from other
8 circumstances including course of dealing or usage of trade or course of performance.” Thus, use
9 of an information transmission method might be found to be authorized by agreement, even
10 though the parties have not explicitly so specified in a formal agreement. The term communicate
11 is used in Sections 8-102(a)(7) (definition of entitlement order), 8-102(a)(11) (definition of
12 instruction), and 8-403 (demand that issuer not register transfer). Also in furtherance of medium
13 neutrality, the reference in paragraph (6)(i) to a “signed writing” has been changed to refer to a
14 “signed record.”
15

16 9. “Financial asset.” The definition of “financial asset,” in conjunction with the
17 definition of “securities account” in Section 8-501, sets the scope of the indirect holding system
18 rules of Part 5 of Revised Article 8. The Part 5 rules apply not only to securities held through
19 intermediaries, but also to other financial assets held through intermediaries. The term financial
20 asset is defined to include not only securities but also a broader category of obligations, shares,
21 participations, and interests.
22

23 Having separate definitions of security and financial asset makes it possible to separate
24 the question of the proper scope of the traditional Article 8 rules from the question of the proper
25 scope of the indirect holding system rules. Some forms of financial assets should be covered by
26 the indirect holding system rules of Part 5, but not by the rules of Parts 2, 3, and 4. The term
27 financial asset is used to cover such property. Because the term security entitlement is defined in
28 terms of financial assets rather than securities, the rules concerning security entitlements set out
29 in Part 5 of Article 8 and in Revised Article 9 apply to the broader class of financial assets.
30

31 The fact that something does or could fall within the definition of financial asset does not,
32 without more, trigger Article 8 coverage. The indirect holding system rules of Revised Article 8
33 apply only if the financial asset is in fact held in a securities account, so that the interest of the
34 person who holds the financial asset through the securities account is a security entitlement.
35 Thus, questions of the scope of the indirect holding system rules cannot be framed as “Is such-
36 and-such a ‘financial asset’ under Article 8?” Rather, one must analyze whether the relationship
37 between an ~~institution~~ intermediary and a person on whose behalf the ~~institution~~ intermediary
38 holds an asset falls within the scope of the term securities account as defined in Section 8-501.
39 That question turns in large measure on whether it makes sense to apply the Part 5 rules to the
40 relationship.
41

42 It is not necessary for all of the Part 5 rules to be relevant to a particular financial asset
43 for the relevant property to qualify as a “financial asset” credited to a securities account. Many of
44 the duties set forth in Part 5 will often be relevant to a digital asset such as a “controllable
45 electronic record” (Section 12-102), or a “controllable account” or “controllable payment
46 intangible” (Section 9-102) evidenced by a controllable electronic record, treated as a financial

1 asset credited to a securities account. These duties include the duty to exercise rights as directed
2 by the entitlement holder, comply with the entitlement holder's entitlement orders, and change
3 the position to another form of holding.

4
5 If the parties agree to treat a digital asset as a financial asset under Article 8 and the
6 digital asset is in fact held in a securities account for an entitlement holder, the rules applicable to
7 controllable electronic records under Article 12 would not apply to the entitlement holder's
8 security entitlement related to the financial asset. If the financial asset itself is a controllable
9 electronic record, however, then the rules in Article 12 could apply to the securities
10 intermediary's rights with respect to the controllable electronic record if the intermediary holds
11 the asset directly.

12
13 The term financial asset is used to refer both to the underlying asset and the particular
14 means by which ownership of that asset is evidenced. Thus, with respect to a certificated
15 security, the term financial asset may, as context requires, refer either to the interest or obligation
16 of the issuer or to the security certificate representing that interest or obligation. Similarly, if a
17 person holds a security or other financial asset through a securities account, the term financial
18 asset may, as context requires, refer either to the underlying asset or to the person's security
19 entitlement.

20
21 * * *

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

42
43 The terms securities intermediary and broker have different meanings. Broker means a
44 person engaged in the business of buying and selling securities, as agent for others or as
45 principal. Securities intermediary means a person maintaining securities accounts for others. A

1 stockbroker, in the colloquial sense, may or may not be acting as a securities intermediary.

2
3 The definition of securities intermediary includes the requirement that the person in
4 question is “acting in the capacity” of maintaining securities accounts for others. This is to take
5 account of the fact that a particular entity, such as a bank, may act in many different capacities in
6 securities transactions. A bank may act as a transfer agent for issuers, as a securities custodian
7 for institutional investors and private investors, as a dealer in government securities, as a lender
8 taking securities as collateral, and as a provider of general payment and collection services that
9 might be used in connection with securities transactions. A bank that maintains securities
10 accounts for its customers would be a securities intermediary with respect to those accounts; but
11 if it takes a pledge of securities from a borrower to secure a loan, it is not thereby acting as a
12 securities intermediary with respect to the pledged securities, since it holds them for its own
13 account rather than for a customer. In other circumstances, those two functions might be
14 combined. For example, if the bank is a government securities dealer it may maintain securities
15 accounts for customers and also provide the customers with margin credit to purchase or carry
16 the securities, in much the same way that brokers provide margin loans to their customers.

17
18 The definition of securities intermediary includes the requirement that the person in
19 question “in the ordinary course of its business maintain securities accounts for others”. This
20 “ordinary course” requirement does not have a fixed quantitative requirement and is determined
21 by the facts of each case. Thus, a person need not necessarily satisfy a specified threshold of
22 activity or necessarily have a minimum number of customers. Law other than the UCC may
23 determine who may legally engage in such a business.

24
25 * * *

26
27 16. “Security certificate.” The term “security” refers to the underlying asset, e.g.,
28 1000 shares of common stock of Acme, Inc. The term “security certificate” refers to the paper
29 certificates that have traditionally been used to embody -the underlying intangible interest.

30
31 * * *

32
33 18. “Uncertificated security.” The term “uncertificated security” means a security that
34 is not represented by a security certificate—i.e., a paper certificate. This is so even if, for
35 example, the organic documents relating to the security refer to it as being “certificated” or refer
36 to the electronic record evidencing the security as an “electronic certificate.” For uncertificated
37 securities, there is no need to draw any distinction between the underlying asset and the means
38 by which a direct holder's interest in that asset is evidenced. Compare “certificated security” and
39 “security certificate.” For a discussion of the roles that controllable electronic records (Section
40 12-102(a)(1)) may play in transactions involving uncertificated securities, see Section 12-102,
41 Comment 2.

42 43 Reporter’s Note

44
45 1. *No change.* No changes are proposed to the definitions of “certificated security,”
46 “financial asset,” “securities intermediary,” “security certificate,” or “uncertificated security,”

1 which are provided for convenience

2
3 2. *Relationship between Articles 8 and 12.* These amendments to the official comments to
4 Article 8 are intended primarily to make clear that a controllable electronic record, a controllable
5 account, or a controllable account may be a financial asset credited to a securities account under
6 Article 8 and to identify several significant aspects of the relationship between Articles 8 and 12.
7 See also Section 12-102, Comment 2.

8
9 * * *

10 **Section 8-103. Rules for Determining Whether Certain Obligations and Interests**
11 **are Securities or Financial Assets.**

12 * * *

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

15 **Official Comment**

16 * * *

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

24
25 * * *

26 **Section 8-106. Control**

27 * * *

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

29 * * *

30 (3) ~~another person has control of the security entitlement on behalf of the~~
31 ~~purchaser or, having previously acquired control of the security entitlement, acknowledges that it~~

1 ~~has control on behalf of the purchaser.~~ person, other than the transferor to the purchaser of an
2 interest in the security entitlement:

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

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

7 * * *

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

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

14 **Official Comment**

15 1. The concept of “control” plays a key role in various provisions dealing with the
16 rights of purchasers, including secured parties. See Sections 8-303 (protected purchasers); 8-
17 503(e) (purchasers from securities intermediaries); 8-510 (purchasers of security entitlements
18 from entitlement holders); 9-203(b)(3)(D) (attachment of security interests); 9-314 (perfection of
19 security interests); 9-328 (priorities among conflicting security interests).

20
21 Obtaining “control” means that the purchaser has taken whatever steps are necessary,
22 given the manner in which the securities or other financial assets are held, to place itself in a
23 position where it can have the securities or other financial assets sold, without further action by
24 the owner, registered owner, entitlement holder, transferor, or other person with an interest in the
25 securities or other financial assets.

26
27 * * *

28
29 4. Subsection (d) specifies the means by which a purchaser can obtain control of a
30 security entitlement. Three mechanisms are possible, analogous to those provided in subsection
31 (c) for uncertificated securities. Under subsection (d)(1), a purchaser has control if it is the
32 entitlement holder. This subsection would apply whether the purchaser holds through the same

1 intermediary that the debtor used, or has the securities position transferred to its own
2 intermediary. Subsection (d)(2) provides that a purchaser has control if the securities
3 intermediary has agreed to act on entitlement orders originated by the purchaser if no further
4 consent by the entitlement holder is required. Under subsection (d)(2), control may be achieved
5 even though the original entitlement holder remains as the entitlement holder. Finally, a
6 purchaser may obtain control under subsection (d)(3) if another person has control and the
7 person acknowledges that it has control on the purchaser's behalf. ~~Control~~ In general, control
8 under subsection (d)(3) parallels the delivery of certificated securities and uncertificated
9 securities under Section 8-301. Of course, the acknowledging person cannot be the debtor. See
10 the discussion of subsection (d)(3) in Comment 4A, below.

11
12 ~~This section~~ Subsection (d) specifies only the minimum requirements that such an
13 arrangement must meet to confer “control” of a security entitlement; the details of the
14 arrangement can be specified by agreement. The arrangement might cover all of the positions in
15 a particular account or subaccount, or only specified positions. There is no requirement that the
16 control party's right to give entitlement orders be exclusive. The arrangement might provide that
17 only the control party can give entitlement orders, or that either the entitlement holder or the
18 control party can give entitlement orders. See subsection (f).

19
20 The following examples illustrate the application of subsection (d):

21
22 * * *

23
24 Example 9. Debtor grants Alpha Bank a security interest in a security entitlement that
25 includes 1000 shares of XYZ Co. stock that Debtor holds through an account with Able & Co.
26 Beta Bank agrees with Alpha to act as Alpha's collateral agent with respect to the security
27 entitlement. Debtor, Able, and Beta enter into an agreement under which Debtor will continue to
28 receive dividends and distributions, and will continue to have the right to direct dispositions, but
29 Beta also has the right to direct dispositions. Because Able has agreed that it will comply with
30 entitlement orders originated by Beta without further consent by Debtor, Beta has control of the
31 security entitlement (see Example 3). Because Beta has acknowledged that it has control on
32 behalf of Alpha, Alpha also has control under subsection (d)(3). It is not necessary for Able to
33 enter into an agreement directly with Alpha or for Able to be aware of Beta's ~~agency~~ relationship
34 with Alpha.

35
36 * * *

37
38 4A. Subsection (d)(3) was revised to conform that provision for control through
39 another person to the corresponding provisions for control of other types of assets. See Section
40 12-105, Comment 8; see also Sections 7-106(g) (control of electronic document of title); 9-
41 104(a)(4) (control of deposit account); 9-105(g) (control of authoritative electronic copy of a
42 record evidencing chattel paper); 9-105A(e) (control of electronic money). Under subsection
43 (d)(3), for an acknowledgment to be effective to confer control, it must be made by a person
44 “other than the transferor of an interest in the security entitlement.” See Section 12-105,
45 Comment 9 (discussing the rationale for this requirement). Subsections (h) and (i) derive from
46 Section 9-313(f) and (g). Subsection (h) makes clear that a person that has control under this

1 section has no duty to acknowledge that it has or will obtain control on behalf of a purchaser.
2 Arrangements for a person to acknowledge that it has or will obtain control on behalf of another
3 person are not standardized. Accordingly, subsection (i) leaves to the agreement of the parties
4 and to any other applicable law any duties of a person that does acknowledge that it has or will
5 obtain control on behalf of a purchaser and provides that a person making an acknowledgment is
6 not required to confirm the acknowledgment to any other person.

7
8 * * *

9 **Section 8-110. Applicability; Choice of Law.**

10 (a) The local law of the issuer's jurisdiction, as specified in subsection (d), governs:

11 (1) the validity of a security;

12 (2) the rights and duties of the issuer with respect to registration of transfer;

13 (3) the effectiveness of registration of transfer by the issuer;

14 (4) whether the issuer owes any duties to an adverse claimant to a security; and

15 (5) whether an adverse claim can be asserted against a person to whom transfer of

16 a certificated or uncertificated security is registered or a person who obtains control of an
17 uncertificated security.

18 (b) The local law of the securities intermediary's jurisdiction, as specified in subsection

19 (e), governs:

20 (1) acquisition of a security entitlement from the securities intermediary;

21 (2) the rights and duties of the securities intermediary and entitlement holder

22 arising out of a security entitlement;

23 (3) whether the securities intermediary owes any duties to an adverse claimant to

24 a security entitlement; and

25 (4) whether an adverse claim can be asserted against a person who acquires a

26 security entitlement from the securities intermediary or a person who purchases a security

27 entitlement or interest therein from an entitlement holder.

1 (c) The local law of the jurisdiction in which a security certificate is located at the time of
2 delivery governs whether an adverse claim can be asserted against a person to whom the security
3 certificate is delivered.

4 (d) “Issuer's jurisdiction” means the jurisdiction under which the issuer of the security is
5 organized or, if permitted by the law of that jurisdiction, the law of another jurisdiction specified
6 by the issuer. An issuer organized under the law of this State may specify the law of another
7 jurisdiction as the law governing the matters specified 'in subsection (a)(2) through (5).

8 (e) The following rules determine a “securities intermediary's jurisdiction” for purposes
9 of this section:

10 (1) If an agreement between the securities intermediary and its entitlement holder
11 governing the securities account expressly provides that a particular jurisdiction is the securities
12 intermediary's jurisdiction for purposes of this part, this article, or this [Act], that jurisdiction is
13 the securities intermediary's jurisdiction.

14 (2) If paragraph (1) does not apply and an agreement between the securities
15 intermediary and its entitlement holder governing the securities account expressly provides that
16 the agreement is governed by the law of a particular jurisdiction, that jurisdiction is the securities
17 intermediary's jurisdiction.

18 (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between
19 the securities intermediary and its entitlement holder governing the securities account expressly
20 provides that the securities account is maintained at an office in a particular jurisdiction, that
21 jurisdiction is the securities intermediary's jurisdiction.

22 (4) If none of the preceding paragraphs applies, the securities intermediary's
23 jurisdiction is the jurisdiction in which the office identified in an account statement as the office

1 serving the entitlement holder's account is located.

2 (5) If none of the preceding paragraphs applies, the securities intermediary's
3 jurisdiction is the jurisdiction in which the chief executive office of the securities intermediary is
4 located.

5 (f) A securities intermediary's jurisdiction is not determined by the physical location of
6 certificates representing financial assets, or by the jurisdiction in which is organized the issuer of
7 the financial asset with respect to which an entitlement holder has a security entitlement, or by
8 the location of facilities for data processing or other record keeping concerning the account.

9 (g) The local law of the issuer's jurisdiction or the securities intermediary's jurisdiction
10 governs the matters specified in subsections (a) and (b) even if a matter or transaction does not
11 bear any relation to that jurisdiction.

12 Official Comment

13 * * *

14 3. * * *

15
16
17
18 Where the Hague Securities Convention applies, the foregoing provisions of an account
19 agreement effectively determine the applicable law only if the intermediary, at the time of the
20 agreement, had an office in the designated jurisdiction (which may be anywhere in the United
21 States if the account agreement specifies a state of the United States) that is engaged in a regular
22 activity of maintaining securities accounts (a "Qualifying Office"). However, because the policy
23 of this section and the Convention is to enable parties to determine, in advance and with
24 certainty, what law will apply to transactions governed by this Article, the validation of the
25 parties' selection of governing law by agreement is not conditioned upon a determination that the
26 jurisdiction whose law is chosen bear a "reasonable relation" to a matter or the transaction. See
27 Section 4A-507; compare Section 1-105(1) (Revised Section 1-301(a)). That is also true, with
28 respect to the similar provisions in subsection (d) of this section and in Section 9-305. Subsection
29 (g) makes this explicit. See Comment 5A, below. The remaining paragraphs in subsection (e)
30 and Convention article 5 contain additional default rules for determining the applicable law.

31 * * *

32
33
34 5A. Subsection (g) reflects what is stated in Comment 3—that the local law of the
35 issuer's jurisdiction or securities intermediary's jurisdiction governs even if a matter or

1 transaction bears no relation to that jurisdiction. This also is implicit in Section 1-301(c), which
2 provides that the applicable law provided in this section (and other similar provisions) governs.

3
4 * * *

5
6 **Section 8-303. Protected Purchaser.**

7 (a) “Protected purchaser” means a purchaser of a certificated or uncertificated security, or
8 of an interest therein, who:

9 (1) gives value;

10 (2) does not have notice of any adverse claim to the security; and

11 (3) obtains control of the certificated or uncertificated security.

12 (b) ~~In addition to acquiring the rights of a purchaser, a~~ A protected purchaser acquires its
13 interest in the security free of any adverse claim.

14 **Official Comment**

15 2. To qualify as a protected purchaser under subsection (a), a purchaser must give
16 value, take without notice of any adverse claim, and obtain control. Value is used in the broad
17 sense defined in Section ~~4-201(44)~~ 1-204. See also Section 8-116 (securities intermediary as
18 purchaser for value). Adverse claim is defined in Section 8-102(a)(1). Section 8-105 specifies
19 whether a purchaser has notice of an adverse claim. Control is defined in Section 8-106. To
20 qualify as a protected purchaser under subsection (b), there must be a time at which all of the
21 requirements are satisfied. Thus if a purchaser obtains notice of an adverse claim before giving
22 value or satisfying the requirements for control, the purchaser cannot be a protected purchaser.
23 See also Section 8-304(d). The requirement that a protected purchaser obtain control expresses
24 the point that to qualify for the adverse claim cut-off rule a purchaser must take through a
25 transaction that is implemented by the appropriate mechanism. By contrast, the rules in Part 2
26 provide that any purchaser for value of a security without notice of a defense may take free of the
27 issuer's defense based on that defense. See Section 8-202.

28
29 The reference to the acquisition of the rights of a purchaser in the previous text of
30 subsection (b) has been deleted. However, because a protected purchaser acquires the rights of a
31 purchaser under Section 8-302, the revised text does not diminish a protected purchaser's rights.
32 That revision aligned the text more closely to that of Section 12-104(e) on the rights of a
33 qualifying purchaser of a controllable electronic record, controllable account, or controllable
34 payment intangible.

35
36 * * *

Section 8-501. Securities Account; Acquisition of Security Entitlement from Securities Intermediary.

* * *

(d) If a securities intermediary holds a financial asset for another person, and the financial asset is registered in the name of, payable to the order of, or specially indorsed to the other person, and has not been indorsed to the securities intermediary or in blank, the other person is 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 and 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

1 words of the definition taken out of context, but by considering whether it promotes the
2 objectives of Article 8 to include the arrangement within the term securities account.

3
4 The effect of concluding that an arrangement is a securities account is that the rules of
5 Part 5 apply. Accordingly, the definition of “securities account” must be interpreted in light of
6 the substantive provisions in Part 5, which describe the core features of the type of relationship
7 for which the commercial law rules of Revised Article 8 concerning security entitlements were
8 designed. There are many arrangements between ~~institutions~~ intermediaries and other persons
9 concerning securities or other financial assets which do not fall within the definition of
10 “securities account” because the ~~institutions~~ intermediaries have not undertaken to treat the other
11 persons as entitled to exercise the ordinary rights of an entitlement holder specified in the Part 5
12 rules. For example, the term securities account does not cover the relationship between a bank
13 and its depositors or the relationship between a trustee and the beneficiary of an ordinary trust,
14 because those are not relationships in which the holder of a financial asset has undertaken to treat
15 the other as entitled to exercise the rights that comprise the financial asset in the fashion
16 contemplated by the Part 5 rules. The interpretation of the term “securities account” does not
17 depend on the type of security or other financial asset that might be involved.

18
19 In short, the primary factor in deciding whether an arrangement is a securities account is
20 whether application of the Part 5 rules is consistent with the expectations of the parties to the
21 relationship. Relationships not governed by Part 5 may be governed by other parts of Article 8 if
22 the relationship gives rise to a new security or may be governed by other law entirely.

23
24 * * *

25
26 4. Part 5 of Article 8 sets out a carefully designed system of rules for the indirect
27 holding system. Persons who hold securities through brokers or custodians have security
28 entitlements that are governed by Part 5, rather than being treated as the direct holders of
29 securities. Subsection (d) specifies the limited circumstance in which a customer who leaves a
30 financial asset with a broker or other securities intermediary has a direct interest in the financial
31 asset, rather than a security entitlement. The customer can be a direct holder only if the security
32 certificate, or other financial asset, is registered in the name of, payable to the order of, or
33 specially indorsed to the customer, and has not been indorsed by the customer to the securities
34 intermediary or in blank. The distinction between those circumstances where the customer can be
35 treated as direct owner and those where the customer has a security entitlement is essentially the
36 same as the distinction drawn under the federal bankruptcy code between customer name
37 securities and customer property. The distinction does not turn on any form of physical
38 identification or segregation. A customer who delivers certificates to a broker with blank
39 indorsements or stock powers is not a direct holder but has a security entitlement, even though
40 the broker holds those certificates in some form of separate safe-keeping arrangement for that
41 particular customer. The customer remains the direct holder only if there is no indorsement or
42 stock power so that further action by the customer is required to place the certificates in a form
43 where they can be transferred by the broker.

44
45 The rule of subsection (d) corresponds to the rule set out in Section 8-301(a)(3)
46 specifying when acquisition of possession of a certificate by a securities intermediary

1 counts as “delivery” to the customer.

2
3 Subsection (d) uses terminology applicable to conventional certificated securities (e.g.,
4 “indorsed”) and contemplates the limited circumstances in which a securities intermediary
5 (defined in Section 8-102(a)(14) to include only a clearing corporation or another person that in
6 the ordinary course of its business maintains securities accounts for others and that is acting in
7 that capacity) may hold a financial asset for a customer under a direct holding arrangement rather
8 than as a security entitlement. However, assets such as controllable electronic records,
9 controllable accounts, and controllable payment intangibles also might be associated with an
10 intermediary as well as with its customer under a similar direct holding arrangement. For
11 example, the intermediary and the customer might share control of the financial asset under an
12 arrangement whereby the intermediary could exercise powers, such as the power to transfer
13 control, only with the concurrent exercise of the powers by the customer. As with conventional
14 certificated securities, whether an intermediary has created a security entitlement in favor of an
15 entitlement holder or its customer is holding a financial asset directly depends on the nature of
16 the relationship and the nature of the rights of the intermediary and the customer with respect to
17 the financial asset. Moreover, a person holding such an asset for the benefit of another may not
18 be acting in the capacity of a securities intermediary at all, even if the person also regularly acts
19 in that capacity. In such a case, subsection (d) would not apply and the relationship would be
20 governed by the agreement of the parties and the application of law other than this Article.

21
22 * * *

23 24 **Reporter’s Note**

25 *No change.* No change is proposed to Section 8-501, which is provided for convenience.

26 * * *

27 **Section 8-505. Duty of Securities Intermediary with Respect to Payments and** 28 **Distributions.**

29 (a) A securities intermediary shall take action to obtain a payment or distribution made by
30 the issuer of a financial asset. A securities intermediary satisfies the duty if:

31 (1) the securities intermediary acts with respect to the duty as agreed upon by the
32 entitlement holder and the securities intermediary; or

33 (2) in the absence of agreement, the securities intermediary exercises due care in
34 accordance with reasonable commercial standards to attempt to obtain the payment or
35 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 that a securities intermediary will take appropriate action to see to it that any payments or distributions made by the issuer are received. One of the main reasons that investors make use of securities intermediaries is to obtain the services of a professional in performing the record-keeping and other functions necessary to ensure that payments and other distributions are received.

2. Subsection (a) incorporates the same “agreement/due care” formula as the other provisions of Part 5 dealing with the duties of a securities intermediary. See Comment 4 to Section 8-504. This formulation permits the parties to specify by agreement what action, if any, the intermediary is to take with respect to the duty to obtain payments and distributions. In the absence of specification by agreement, the intermediary satisfies the duty if the intermediary exercises due care in accordance with reasonable commercial standards. The provisions of Section 8-509 also apply to the Section 8-505 duty, so that compliance with applicable regulatory requirements constitutes compliance with the Section 8-505 duty.

3. Subsection (b) provides that a securities intermediary is obligated to its entitlement holder for those payments or distributions made by the issuer that are in fact received by the intermediary. It does not deal with the details of the time and manner of payment. Moreover, as with any other monetary obligation, the obligation to pay may be subject to other rights of the obligor, by way of set-off counterclaim or the like. Section 8-509(c) makes this point explicit.

4. This section applies to payments and distributions made by an issuer of a financial asset credited to a securities account. If a distribution is made to, or made available to, a securities intermediary on account of a financial asset as to which there is no issuer, the duties, if any, of the securities intermediary with respect to the distribution are subject to the agreement of the intermediary and the entitlement holder. However, in the absence of an agreement, this section may be applied by analogy in an appropriate case. If the securities intermediary is a secured party, Section 9-207(c) applies.

Reporter’s Note

No change. No change is proposed to Section 8-505, which is provided for convenience.

1 * * *

2
3 **ARTICLE 9**

4 **SECURED TRANSACTIONS**

5 **Prefatory Note to 2022 Article 9 Amendments**

6 For a brief summary of the more significant revisions of Article 9 that are included in the
7 2022 Revisions, see Section 9-101, Comment 5.

8
9 **Section 9-101. Short Title.** This article may be cited as Uniform Commercial Code–
10 Secured Transactions.

11 **Official Comment**

12 ~~1. **Source.** This Article supersedes former Uniform Commercial Code (UCC) Article 9.~~
13 ~~As did its predecessor, it provides a comprehensive scheme for the regulation of security~~
14 ~~interests in personal property and fixtures. For the most part this Article follows the general~~
15 ~~approach and retains much of the terminology of former Article 9. In addition to describing~~
16 ~~many aspects of the operation and interpretation of this Article, these Comments explain the~~
17 ~~material changes that this Article makes to former Article 9. Former Article 9 superseded the~~
18 ~~wide variety of pre-UCC security devices. Unlike the Comments to former Article 9, however,~~
19 ~~these Comments dwell very little on the pre-UCC state of the law. For that reason, the Comments~~
20 ~~to former Article 9 will remain of substantial historical value and interest. They also will remain~~
21 ~~useful in understanding the background and general conceptual approach of this Article.~~

22
23 ~~Citations to “Bankruptcy Code Section —” in these Comments are to Title 11 of the~~
24 ~~United States Code as in effect on July 1, 2010.~~

25
26 2. 1. **Source, Background, and History.** In 1990, the Permanent Editorial Board for
27 the UCC with the support of its sponsors, The American Law Institute and the National
28 Conference of Commissioners on Uniform State Laws, established a committee to study
29 Uniform Commercial Code (UCC) Article 9 of the UCC. The study committee issued its report
30 as of December 1, 1992, recommending the creation of a drafting committee for the revision of
31 Article 9 and also recommending numerous specific changes to Article 9. Organized in 1993, a
32 drafting committee met fifteen times from 1993 to 1998. This Extensive revisions of this Article
33 was were approved by its sponsors in 1998 (1998 Revisions).

34
35 The 1998 Revisions superseded former Article 9 and, as did their predecessor, provided a
36 comprehensive scheme for the regulation of security interests in personal property and fixtures.
37 For the most part this Article follows the general approach and retains much of the terminology
38 of former Article 9. Comment 4 describes the material changes that the 1998 Revisions made to
39 former Article 9. Former Article 9 superseded the wide variety of pre-UCC security devices.
40 Unlike the Comments to former Article 9, however, these Comments dwell very little on the pre-

1 UCC state of the law. For that reason, the Comments to former Article 9 will remain of
2 substantial historical value and interest. They also will remain useful in understanding the
3 background and general conceptual approach of this Article.

4
5 * * *

6
7 **3A. Further Amendments and 2022 Revisions.** This Article was conformed to
8 revised Article 1 in 2001 and to amendments to Article 7 in 2003. The sponsors approved
9 amendments to selected sections of this Article in 2010. Article 9 was again extensively revised
10 in 2022 in connection with a substantial revision of the UCC relating primarily to emerging
11 technologies (2022 Revisions). In particular, the 2022 Revisions conform and adapt Article 9 to
12 Article 12, covering controllable electronic records and rights to payment that are tethered to
13 controllable electronic records—controllable accounts and controllable payment intangibles. For
14 a brief summary of the 2022 Revisions that relate to Article 9, see Comment 5, below.

15
16 Note also that citations to “Bankruptcy Code Section” in these Comments are to Title 11
17 of the United States Code as in effect on July 1, 2022.

18
19 **4. Summary of 1998 Revisions.** Following is a brief summary of some of the more
20 significant ~~revisions~~ features of the 1998 Revisions of Article 9 that are included in the 1998
21 revision of this Article.

22
23 * * *

24
25 *Electronic chattel paper.* Section 9-102 ~~includes~~ of the 1998 Revisions included a
26 new defined term: “electronic chattel paper.” Electronic chattel paper is a record or records
27 consisting of information stored in an electronic medium (i.e., it is not written). Perfection of a
28 security interest in electronic chattel paper may be by control or filing. See Sections 9-105 (*sui*
29 *generis* definition of control of electronic chattel paper), 9-312 (perfection by filing), 9-314
30 (perfection by control). The 2022 Revisions deleted that term and substantially modified the
31 rules for chattel paper evidenced by electronic records, as discussed in Comment 5.

32
33 * * *

34
35 ~~m. Conforming and Related Amendments to Other UCC Articles.~~
36 ~~Appendix I contains several revisions to the provisions and Comments of other UCC articles.~~
37 ~~For the most part the revisions are explained in the Comments to the proposed revisions. Cross-~~
38 ~~references in other UCC articles to sections of Article 9 also have been revised.~~

39
40 * * *

41
42 **5. Summary of 2022 Revisions.** Following is a brief summary of some of the more
43 significant revisions of Article 9 that are included in the 2022 Revisions. The amendments to
44 Article 9 are extensive. Many of the amendments are necessary to conform Article 9 to Article
45 12, which (along with its Comments) should be read along with the Article 9 amendments and

1 Comments. Other material amendments include those relating to chattel paper and money,
2 among other matters.

3
4 a. **Article 12-Related Revisions.** Article 12-related amendments to Article 9
5 include the addition of two new types of collateral: controllable account (a subset of account)
6 and controllable payment intangible (a subset of payment intangible, which is a subset of general
7 intangible). Perfection of a security interest in a controllable electronic record (defined in Section
8 12-102(a)(1), and a subset of general intangible), controllable account, or controllable payment
9 intangible may be by control or by filing a financing statement. Control of a controllable
10 electronic record is determined under Section 12-105. Control of a controllable account or
11 controllable payment intangible is achieved by obtaining control of the controllable electronic
12 record that evidences the account or payment intangible. Section 9-107A(b). The rights of a
13 secured party that takes free of competing property interests under Section 12-104(e) or that is
14 protected from certain actions under Section 12-104(g), as a qualifying purchaser of a
15 controllable account, controllable electronic record, or controllable payment intangible, are
16 respected under Article 9. Section 9-331.

17
18 The law of the controllable electronic record’s jurisdiction under Section 12-107 governs
19 perfection by control and priority of a security interest in a controllable account, controllable
20 electronic record, or controllable payment intangible. Section 9-306B(a). The law of the
21 jurisdiction in which a debtor is located governs perfection by filing (but not priority) for such
22 collateral. Section 9-306B(b).

23
24 The 2022 Revisions also contains several other Article 12-related conforming
25 amendments to Article 9.

26
27 b. **Chattel Paper-Related Amendments.** These amendments primarily
28 address two issues that have arisen under the pre-2022 Article 9 with respect to transactions in
29 chattel paper.

30
31 First, the definition of “chattel paper” created uncertainty in “bundled” or “hybrid”
32 transactions in which monetary obligations exist not only under a lease of goods but also with
33 respect to other property and services relating to the leased goods. Frequently, the value of the
34 non-goods aspect of a transaction is substantially greater than the value of the lessee’s rights
35 under the lease of goods. Those who finance chattel paper and other rights to payment have
36 become uncertain as to whether these transactions give rise to chattel paper. The revisions
37 resolve this issue by treating only those transactions whose predominant purpose was to give the
38 obligor (lessee) the right to possession and use of the goods as giving rise to “chattel paper.”

39
40 Second, the statutory distinction between “tangible chattel paper” and “electronic chattel
41 paper” caused practical problems. As to tangible chattel paper (i.e., evidenced by writings),
42 problems arose in the case of multiple originals of writings and situations in which separate
43 writings covered different components of chattel paper. Official comments issued in connection
44 with the 1998 Revisions addressed, but did not entirely resolve, these issues. As to electronic
45 chattel paper, the safe harbor for control was based on a “single authoritative copy” of the chattel
46 paper. Moreover, in some situations tangible chattel paper is converted to electronic form and

1 electronic chattel paper is converted to tangible form. Additional uncertainty existed when one or
2 more records comprised one or more authoritative tangible copies of the records that evidenced
3 the right to payment and rights in related property and one or more authoritative electronic
4 copies of those records also existed.

5
6 The 2022 Revisions provide a single rule, under which a security interest in chattel paper
7 can be perfected by taking possession of the authoritative tangible copies, if any, and obtaining
8 control of the electronic authoritative copies, if any. This single rule addresses cases where some
9 records evidencing chattel paper are electronic and some are tangible or where a record in one
10 medium is replaced by a record in another.

11
12 The 2022 Revisions also define chattel paper more accurately, as the right to payment of
13 a monetary obligation that is secured by a security interest in specific goods or owed under a
14 lease of specific goods, if the right to payment and interest in the goods are evidenced by a
15 record.

16
17 Finally, the 2022 Revisions provide a new choice-of-law rule for perfection and priority
18 of security interests in chattel paper that is evidenced by authoritative electronic copies of
19 records or by such electronic copies and authoritative tangible copies. For such chattel paper,
20 Section 9-306A provides that perfection by control and possession of authoritative copies and
21 priority are governed by the law of the “electronic chattel paper’s jurisdiction,” based loosely on
22 Sections 8-110 and 9-305. For chattel paper evidenced only by authoritative tangible copies,
23 Section 9-306A(d) provides that perfection by possession and priority are governed by the law of
24 the location of the authoritative tangible copies. Perfection by filing continues to be governed by
25 the law of the location of the debtor for all chattel paper.

26 27 c. Money-Related Amendments.

28
29 Section 1-201(b)(24) defines “money” as including “a medium of exchange currently
30 authorized or adopted by a domestic or foreign government” There is no way of knowing
31 how money in an intangible form might develop, but there are indications that some countries
32 might authorize or adopt intangible tokens as a medium of exchange and others might authorize
33 or adopt deposit accounts with a central bank as money.² For many purposes, there is no need for
34 the UCC to distinguish among types of money. For Article 9 purposes, however, distinctions
35 must be drawn. Only tangible money is susceptible of perfection by possession. And the steps
36 needed for perfection by control with respect to intangible tokens, such as controllable electronic
37 records, will not work for deposit accounts with a central bank, and vice versa. For this reason,
38 the revisions provide an Article 9 definition of “money” that is narrower than the Article 1
39 definition. The Article 9 definition expressly excludes deposit accounts. Thus, “electronic
40 money,” defined in Section 9-102 as “money in an electronic form,” would not include deposit
41 accounts. The Article 9 definition of “money” also excludes money in an electronic form that
42 cannot be subjected to control under Section 9-105A.

43
44 The Article 9 provisions governing “deposit accounts” would remain suitable for

² These tokens or accounts sometimes are referred to as central bank digital currency or CBDC.

1 accounts with a central bank, even if a government has adopted these accounts as money. The
2 revisions make no changes with respect to Article 9's treatment of deposit accounts, aside from
3 distinguishing them from "money" and therefore from "electronic money." Under the revisions,
4 a security interest in electronic money as original collateral can be perfected only by control. The
5 requirements for obtaining control of electronic money under Section 9-105A are essentially the
6 same as those for obtaining control of a controllable electronic record under Article 12.

7
8 The revisions also make changes to Section 9-332, the take-free rules for transferees of
9 money, including the addition of a new rule applicable to electronic money, and transferees of
10 funds from deposit accounts.

11 **Section 9-102. Definitions and Index of Definitions.**

12
13 (a) [Article 9 definitions.] In this article:

14 * * *

15 (2) "Account", except as used in "account for", "account to", "account
16 statement", "customer's account", "on account of", "statement of account", and paragraphs (14)
17 ("commodity account") and (29) ("deposit account"), means a right to payment of a monetary
18 obligation, whether or not earned by performance, (i) for property that has been or is to be sold,
19 leased, licensed, assigned, or otherwise disposed of, (ii) for services rendered or to be rendered,
20 (iii) for a policy of insurance issued or to be issued, (iv) for a secondary obligation incurred or to
21 be incurred, (v) for energy provided or to be provided, (vi) for the use or hire of a vessel under a
22 charter or other contract, (vii) arising out of the use of a credit or charge card or information
23 contained on or for use with the card, or (viii) as winnings in a lottery or other game of chance
24 operated or sponsored by a State, governmental unit of a State, or person licensed or authorized
25 to operate the game by a State or governmental unit of a State. The term includes controllable
26 accounts and health-care-insurance receivables. The term does not include (i) ~~rights to payment~~
27 ~~evidenced by chattel paper or an instrument~~ chattel paper, (ii) commercial tort claims, (iii)
28 deposit accounts, (iv) investment property, (v) letter-of-credit rights or letters of credit, ~~or~~ (vi)
29 rights to payment for money or funds advanced or sold, other than rights arising out of the use of

1 a credit or charge card or information contained on or for use with the ~~card~~ card, or (vii) rights to
2 payment evidenced by an instrument.

3 (3) “Account debtor” means a person obligated on an account, chattel paper, or
4 general intangible. The term does not include persons obligated to pay a negotiable instrument,
5 even if the negotiable instrument ~~constitutes part of~~ evidences chattel paper.

6 (4) “Accounting”, except as used in “accounting for”, means a record:

7 (A) ~~authenticated~~ signed by a secured party;

8 (B) indicating the aggregate unpaid secured obligations as of a date not more
9 than 35 days earlier or 35 days later than the date of the record; and

10 (C) identifying the components of the obligations in reasonable detail.

11 * * *

12 (7A) “Assignee”, except as used in “assignee for benefit of creditors”, means a
13 person (i) in whose favor a security interest that secures an obligation is created or provided for
14 under a security agreement, whether or not the obligation is outstanding or (ii) to which an
15 account, chattel paper, payment intangible, or promissory note has been sold. The term includes
16 a person to which a security interest has been transferred by a secured party.

17 (7B) “Assignor” means a person that (i) under a security agreement creates or
18 provides for a security interest that secures an obligation or (ii) sells an account, chattel paper,
19 payment intangible, or promissory note. The term includes a secured party that has transferred a
20 security interest to another person.

21 (7) “~~Authenticate~~” means:

22 (A) ~~to sign; or~~

23 (B) ~~with present intent to adopt or accept a record, to attach to or logically~~

1 ~~associate with the record an electronic sound, symbol, or process. [Reserved.]~~

2 * * *

3 (11) ~~“Chattel paper” means a record or records that evidence both a monetary~~
4 ~~obligation and a security interest in specific goods, a security interest in specific goods and~~
5 ~~software used in the goods, a security interest in specific goods and license of software used in~~
6 ~~the goods, a lease of specific goods, or a lease of specific goods and license of software used in~~
7 ~~the goods. In this paragraph, “monetary obligation” means a monetary obligation secured by the~~
8 ~~goods or owed under a lease of the goods and includes a monetary obligation with respect to~~
9 ~~software used in the goods. The term does not include (i) charters or other contracts involving~~
10 ~~the use or hire of a vessel or (ii) records that evidence a right to payment arising out of the use of~~
11 ~~a credit or charge card or information contained on or for use with the card. If a transaction is~~
12 ~~evidenced by records that include an instrument or series of instruments, the group of records~~
13 ~~taken together constitutes chattel paper. “Chattel paper” means:~~

14 (A) a right to payment of a monetary obligation secured by specific goods,
15 if the right to payment and security agreement are evidenced by a record; or

16 (B) a right to payment of a monetary obligation owed by a lessee under a
17 lease agreement with respect to specific goods and a monetary obligation owed by the lessee in
18 connection with the transaction giving rise to the lease, if:

19 (i) the right to payment and lease agreement are evidenced by a
20 record; and

21 (ii) the predominant purpose of the transaction giving rise to the
22 lease was to give the lessee the right to possession and use of the goods.

23 The term does not include a right to payment arising out of a charter or other contract involving

1 the use or hire of a vessel or a right to payment arising out of the use of a credit or charge card or
2 information contained on or for use with the card.

3 * * *

4 (27A) “Controllable account” means an account evidenced by a controllable
5 electronic record that provides that the account debtor undertakes to pay the person that under
6 Section 12-105 has control of the controllable electronic record.

7 (27B) “Controllable payment intangible” means a payment intangible evidenced
8 by a controllable electronic record that provides that the account debtor undertakes to pay the
9 person that under Section 12-105 has control of the controllable electronic record.

10 * * *

11 (29) “Deposit account” means a demand, time, savings, passbook, or similar
12 account maintained with a bank. The term does not include investment property or accounts
13 evidenced by an instrument.

14 * * *

15 ~~(31) “Electronic chattel paper” means chattel paper evidenced by a record or~~
16 ~~records consisting of information stored in an electronic medium. [Reserved.]~~

17 (31A) “Electronic money” means money in an electronic form.

18 * * *

19 (42) “General intangible” means any personal property, including things in action,
20 other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods,
21 instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or
22 other minerals before extraction. The term includes controllable electronic records, payment
23 intangibles, and software.

1 * * *

2 (47) “Instrument” means a negotiable instrument or any other writing that
3 evidences a right to the payment of a monetary obligation, is not itself a security agreement or
4 lease, and is of a type that in ordinary course of business is transferred by delivery with any
5 necessary indorsement or assignment. The term does not include (i) investment property, (ii)
6 letters of credit, ~~or~~ (iii) writings that evidence a right to payment arising out of the use of a credit
7 or charge card or information contained on or for use with the card, or (iv) writings that evidence
8 chattel paper.

9 * * *

10 (54A) “Money” has the meaning in Section 1-201(b)(24), but does not include (i)
11 a deposit account or (ii) money in an electronic form that cannot be subjected to control under
12 Section 9-105A.

13 * * *

14 (61) “Payment intangible” means a general intangible under which the account
15 debtor’s principal obligation is a monetary obligation. The term includes a controllable payment
16 intangible.

17 * * *

18 (64) “Proceeds”, except as used in Section 9-609(b), means the following
19 property:

20 (A) whatever is acquired upon the sale, lease, license, exchange, or other
21 disposition of collateral;

22 (B) whatever is collected on, or distributed on account of, collateral;

23 (C) rights arising out of collateral;

1 (D) to the extent of the value of collateral, claims arising out of the loss,
2 nonconformity, or interference with the use of, defects or infringement of rights in, or damage to,
3 the collateral; or

4 (E) to the extent of the value of collateral and to the extent payable to the
5 debtor or the secured party, insurance payable by reason of the loss or nonconformity of, defects
6 or infringement of rights in, or damage to, the collateral.

7 * * *

8 (65) “Promissory note” means an instrument that evidences a promise to pay a
9 monetary obligation, does not evidence an order to pay, and does not contain an
10 acknowledgment by a bank that the bank has received for deposit a sum of money or funds.

11 (66) “Proposal” means a record ~~authenticated~~ signed by a secured party which
12 includes the terms on which the secured party is willing to accept collateral in full or partial
13 satisfaction of the obligation it secures pursuant to Sections 9-620, 9-621, and 9-622.

14 * * *

15 (75) ~~“Send”, in connection with a record or notification, means:~~
16 ~~(A) to deposit in the mail, deliver for transmission, or transmit by any other~~
17 ~~usual means of communication, with postage or cost of transmission provided for, addressed to~~
18 ~~any address reasonable under the circumstances; or~~

19 ~~(B) to cause the record or notification to be received within the time that it~~
20 ~~would have been received if properly sent under subparagraph (A). [Reserved.]~~

21 * * *

22 (79) ~~“Tangible chattel paper” means chattel paper evidenced by a record or~~
23 ~~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.] “Control” as provided in ~~Section~~ 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

* * *

2. Parties to Secured Transactions.

* * *

c. **Other Parties.** A “consumer obligor” is defined as the obligor in a consumer transaction. Definitions of “new debtor” and “original debtor” are used in the special rules found in Sections 9-326 and 9-508.

Instead of referring to a “debtor,” “secured party,” and “security interest,” all of which terms are defined in the UCC, several provisions of Article 9, including Part 4, refer to an “assignor,” “assignee,” and “assignment,” or sometimes an “assigned contract,” none of which terms have been defined in the UCC. Some courts read the undefined terms in an unduly narrow way. In 2020, the Permanent Editorial Board for the UCC issued a Commentary clarifying the meanings of these terms and amended the official comments accordingly. *PEB Commentary No. 21, Use of the Term “Assignment” in Article 9 of the Uniform Commercial Code* (Mar. 11,

2020). Paragraph 7A defines “assignee” as a person in whose favor a security interest securing an obligation is created or to which an account, chattel paper, or a payment intangible has been sold. Paragraph 7B defines “assignor” as creating a security interest securing an obligation or that sells an account, chattel paper, or a payment intangible. These definitions incorporate the essence of the Commentary into the statutory text. The definitions also specify that an “assignor” includes a secured party that transfers a security interest to another person and an “assignee” includes a person to which a security interest has been transferred by a secured party.

Absent a contrary agreement, an assignee obtains the rights and powers of an assignor as against an account debtor on assigned collateral (e.g., under Section 9-406) and as between the assignee and the assignor (debtor) (e.g., under Section 9-607). See also Restatement (Second) of Contracts § 317(1) (1981) (emphasis added):

- An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.

* * *

4. Goods-Related Definitions.

* * *

c. As-Extracted Collateral.” * * *

* * *

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.”

* * *

1 5. **Receivables-related Definitions.**

2 a. **“Account”; “Health-Care-Insurance Receivable”; “As-Extracted**
3 **Collateral.”** The definition of “account” has been expanded and reformulated. * * *

4
5 * * *

6 The amendments to the definition of “account” reflect the revised definition of “chattel
7 paper,” discussed in Comment 5.b. The revised definition also includes some additional
8 exceptions that accommodate the use of the term in other provisions.
9

10 b. **“Chattel Paper.”; “Electronic Chattel Paper”; “Tangible Chattel**
11 **Paper.”** “Chattel paper” consists of a monetary obligation together with a security interest in or a
12 lease of specific goods if the obligation and security interest or lease are evidenced by “a record
13 or records.”. The definition has been expanded from that found in former Article 9 to include
14 records that evidence a monetary obligation and a security interest in specific goods and software
15 used in the goods, a security interest in specific goods and license of software used in the goods,
16 or a lease of specific goods and license of software used in the goods. The expanded definition
17 covers transactions in which the debtor’s or lessee’s monetary obligation includes amounts owed
18 with respect to software used in the goods. The monetary obligation with respect to the software
19 need not be owed under a license from the secured party or lessor, and the secured party or lessor
20 need not be a party to the license transaction itself. Among the types of monetary obligations that
21 are included in “chattel paper” are amounts that have been advanced by the secured party or
22 lessor to enable the debtor or lessee to acquire or obtain financing for a license of the software
23 used in the goods. The definition also makes clear that rights to payment arising out of credit-
24 card transactions are not chattel paper. “Chattel paper” consists of a monetary obligation that is
25 either secured by specific goods or arises in connection with a lease of specific goods, in each
26 case if the obligation and security interest or lease is evidenced by a record. The monetary
27 obligation itself need not relate to the goods. For example, a loan secured by specific goods and
28 evidenced by one or more records creates chattel paper regardless of the purpose of the loan.
29

30 Rights to payment arising out of Charters charters of vessels or the use of credit or charge
31 cards are expressly excluded from the definition of chattel paper; they are accounts. The term
32 “charter” as used in this section includes bareboat charters, time charters, successive voyage
33 charters, contracts of affreightment, contracts of carriage, and all other arrangements for the use
34 of vessels.
35

36 Under former Section 9-105, only if the evidence of an obligation consisted of “a writing
37 or writings” could an obligation qualify as chattel paper. In this Article, traditional, written
38 chattel paper is included in the definition of “tangible chattel paper.” “Electronic chattel paper”
39 is chattel paper that is stored in an electronic medium instead of in tangible form.
40

41 The concept of an electronic medium should be construed liberally to include electrical,
42 digital, magnetic, optical, electromagnetic, or any other current or similar emerging technologies.
43

44 What distinguishes chattel paper from other rights to payment is the fact that creditor has

1 an interest in specific goods to enforce the right to payment. For example, the fact that a secured
2 party also has an interest in other property does not prevent the right to payment from being
3 chattel paper, provided that the creditor relies on the specific goods as the primary collateral.
4

5 **Example 8.** To secure a loan, Borrower grants Lender a security interest in a specified
6 item of equipment and a deposit account. The loan and the security interest are evidenced
7 by one or more records. The right to payment is chattel paper, assuming the equipment is
8 the primary collateral.
9

10 In Example 8, the inclusion of some incidental collateral, such as a deposit account, does not
11 prevent characterization of the right to payment as chattel paper. Another typical example would
12 be the inclusion of after-acquired replacement parts to be installed on the specific goods. On the
13 other hand, to be chattel paper, a right to payment must be accompanied by a security interest in
14 specific goods or a lease of specific goods. A right to payment secured by a security interest in
15 rotating collateral is not chattel paper.
16

17 **Example 9.** To secure a loan, Borrower grants Lender a security interest in all of
18 Borrower's existing and after-acquired inventory. The loan and the security interest are
19 evidenced by one or more records. The right to payment is not chattel paper.
20

21 **Example 10.** To secure a loan, Borrower grants Lender a security interest in a
22 specifically described item of equipment and also in all of Borrower's existing and after-
23 acquired equipment. The loan and the security interest are evidenced by one or more
24 records. The right to payment is not chattel paper.
25

26 Example 9 is the easy case because no "specific goods" are identified. As to Example 10, it is
27 true that the monetary obligation is secured by "specific goods" and the definition of chattel
28 paper does not specify that the obligation must be secured *only* by specific goods. However, if
29 the right to payment in Example 10 were to be characterized as chattel paper, it would be
30 possible to convert virtually any monetary obligation evidenced by records and secured by any
31 collateral into chattel paper merely by including as collateral a specific item of goods (whether
32 inventory, equipment, consumer goods, or farm products). The special rules for chattel paper
33 contemplate reliance on specific goods as the primary collateral, even if some incidental property
34 also might be included. If the inclusion of additional goods or other property indicate that
35 primary reliance is not on the specific goods, then classification as chattel paper would not be
36 appropriate. Of course, there may be close cases. In those situations, parties should take
37 appropriate precautions.
38

39 A right to payment arising from a lease of specific goods gives rise to chattel paper only
40 if the predominant purpose of the transaction is to provide the lessee the right to possession and
41 use of the goods. Therefore, under paragraph (11)(B)(ii), when a lease of specific goods is
42 combined with an obligation to provide or right to receive other property or services, the
43 resulting right to payment will be chattel paper only if the goods aspect of the transaction
44 predominates.
45

46 **Example 11.** Customer and Car Dealer enter into a transaction, evidenced by one or more

1 records, pursuant to which, in exchange for a payment of \$2,000 per month: (i) Customer
2 is entitled to possession of a specific vehicle for 36 months; (ii) Car Dealer will provide
3 round-the-clock monitoring of the vehicle's location and condition, and alert authorities
4 to provide road-side assistance in the event of a malfunction or accident; and (iii) Car
5 Dealer will, from time to time, remotely update the vehicle's operating system. The value
6 of the right to possess and use the vehicle is significantly greater than the value of the
7 monitoring service and updates. Because the goods aspect of the transaction
8 predominates, under paragraph (11)(B)(ii) Customer's monetary obligation, including the
9 portion attributable to Car Dealer's obligation to provide monitoring and updates,
10 constitutes chattel paper.

11
12 **Example 12.** Customer and Cableco enter into a transaction, evidenced by one or more
13 records, pursuant to which, in exchange for a payment of \$200 per month, Cableco will
14 provide Customer with specified television programming and a device needed to access
15 the programming (a "lease" of the device). If the components of the transaction were
16 priced separately, the price for the programming would be substantially more than the
17 price for possession and use of the device. Because the goods aspect of this transaction
18 does not predominate, under paragraph (11)(B)(ii) Customer's monetary obligation does
19 not constitute chattel paper.

20
21 The latest revision to the definition of chattel paper omits the references to a "license of
22 software used in the goods" as superfluous, inasmuch as there is no reason to single out software.
23 Other types of property may secure an obligation or be included in a transaction involving a
24 lease, as discussed above. See also Sections 2-102 (scope of Article 2); 2-106(5) (defining
25 "hybrid transaction"); 2A-102 (scope of Article 2A); 2A-103(aa) (definition of "hybrid lease").

26
27 The latest revision to the definition of "chattel paper" also changed the language from "a
28 record or records that evidence a monetary obligation" to "a right to payment of a monetary
29 obligation . . . evidenced by a record." This semantic change was for clarification purposes only;
30 it does not imply a change in meaning. Chattel paper is and has always been a right to payment
31 of a monetary obligation. Because the revised definition is based on the obligation, rather than
32 the record, the definition no longer includes the following statement, which was included in the
33 previous definition: "If a transaction is evidenced by records that include an instrument or series
34 of instruments, the group of records taken together constitutes chattel paper." The omission of
35 that statement also does not imply a change in meaning, except that writings evidencing chattel
36 paper are excluded from the definition of "instrument" under Section 9-102(a)(47). Although the
37 definition refers to "a record," chattel paper can be evidenced by one or more records because,
38 under Section 1-106, unless the statutory context otherwise requires, words in the singular
39 number include the plural.

40
41 Finally, the revised definition of "chattel paper" and the approach to perfection of a
42 security interest by possession and control under Section 9-314A have eliminated the need to
43 have separate definitions of "electronic chattel paper" and "tangible chattel paper" in Section 9-
44 102. Consequently, those definitions have been deleted.

45 * * *

1 c. **“Instrument”; “Promissory Note.”** The definition of “instrument”
2 includes a negotiable instrument. As under former Section 9-105, it also includes any other right
3 to payment of a monetary obligation that is evidenced by a writing of a type that in ordinary
4 course of business is transferred by delivery (and, if necessary, an indorsement or assignment).
5 The revised definition now explicitly excludes a writing that evidences a right to payment that is
6 chattel paper. This revision clarifies and makes explicit the understanding before the revision that
7 an obligation on an instrument that evidences chattel paper is to be treated (e.g., under Section 9-
8 330) as an obligation on chattel paper and not on an instrument. ~~Except in the case of chattel~~
9 paper. With that exception, the fact that an instrument is secured by a security interest or
10 encumbrance on property does not change the character of the instrument as such or convert the
11 combination of the instrument and collateral into a separate classification of personal property.
12 The definition also makes clear that rights to payment arising out of credit-card transactions are
13 not instruments. The definition of “promissory note” is ~~new~~, necessitated by the inclusion of
14 sales of promissory notes within the scope of Article 9. It explicitly excludes obligations arising
15 out of “orders” to pay (e.g., checks) as opposed to “promises” to pay. See Section 3-104. Section
16 9-406(d.1) adopts a modified meaning of “promissory note” as that term is used in Section 9-
17 406(d). See Section 9-406, Comment 5.

18 * * *

19
20
21 d.1. **“Controllable Account”; Controllable Payment Intangible.”** Article 9
22 affords special treatment to security interests in controllable accounts and controllable payment
23 intangibles, i.e., those accounts and payment intangibles that are evidenced by a controllable
24 electronic record that provides that the account debtor (obligor) undertakes to pay the person
25 having control of the controllable electronic record. (Of course, a person would be an account
26 debtor only if it were actually obligated on the underlying account or payment intangible.) An
27 undertaking to pay the “person that has control” means an undertaking to pay the person that has
28 control at the time payment is made. An undertaking to pay Smith, who happens to have control
29 of the relevant controllable electronic record at the time the undertaking was made, is not an
30 undertaking to pay the person that has control.

31
32 This special treatment includes the following:

- 33
34 • Perfection of a security interest in a controllable account or controllable payment
35 intangible can be achieved by filing a financing statement or by obtaining control of
36 the controllable electronic record that evidences the controllable account or
37 controllable payment intangible. Sections 9-312(a); 9-314(a); 9-107A(b).
- 38
39 • A security interest in a controllable electronic record, controllable account, or
40 controllable payment intangible that is perfected by control has priority over a
41 conflicting security interest that is perfected by another method. Section 9-326A.
- 42
43 • The benefit of the take-free and no-action rules for qualifying purchasers (including
44 secured parties) of controllable electronic records also extends to qualifying
45 purchasers of controllable accounts and controllable payment intangibles, whether or
46 not the qualifying purchaser also purchases the related controllable electronic record.

1 See Section 12-104(a) and Comments 7 and 8.

2
3 * * *

4
5 h. **“Account Debtor.”** An “account debtor” is a person obligated on an account,
6 chattel paper, or general intangible. The account debtor’s obligation often is a monetary
7 obligation; however, this is not always the case. For example, if a franchisee uses its rights
8 under a franchise agreement (a general intangible) as collateral, then the franchisor is an
9 “account debtor.” As a general matter, Article 3, and not Article 9, governs obligations on
10 negotiable instruments. Accordingly, the definition of “account debtor” excludes obligors on
11 negotiable instruments constituting part of chattel paper. The principal effect of this change
12 from the definition in former Article 9 is that the rules in Sections 9-403, 9-404, 9-405, and 9-
13 406, dealing with the rights of an assignee and duties of an account debtor, do not apply to an
14 assignment of chattel paper in which the obligation to pay is evidenced by a negotiable
15 instrument. (Section 9-406(d), however, does apply to ~~promissory notes, including negotiable~~
16 ~~promissory notes~~ a negotiable instrument that is a promissory note, as that term is modified by
17 subsection (d.1) of that section, discussed below.) Rather, the ~~assignee’s rights of an assignee of~~
18 a negotiable instrument are governed by Article 3. Similarly, the duties of an obligor on a
19 nonnegotiable instrument are governed by non-Article 9 law unless the nonnegotiable instrument
20 is a part of chattel paper, in which case the obligor is an account debtor.

21
22 The second reference to “instrument” in the definition of “account debtor” has been
23 amended to add the modifier “negotiable,” making it clear that an obligor on a negotiable
24 instrument is not an account debtor. This amendment (which is intended to clarify and not to
25 change the meaning of the definition) is useful because the definition of “instrument” has been
26 revised to exclude writings that evidence chattel paper although the definition of “negotiable
27 instrument” in Section 1-201 continues to apply under Article 9. See Section 9-102(a)(47) and
28 (b); Comment 5.c.

29
30 * * *

31
32 **9. Definitions Relating to Medium Neutrality.**

33
34 a. **“Record.”** In many, but not all, instances, the term “record” replaces the
35 term “writing” and “written.” * * *

36
37 * * * A record may be ~~authenticated~~ signed. See Comment 9.b. * * *

38
39 * * *

40
41 b. **“Authenticate”; “Communicate”; “Send.”** ~~The terms defined term~~
42 “authenticate” has been deleted. That term and “authenticated” were generally replace used in
43 Article 9 instead of “sign” and “signed.” “Authenticated” replaces and broadens the definition of
44 “signed.” However, the revised definition of “sign” in Section 1-201, to encompass encompasses
45 authentication of all records, not just writings. Accordingly, “sign” and “signed” are now used in
46 Article 9. (References to ~~authentication~~ signing of, e.g., an agreement, demand, or notification

mean, of course, ~~authentication~~ signing of a record containing an agreement, demand, or notification.) The terms “communicate” and “send” also contemplate the possibility of communication by nonwritten media. These definitions include the act of transmitting both tangible and intangible records. The definition of “send” ~~replaces, for purposes of this Article, the corresponding term in Section 1-201. The reference to “usual means of communication” in that definition contemplates an inquiry into the appropriateness of the method of transmission used in the particular circumstances involved~~ has been deleted from this Section and added to Section 1-201.

* * *

12A. Money-Related Definitions: “Money”; “Electronic Money”; “Tangible Money.” One purpose of the Article 9 definition of “money” is to ensure that 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 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). See Section 9-101, Comment 5.c. However, the 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 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. A second purpose of the Article 9 definition of “money” 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. Such property would be a general intangible, 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. 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. Sometimes there occurs a change in the software (code) of a system (sometimes referred to as a “protocol”

1 or “platform”) in which a controllable electronic record is recorded. When such a change occurs
2 in a blockchain platform, the blockchain may remain intact, no new blockchain may result, and
3 the change sometimes is colloquially referred to as a “soft fork.” If, instead, such a change
4 results in a new, separate blockchain that exists alongside the original blockchain and a new
5 controllable electronic record is created, the change is sometimes referred to as a “hard fork.”
6 But the terms “fork,” “soft fork,” and “hard fork” are ambiguous and not used consistently. Even
7 in a hard fork situation the pre-fork controllable electronic record typically would remain intact
8 (although its value might be affected). A person in control of the original record may not
9 automatically obtain control of a new record. Additional steps may be required for the person in
10 control of the original record to obtain control of the new record.

11
12 Depending on the nature and structure of the fork, a new controllable electronic record
13 arising under a hard fork may be property “distributed on account of” the original record or
14 “rights arising out of” the original record, thereby constituting proceeds of the original record
15 under subparagraph (B) or (C), or both, of the definition of “proceeds.” If the new record is
16 identifiable “proceeds,” then the rules on attachment, perfection, priority under Sections 9-
17 203(f), 9-315, and 9-322 would apply. If a security interest in the original record is perfected by
18 control, the creation of the new record in connection with a hard fork typically results in the
19 secured party obtaining control (or having the opportunity to obtain control) of the new record. If
20 that is not the case and perfection of the security interest in the original record is only by control,
21 however, then perfection would continue in the new record only until the 21st day after the
22 security interest attaches to the new record, unless one of the exceptions under subsection (d)
23 applies. Section 9-315(c), (d). For this reason, a secured party may wish also to perfect its
24 security interest by filing so that the perfection would continue thereafter in any proceeds under
25 Section 9-315(d)(1). A secured party that does so may, to ensure the priority of its perfected
26 security interest, also wish to consider obtaining a release or subordination from any earlier filed
27 secured party whose financing statement covers the same type of property. Even if that is
28 achieved, a security interest in the record that is perfected by control (even if control is later
29 obtained) would have priority over a security interest perfected only by filing. Section 9-326A.

30
31 New controllable electronic records also may be provided to persons in control of
32 existing records by way of an “airdrop” that does not involve a fork in an existing blockchain.
33 Depending on the circumstances, these new records may or may not be proceeds of the existing,
34 original record.

35
36 If the original record were a financial asset credited to a securities account, the new
37 record might become proceeds of a security entitlement for the reasons described above.
38 Concerning the duties, if any, of a securities intermediary with respect to such a distribution, see
39 Section 8-505, Comment 4.

40
41 * * *

42 15. **“Accounting.”** This definition describes the record and information that a debtor
43 is entitled to request under Section 9-210. Consistent with the revised definition of “sign” in
44 Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the
45 previous text of this definition.

1 * * *

2
3 23. **“Proposal.”** This definition describes a record that is sufficient to propose to
4 retain collateral in full or partial satisfaction of a secured obligation. See Sections 9-620, 9-621,
5 9-622. Consistent with the revised definition of “sign” in Section 1-201, the cognate term
6 “signed” replaces the reference to “authenticated” in the previous text of this definition.
7

8 **Reporter’s Note**
9

10 1. *No change to definitions of “deposit account,” “proceeds,” or “promissory*
11 *note.”* No changes to the definitions of “deposit account,” “proceeds,” or “promissory note” are
12 proposed and the definitions are provided for convenience.
13

14 2. *Further updating of official comment to Section 9-102.* The revisions to the
15 official comment to this section reflected above primarily address the more significant changes
16 in the 2022 Revisions relating to Article 9 definitions. However, the entire official comment to
17 this section will be updated in due course.
18

19 * * *

20 **Section 9-104. Control of Deposit Account.**

21 (a) **[Requirements for control.]** A secured party has control of a deposit account if:

22 (1) the secured party is the bank with which the deposit account is maintained;

23 (2) the debtor, secured party, and bank have agreed in ~~an authenticated~~ a signed
24 record that the bank will comply with instructions originated by the secured party directing
25 disposition of the funds in the deposit account without further consent by the debtor; ~~or~~

26 (3) the secured party becomes the bank’s customer with respect to the deposit
27 account; or

28 (4) another person, other than the debtor:

29 (A) has control of the deposit account and acknowledges that it has control
30 on behalf of the secured party; or

31 (B) obtains control of the deposit account after having acknowledged that
32 it will obtain control of the deposit account on behalf of the secured party

1 (b) **[Debtor’s right to direct disposition.]** A secured party that has satisfied subsection
2 (a) has control, even if the debtor retains the right to direct the disposition of funds from the
3 deposit account.

4 **Official Comment**

5
6 1. **Source.** ~~New; derived~~ Derived from Section 8-106.

7
8 2. **Why “Control” Matters.** This section explains the concept of “control” of a deposit
9 account. “Control” under this section may serve two functions. First, “control . . . pursuant to
10 the debtor’s agreement” may substitute for ~~an authenticated~~ a signed security agreement as an
11 element of attachment. See Section 9-203(b)(3)(D). Second, when a deposit account is taken as
12 original collateral, the only method of perfection is obtaining control under this section. See
13 Section 9-312(b)(1).

14
15 3. **Requirements for “Control: In General.”** This section derives from Section 8-106
16 of Revised Article 8, which defines “control” of securities and certain other investment property.
17 Under subsection (a)(1), the bank (if it is the secured party) with which the deposit account is
18 maintained has control. The effect of this provision is to afford the bank automatic perfection.
19 No other form of public notice is necessary; all actual and potential creditors of the debtor are
20 always on notice that the bank with which the debtor’s deposit account is maintained may assert
21 a claim against the deposit account.

22
23 **Example:** D maintains a deposit account with Bank A. To secure a loan from Banks X,
24 Y, and Z, D creates a security interest in the deposit account in favor of Bank A, as agent
25 for Banks X, Y, and Z. Because Bank A is a “secured party” as defined in Section 9-102,
26 the security interest is perfected by control under subsection (a)(1).

27
28 Under subsection (a)(2), a secured party may obtain control by obtaining the bank’s
29 ~~authenticated~~ signed agreement that it will comply with the secured party’s instructions without
30 further consent by the debtor. The analogous provision in Section 8-106 does not require that the
31 agreement be ~~authenticated~~ signed. An agreement to comply with the secured party’s
32 instructions suffices for “control” of a deposit account under this section even if the bank’s
33 agreement is subject to specified conditions, e.g., that the secured party’s instructions are
34 accompanied by a certification that the debtor is in default. (Of course, if the condition is the
35 *debtor’s* further consent, the statute explicitly provides that the agreement would *not* confer
36 control.) See revised Section 8-106, Comment 7.

37
38 * * *

39 4. **Control on behalf of another person.** Subsection (a)(4) provides for a secured
40 party to obtain control of a deposit account by virtue of the acknowledgment by another person,
41 other than the debtor, in control of the deposit account. It generally follows revisions to the
42 corresponding provisions for control of electronic documents of title (Section 7-106(g)), control

1 of a security entitlement (8-106(d)), control of an electronic copy of a record evidencing chattel
2 paper (Section 9-105(g)), control of electronic money (Section 9-105A(e)), and control of
3 controllable electronic records (Section 12-105(e)). For a brief discussion, see Section 12-105,
4 Comments 8 and 9.

5
6 An acknowledgment by a person in control under subsection (a)(4) would not impose any
7 duties on the bank with which the deposit account is maintained. Indeed, the bank may have no
8 knowledge or involvement whatsoever with a control person's acknowledgment under that
9 subsection. On the other hand, subsection (a)(4) should not be construed to permit the bank with
10 which the deposit account is maintained to short-circuit subsection (a)(2), which provides for
11 control through a control agreement among the debtor, the bank, and the control person.
12 However, it would be possible for the bank, acting in a capacity other than as the depository bank
13 (for example, as a secured party) to acknowledge that it has control on behalf of another
14 purchaser under subsection (a)(4).

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.

23 24 **~~Section 9-105. Control of Electronic Chattel Paper.~~**

25 **~~(a) [General rule: control of electronic chattel paper.]~~** A secured party has control of
26 ~~electronic chattel paper if a system employed for evidencing the transfer of interests in the~~
27 ~~chattel paper reliably establishes the secured party as the person to which the chattel paper was~~
28 ~~assigned.~~

29 **~~(b) [Specific facts giving control.]~~** A system satisfies subsection (a) if the record or
30 ~~records comprising the chattel paper are created, stored, and assigned in such a manner that:~~

31 ~~(1) a single authoritative copy of the record or records exists which is unique,~~
32 ~~identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;~~

33 ~~(2) the authoritative copy identifies the secured party as the assignee of the record~~
34 ~~or records;~~

35 ~~(3) the authoritative copy is communicated to and maintained by the secured party~~

1 ~~or its designated custodian;~~

2 ~~(4) copies or amendments that add or change an identified assignee of the~~
3 ~~authoritative copy can be made only with the consent of the secured party;~~

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

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

8 **Section 9-105. Control of Electronic Copy of Record Evidencing Chattel Paper.**

9 **(a) [General rule: control of electronic copy of record evidencing chattel paper.] A**
10 purchaser has control of an authoritative electronic copy of a record evidencing chattel paper if a
11 system employed for evidencing the assignment of interests in the chattel paper reliably
12 establishes the purchaser as the person to which the authoritative electronic copy was assigned.

13 **(b) [~~Specific facts giving control.~~][Single authoritative copy.] A system satisfies**
14 subsection (a) if the record or records evidencing the chattel paper are created, stored, and
15 assigned in such a manner that:

16 (1) a single authoritative copy of the record or records exists which is unique,
17 identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

18 (2) the authoritative copy identifies the purchaser as the assignee of the record or
19 records;

20 (3) the authoritative copy is communicated to and maintained by the purchaser or
21 its designated custodian;

22 (4) copies or amendments that add or change an identified assignee of the
23 authoritative copy can be made only with the consent of the purchaser;

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

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

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

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

11 (2) enables the purchaser readily to identify itself in any way, including by name,
12 identifying number, cryptographic key, office, or account number, as the assignee of the
13 authoritative electronic copy; and

14 (3) gives the purchaser exclusive power, subject to subsection (d), to:

15 (A) prevent others from adding or changing an identified assignee of the
16 authoritative electronic copy; and

17 (B) transfer control of the authoritative electronic copy.

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

20 (1) the authoritative electronic copy, a record attached to or logically associated
21 with the authoritative electronic copy, or a system in which the authoritative electronic copy is
22 recorded limits the use of the authoritative electronic copy or has a protocol programmed to
23 cause a change, including a transfer or loss of control; or

(2) the power is shared with another person.

(e) **[When power is not shared with another person.]** A power of a purchaser is not shared with another person under subsection (d)(2) and the purchaser's power is not exclusive if:

(1) the purchaser 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
purchaser; or

(B) is the transferor to the purchaser of an interest in the chattel paper.

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

(g) [Obtaining control through another person.] A purchaser has control of an authoritative electronic copy of a record evidencing chattel paper if another person, other than the transferor to the purchaser of an interest in the chattel paper:

(1) has control of the authoritative electronic copy and acknowledges that it has control on behalf of the purchaser; or

(2) obtains control of the authoritative electronic copy after having acknowledged

that it will obtain control of the electronic copy on behalf of the purchaser.

Official Comment

~~1. Source. New.~~

~~2. **“Control” of Electronic Chattel Paper.** This Article covers security interests in “electronic chattel paper,” a new term defined in Section 9-102. This section governs how “control” of electronic chattel paper may be obtained. Subsection (a), which derives from Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control. Subsection (b) sets forth a safe harbor test that, if satisfied, establishes control under the general test in subsection (a).~~

1 A secured party's control of electronic chattel paper (i) may substitute for an
2 authenticated security agreement for purposes of attachment under Section 9-203, (ii) is a
3 method of perfection under Section 9-314, and (iii) is a condition for obtaining special, non-
4 temporal priority under Section 9-330. Because electronic chattel paper cannot be transferred,
5 assigned, or possessed in the same manner as tangible chattel paper, a special definition of
6 control is necessary. In descriptive terms, this section provides that control of electronic chattel
7 paper is the functional equivalent of possession of "tangible chattel paper" (a term also defined
8 in Section 9-102).

9
10 **3. Development of Control Systems.** This Article leaves to the marketplace the
11 development of systems and procedures, through a combination of suitable technologies and
12 business practices, for dealing with control of electronic chattel paper in a commercial context.
13 Systems that evolve for control of electronic chattel paper may or may not involve a third party
14 custodian of the relevant records. As under UETA, a system must be shown to reliably establish
15 that the secured party is the assignee of the chattel paper. Reliability is a high standard and
16 encompasses the general principles of uniqueness, identifiability, and unalterability found in
17 subsection (b) without setting forth specific guidelines as to how these principles must be
18 achieved. However, the standards applied to determine whether a party is in control of electronic
19 chattel paper should not be more stringent than the standards now applied to determine whether a
20 party is in possession of tangible chattel paper. For example, just as a secured party does not
21 lose possession of tangible chattel paper merely by virtue of the possibility that a person acting
22 on its behalf *could* wrongfully redeliver the chattel paper to the debtor, so control of electronic
23 chattel paper would not be defeated by the possibility that the secured party's interest *could* be
24 subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

25
26 This section and the concept of control of electronic chattel paper are not based on the
27 same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of
28 investment property (Section 9-106), and letter of credit rights (Section 9-107). The rules for
29 control of those types of collateral are based on existing market practices and legal and
30 regulatory regimes for institutions such as banks and securities intermediaries. Analogous
31 practices for electronic chattel paper are developing nonetheless. The flexible approach adopted
32 by this section, moreover, should not impede the development of these practices and, eventually,
33 legal and regulatory regimes, which may become analogous to those for, e.g., investment
34 property.

35
36 **4. "Authoritative Copy" of Electronic Chattel Paper.** One requirement for
37 establishing control under subsection (b) is that a particular copy be an "authoritative copy."
38 "Although other copies may exist, they must be distinguished from the authoritative copy. This
39 may be achieved, for example, through the methods of authentication that are used or by
40 business practices involving the marking of any additional copies. When tangible chattel paper
41 is converted to electronic chattel paper, in order to establish that a copy of the electronic chattel
42 paper is the authoritative copy it may be necessary to show that the tangible chattel paper no
43 longer exists or has been permanently marked to indicate that it is not the authoritative copy.

44
45 **1. The Functions of Control.** A secured party can perfect a security interest in
46 chattel paper by filing. See Section 9-312(a). Alternatively, a secured party can perfect a security

1 interest in chattel paper by taking possession of all authoritative tangible copies of the record
2 evidencing the chattel paper and obtaining control of all authoritative electronic copies. Section
3 9-314A. Perfection generally serves the function of enabling the public to determine that an asset
4 (here, chattel paper) may be encumbered with a security interest. Possession and control also are
5 conditions for achieving priority under Section 9-330(a), (b), and (c). A secured party's
6 possession or control of chattel paper also may substitute for a signed security agreement for
7 purposes of attachment under Section 9-203

8
9 **2. Conditions for Obtaining Control: In General.** This section provides the
10 requirements for obtaining control of chattel paper. As explained in the comment to the
11 definition of "chattel paper," the definitions of "electronic chattel paper" and "tangible chattel
12 paper" have been deleted as unnecessary. See Section 9-102, Comment 5.b.

13
14 Subsections (a) and (b) are substantially unchanged. Subsection (a), which derives from
15 Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control.
16 (The amendments to subsection (a) primarily reflect the changes to the definition of chattel paper
17 in Section 9-102.) Subsections (b) and (c) set forth safe harbor tests that, if satisfied, establish
18 control under the general test in subsection (a). *It is important to note that compliance with the*
19 *conditions for control in subsection (c) would satisfy the conditions provided in subsection (b).*
20 However, subsection (b) has been retained out of an abundance of caution and to provide
21 assurances that existing systems for control of electronic chattel paper continue to be viable.

22
23 **3. Development of Control Systems and Application of Subsection (b).** This
24 Article leaves to the marketplace the development of systems and procedures, through a
25 combination of suitable technologies and business practices, for dealing with control of chattel
26 paper in a commercial context. As under UETA, for control under subsection (b), a system must
27 be shown to reliably establish that the secured party is the assignee of the chattel paper.
28 Reliability is a high standard and encompasses the general principles of uniqueness,
29 identifiability, and unalterability found in subsection (b), but without setting forth specific
30 guidelines as to how these principles must be achieved. Under subsection (b), at any point in
31 time, a party should be able to identify the single authoritative copy which is unique and
32 identifiable as the authoritative copy. This does not mean that once created that the authoritative
33 copy need be static and never moved or copied from its original location. To the extent that
34 backup systems exist which result in multiple copies, the key to this idea is that at any point in
35 time, the one authoritative copy needs to be unique and identifiable. However, the standards
36 applied to determine whether a party is in control of chattel paper should not be more stringent
37 than the standards now applied to determine whether a party is in possession of tangible chattel
38 paper. For example, just as a secured party does not lose possession of tangible chattel paper
39 merely by virtue of the possibility that a person acting on its behalf *could* wrongfully redeliver
40 the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the
41 possibility that the secured party's interest *could* be subverted by the wrongful conduct of a
42 person (such as a custodian) acting on its behalf.

43
44 **4. Subsection (c) Safe Harbor: In General.** The subsection (c) "safe harbor"
45 generally follows Section 12-105 for control of controllable electronic records. See generally
46 Section 12-105 and Comments. It differs from subsection (b), which (as explained above) is

1 based on a “single authoritative copy” of an electronic record or records, so subsection (b) would
2 be inapplicable when the relevant record is maintained on a blockchain or other distributed
3 ledger. The utility of distributed ledger technology (including blockchain technology) depends
4 on there being multiple authoritative copies of a record. The conditions for “control” in
5 subsection (c) are meant to reflect the functions that possession serves with respect to writings,
6 but in a more accurate and technologically flexible way than does the definition in subsection
7 (b).
8

9 Subsection (c), as supplemented by subsections (d) through (g), sets forth the
10 requirements for a purchaser to have “control of an authoritative electronic copy of a record
11 evidencing chattel paper.” However, for purposes of perfection of a security interest in the
12 chattel paper under Section 9-314A and qualification for non-temporal priority under Section 9-
13 330, the purchaser must obtain control of *each* authoritative electronic copy (i.e., *all* of the
14 copies) of a record evidencing the chattel paper and take possession of each tangible copy of the
15 record evidencing the chattel paper.
16

17 **5. Control of Electronic Copy of Record Evidencing Chattel Paper under**
18 **Subsection (c).** Under subsection (c), to obtain control of an electronic copy of a record
19 evidencing chattel paper a purchaser must be able to identify each electronic copy as
20 authoritative or nonauthoritative and identify itself as the assignee of the authoritative copy. In
21 addition, the purchaser must have the exclusive power to prevent others from adding or changing
22 an identified assignee and to transfer control of the authoritative copy. However, once it is
23 established that a person has received those powers, subsection (f) provides a presumption of
24 exclusivity. Consequently, a person asserting control need not prove exclusivity in order to make
25 out a *prima facie* case. Application of the presumption will be governed also by Section 1-206
26 (effects of a presumption under the UCC) and applicable non-UCC law (including rules of
27 procedure and evidence). See generally Section 12-105, Comment 5. Subsection (d) contains two
28 qualifications of the term “exclusive” as used in subsection (c)(3). A power can be “exclusive”
29 under subsection (c)(3) even if one or both of these qualifications apply.
30

31 Subsection (e) provides that in certain circumstances a power is not shared within the
32 meaning of subsection (d)(2), as a result the relaxation of the exclusivity requirement provided
33 by subsection (d)(2) does not apply, and, consequently, a purchaser’s power is not exclusive.
34 Subsection (e) provides that a purchaser does not share an exclusive power with another person
35 if the purchaser can exercise the power only with the other person’s cooperation (subsection
36 (e)(1)) but the other person either (i) can exercise the power without the purchaser’s cooperation
37 (subsection (e)(2)(A)) or (ii) is the transferor to the purchaser of an interest in the chattel paper
38 (subsection (e)(2)(B)). It follows that a purchaser to which subsection (e) applies does not have
39 control based on its exclusive powers (although it might have control through another person
40 under subsection (g), discussed below, or if another person having control is acting as the
41 person’s agent). As to the rationale for disqualifying a purchaser (which includes a secured party
42 in a secured transaction) from sharing powers with a transferor to the purchaser, as provided in
43 subsection (c)(2)(B), and from the benefit of shared control under subsection (d)(2), and for
44 examples of the operation of subsection (e) (in the context of the similar provision in Section 12-
45 105), see Section 12-105, Comments 5 and 9.
46

1 **6. Control Through Another Person.** Subsection (g) provides for a purchaser to
2 obtain control of an electronic copy by virtue of the acknowledgment by another person in
3 control of the electronic copy. It follows revisions to the corresponding provisions for control of
4 electronic documents of title (Section 7-106(g)), control of a security entitlement (Section 8-
5 106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of electronic money
6 (Section 9-105A(e)), and control of controllable electronic records (Section 12-105(e)). For a
7 brief discussion, see Section 12-105, Comment 8. Under subsection (g) for an acknowledgement
8 by another person to be effective to confer control on a purchaser, the other person making the
9 acknowledgment must be one “other than the transferor to the purchaser of an interest in the
10 chattel paper.” The rationale for this limitation is discussed in Section 12-105, Comment 9.

11
12 Section 9-107B(a) makes clear that a person that has control under this section has no
13 duty to acknowledge that it has or will obtain control on behalf of another person. Arrangements
14 for a person to acknowledge that it has or will obtain control on behalf of another person are not
15 standardized. Accordingly, Section 9-107B(b) leaves to the agreement of the parties and to any
16 other applicable law any duties of a person that does acknowledge that it has or will obtain
17 control on behalf of another person and provides that a person making an acknowledgment is not
18 required to confirm the acknowledgment to another person. For example, subsection (g) would
19 apply to give control to a person, Alpha, when another person, Beta, has control of each
20 authoritative electronic copy of a record evidencing chattel paper and acknowledges that it has
21 control on behalf of Alpha. However, under Section 107B(a), Beta is not required to so
22 acknowledge. And under Section 107B(b), even if Beta does so acknowledge, Beta owes no
23 duty to Alpha unless Beta agrees or other law so provides and Beta is not required to confirm its
24 acknowledgment to any other person.

25
26 **7. References to “Secured Party” Changed to “Purchaser.”** References to a
27 “secured party” in the previous text of this section have been changed to refer to a “purchaser.”
28 This change aligns the text with the priority rules of Section 9-330(a), (b), and (c).

29
30 **Section 9-105A. Control of Electronic Money.**

31 **(a) [General rule: control of electronic money.]** A person has control of electronic
32 money if:

33 (1) the electronic money, a record attached to or logically associated with the
34 electronic money, or a system in which the electronic money is recorded gives the person:

35 (A) the power to avail itself of substantially all the benefit from the
36 electronic money; and

37 (B) exclusive power, subject to subsection (b), to:

38 (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.] 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 power is not 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

1 in subsection (a)(1)(B), the powers are presumed to be exclusive.

2 (e) [Control through another person.] A person has control of electronic money if
3 another person, other than the transferor to the person of an interest in the electronic money:

4 (1) has control of the electronic money and acknowledges that it has control on
5 behalf of the person, or

6 (2) obtains control of the electronic money after having acknowledged that it will
7 obtain control of the electronic money on behalf of the person.

8 Official Comment

9
10 1. “Control” of Electronic Money: In General. A security interest in electronic
11 money as original collateral may be perfected only by control pursuant to this section. See
12 Section 9-312(b)(4). These requirements for obtaining control generally track those in Section
13 12-105 for controllable electronic records. See generally Section 12-105, Comments.

14
15 2. Control on Behalf of Another Person. Subsection (e) provides for a person to
16 obtain control of electronic money by virtue of the acknowledgment by another person in control
17 of the electronic money. It follows revisions to the corresponding provisions for control of
18 electronic documents of title (Section 7-106(g)), control of a security entitlement (Section 8-
19 106(d)(3)), control of deposit accounts (Section 9-104(a)(4)), control of an electronic copy of a
20 record evidencing chattel paper (Section 9-105(g), and control of controllable electronic records
21 (Section 12-105(e)). For a brief discussion, see Section 12-105, Comment 8.

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 * * *

32 Section 9-107A. Control of Controllable Electronic Record, Controllable 33 Account, or Controllable Payment Intangible.

34 (a) [Control under Section 12-105.] A secured party has control of a controllable
35 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.

Official Comment

1. Perfection by Control or Filing and Priority for Controllable Electronic

Records. Perfection by filing and perfection by control are alternative methods of perfection for a controllable electronic record. See Sections 9-312, 9-314. Under 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 or Filing and Priority for Controllable Account or Controllable Payment Intangible.** Perfection by filing and perfection by control also are alternative methods of perfection with for a controllable account or controllable payment intangible. See Sections 9-312, 9-314. Under this section, a secured party would obtain control of a controllable account or controllable payment intangible by obtaining control of the 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 payment intangible would be an Article 9 “payment intangible.” Section 9-102. The fact that an account or payment intangible is a controllable account or controllable payment intangible does not affect a secured party’s alternative of perfection by filing. Moreover, that fact does not affect the applicability of other provisions of Article 9, including the provisions governing an account debtor’s agreement not to assert defenses (Section 9-403) and the statutory overrides of legal and contractual restrictions on the assignability of accounts and payment intangibles (Sections 9-406 and 9-408).

Section 9-107B. No Requirement to Acknowledge or Confirm; No Duties.

(a) **[No requirement to acknowledge.]** A person that has control under Section 9-104, 9-105, or 9-105A is not required to acknowledge that it has or will obtain control on behalf of another person.

(b) [No duties or confirmation.] If a person acknowledges that it has or will obtain

1 control on behalf of another person, unless the person otherwise agrees or law other than this
2 article otherwise provides, the person does not owe any duty to the other person and is not
3 required to confirm the acknowledgment to any other person.

4 **Official Comment**

5
6 1. **Source.** Section 9-107B derives from Sections 8-106(g) and 9-313(f) and (g).

7
8 2. **Purpose.** Subsection (a) makes clear that a person that has control under the
9 specified sections has no duty to acknowledge that it has or will obtain control on behalf of
10 another person. Arrangements for a person to acknowledge that it has control on behalf of
11 another person are not standardized. Accordingly, subsection (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 any other person.

14
15 * * *

16 **Section 9-108. Sufficiency of Description.**

17 * * *

18 (e) [When description by type insufficient.] A description only by type of
19 collateral defined in [the Uniform Commercial Code] is an insufficient description of:

20 (1) a commercial tort claim; or

21 (2) in a consumer transaction, consumer goods, a security entitlement, a
22 securities account, or a commodity account.

23 **Official Comment**

24 * * *

25
26 5. **Consumer Investment Property; Commercial Tort Claims.** Subsection (e)
27 requires greater specificity of description in order to prevent debtors from inadvertently
28 encumbering certain property. Subsection (e) ~~requires~~ provides that a description by defined
29 “type” of collateral alone of a commercial tort claim or, in a consumer transaction, of a security
30 entitlement, securities account, or commodity account, is not sufficient. For example, “all
31 existing and after-acquired investment property” or “all existing and after-acquired security
32 entitlements,” without more, would be insufficient in a consumer transaction to describe a
33 security entitlement, securities account, or commodity account. The reference to “*only* by type”
34 in subsection (e) means that a description is sufficient if it satisfies subsection (a) and also

1 contains a descriptive component beyond the “type” alone. For example, a description such as
2 “all goods now or hereafter sold by secured party to debtor” would suffice. Moreover, if the
3 collateral consists of a securities account or commodity account, a description of the account is
4 sufficient to cover all existing and future security entitlements or commodity contracts carried in
5 the account. See Section 9-203(h), (i).

6
7 Under Section 9-204, an after-acquired collateral clause in a security agreement will not
8 reach future commercial tort claims. It follows that when an effective security agreement (or
9 amendment) covering a commercial tort claim as original collateral is entered into the claim
10 already will exist. Subsection (e) does not require a description to be ~~specific~~, specific, so long
11 as it extends beyond the “type.” For example, a description such as “all tort claims arising out of
12 the explosion of debtor’s factory” would suffice, even if the exact amount of the claim, the
13 theory on which it may be based, and the identity of the tortfeasor(s) are not described. (Indeed,
14 those facts may not be known at the time.)

15
16 The enhanced specificity (beyond the “type”) that subsection (e) requires does not apply
17 to the attachment of security interests in commercial tort claims or collateral in consumer
18 transactions that are identifiable proceeds of other collateral. A security interest automatically
19 attaches to such property under Sections 9-203(f) and 9-315(a)(2). This point is confirmed by
20 Section 9-204(c).

21 22 **Reporter’s Note**

23
24 *No change.* No change is proposed to Section 9-108, which is provided for convenience.
25

26 * * *

27 **Section 9-109. Scope.**

28 * * *

29 **Official Comment**

30 * * *

31 **16. Deposit Accounts.** * * *

32
33 * * * To perfect a security interest in a deposit account as original collateral, a secured
34 party (other than the bank with which the deposit account is maintained) must obtain “control” of
35 the account either by obtaining the bank’s ~~authenticated~~ signed agreement or by becoming the
36 bank’s customer with respect to the deposit account. See Sections 9-312(b)(1), 9-104. Either of
37 these steps requires the debtor’s consent.

38
39 * * *

1 **Section 9-203. Attachment and Enforceability of Security Interest; Proceeds;**
2 **Supporting Obligations; Formal Requisites.**

3 * * *

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

7 (1) value has been given;

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

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

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

14 * * *

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

18 (D) the collateral is controllable accounts, controllable electronic records,
19 controllable payment intangibles, deposit accounts, ~~electronic chattel paper,~~ electronic
20 documents, electronic money, investment property, or letter-of-credit rights, ~~or electronic~~
21 ~~documents,~~ and the secured party has control under Section 7-106, 9-104, 9-105A, 9-106, ~~or 9-~~
22 107, or 9-107A pursuant to the debtor's security agreement; or

23 (E) the collateral is chattel paper and the secured party has possession and

1 control under Section 9-314A pursuant to the debtor's security agreement.

2 * * *

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

6 * * *

7 **Official Comment**

8 * * *

9
10 **3. Security Agreement; Signed.** Under subsection (b)(3), enforceability requires the
11 debtor's security agreement and compliance with an evidentiary requirement in the nature of a
12 Statute of Frauds. Paragraph (3)(A) represents the most basic of the evidentiary alternatives,
13 under which the debtor must ~~authenticate~~ sign a security agreement that provides a description of
14 the collateral. Under Section 9-102, a "security agreement" is "an agreement that creates or
15 provides for a security interest." Neither that definition nor the requirement of paragraph (3)(A)
16 rejects the deeply rooted doctrine that a bill of sale, although absolute in form, may be shown in
17 fact to have been given as security. Under this Article, as under prior law, a debtor may show by
18 parol evidence that a transfer purporting to be absolute was in fact for security. Similarly, a self-
19 styled "lease" may serve as a security agreement if the agreement creates a security interest. See
20 Section 1-203 (distinguishing security interest from lease). Consistent with the revised definition
21 of "sign" in Section 1-201, the cognate terms "signed" and "signing" replace the references to
22 "authenticated" and "authentication" in the previous text of this Section.

23
24 **4. Possession, Delivery, or Control Pursuant to Security Agreement.** The other
25 alternatives in subsection (b)(3) dispense with the requirement of an ~~authenticated~~ signed
26 security agreement and provide alternative evidentiary tests. Under paragraph (3)(B), the
27 secured party's possession substitutes for the debtor's ~~authentication~~ signed security agreement
28 under paragraph (3)(A) if the secured party's possession is "pursuant to the debtor's security
29 agreement." That phrase refers to the debtor's agreement to the secured party's possession for
30 ~~the purpose of creating in connection with the creation of~~ a security interest. The phrase should
31 not be confused with the phrase "debtor has ~~authenticated~~ signed a security agreement," used in
32 paragraph (3)(A), which contemplates the debtor's ~~authentication~~ signing of a record. In the
33 unlikely event that possession is obtained without the debtor's agreement, possession would not
34 suffice as a substitute for ~~an authenticated~~ a signed security agreement. However, once the
35 security interest has become enforceable and has attached, it is not impaired by the fact that the
36 secured party's possession is maintained without the agreement of a subsequent debtor (e.g., a
37 transferee). Possession as contemplated by Section 9-313 is possession for purposes of
38 subsection (b)(3)(B), even though it may not constitute possession "pursuant to the debtor's
39 agreement" and consequently might not serve as a substitute for ~~an authenticated~~ a signed

1 security agreement under subsection (b)(3)(A). Subsection (b)(3)(C) provides that delivery of a
2 certificated security to the secured party under Section 8-301 pursuant to the debtor's security
3 agreement is sufficient as a substitute for ~~an authenticated~~ a signed security agreement.
4 Similarly, under subsection (b)(3)(D), control of controllable accounts, controllable electronic
5 records, controllable payment intangibles, deposit accounts, electronic documents, electronic
6 money, investment property, a deposit account, electronic chattel paper, or a letter-of-credit
7 right, or electronic documents rights satisfies the evidentiary test if control is pursuant to the
8 debtor's security agreement, and under subsection (b)(3)(E), possession and control of chattel
9 paper under Section 9-314A satisfies the evidentiary test if pursuant to the debtor's security
10 agreement.

11 * * *

12
13
14 **8. Proceeds and Supporting Obligations.** Under subsection (f), attachment of a
15 security interest in original collateral also is attachment of a security interest in identifiable
16 proceeds as provided in Section 9-315(a)(2). It is not necessary for a security agreement to
17 mention "proceeds" or otherwise to describe collateral consisting of proceeds. See also Section
18 9-108, Comment 5. Also under subsection (f), a security interest in a "supporting obligation"
19 (defined in Section 9-102) automatically follows from a security interest in the underlying,
20 supported collateral. This result was implicit under former Article 9. Implicit in subsection (f) is
21 the principle that the secured party's interest in a supporting obligation extends to the supporting
22 obligation only to the extent that it supports the collateral in which the secured party has a
23 security interest. Complex issues may arise, however, if a supporting obligation supports many
24 separate obligations of a particular account debtor and if the supported obligations are separately
25 assigned as security to several secured parties. The problems may be exacerbated if a supporting
26 obligation is limited to an aggregate amount that is less than the aggregate amount of the
27 obligations it supports. This Article does not contain provisions dealing with competing claims
28 to a limited supporting obligation. As under former Article 9, other law, including the law of
29 suretyship, and the agreements of the parties will control.

30 * * *

31
32
33 **Section 9-204. After-Acquired Property; Future Advances.**

34 (a) **[After-acquired collateral.]** Except as otherwise provided in subsection (b), a
35 security agreement may create or provide for a security interest in after-acquired collateral.

36 (b) **[When after-acquired property clause not effective.]** A Subject to subsection (c), a
37 security interest does not attach under a term constituting an after-acquired property clause to:

38 (1) consumer goods, other than an accession when given as additional security,
39 unless the debtor acquires rights in them within 10 days after the secured party gives value; or

1 (2) a commercial tort claim.

2 **(c) [Limitation on subsection (b).]** Subsection (b) does not prevent a security interest
3 from attaching:

4 (1) to consumer goods as proceeds under Section 9-315(a) or commingled goods
5 under Section 9-336(c);

6 (2) to a commercial tort claim as proceeds under Section 9-315(a); or

7 (3) under an after-acquired property clause to property that is proceeds of
8 consumer goods or a commercial tort claim.

9 ~~(e)~~ **(d) [Future advances and other value.]** A security agreement may provide that
10 collateral secures, or that accounts, chattel paper, payment intangibles, or promissory notes are
11 sold in connection with, future advances or other value, whether or not the advances or value are
12 given pursuant to commitment.

13 Official Comment

14
15 * * *

16
17 3. **After-Acquired Consumer Goods.** Subsection (b)(1) makes ineffective an after-
18 acquired property clause covering consumer goods (defined in Section ~~9-109~~ 9-102(a)(23)),
19 except as accessions (see Section 9-335), acquired more than 10 days after the secured party
20 gives value. Subsection (b)(1) is unchanged in substance from the corresponding provision in
21 former Section 9-204(2). However, a term granting a security interest in consumer goods that
22 will be purchase-money collateral in the transaction is not “a term constituting an after-acquired
23 property clause.” Consequently, subsection (b)(1) does not prevent the security interest from
24 attaching to the purchase-money collateral even if the collateral is not an accession and the
25 debtor acquires rights in the collateral more than 10 days after the secured party gives value.
26

27 4. **Commercial Tort Claims.** Subsection (b)(2) provides that an after-acquired
28 property clause in a security agreement does not reach future commercial tort claims. In order
29 for a security interest in a tort claim as original collateral to attach, the claim must be in existence
30 when the security agreement is ~~authenticated~~ signed. In addition, the security agreement must
31 describe the tort claim with greater specificity than simply “all tort claims.” See Section 9-
32 108(e).
33

1 **4A. Proceeds and Commingled Goods.** Subsection (c) clarifies and makes explicit
2 what is implicit in the previous text of subsection (b). Subsection (b) does not prevent a security
3 interest from attaching to consumer goods as proceeds or as commingled goods, to commercial
4 tort claims as proceeds, or under an after-acquired property clause to proceeds of consumer
5 goods or commercial tort claims. This clarification corrects and rejects the erroneous holdings of
6 several cases addressing commercial tort claims that are proceeds. As to proceeds, this result also
7 follows from Section 9-203(f).

8
9 * * *

10
11 **Section 9-207. Rights and Duties of Secured Party Having Possession or Control**
12 **of Collateral.**

13 * * *

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

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

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

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

22 * * *

23 **Section 9-208. Additional Duties of Secured Party Having Control of Collateral.**

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

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

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

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

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

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

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

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

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

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

22 (3) a secured party, other than a buyer, having control under Section 9-105 of an
23 authoritative electronic copy of a record evidencing chattel paper shall transfer control of the

1 electronic copy to the debtor or a person designated by the debtor;

2 (4) a secured party having control of investment property under Section 8-
3 106(d)(2) or 9-106(b) shall send to the securities intermediary or commodity intermediary with
4 which the security entitlement or commodity contract is maintained ~~an authenticated~~ a signed
5 record that releases the securities intermediary or commodity intermediary from any further
6 obligation to comply with entitlement orders or directions originated by the secured party;

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

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

12 ~~(A) give control of the electronic document to the debtor or its designated~~
13 ~~custodian;~~

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

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

22 (6) a secured party having control under Section 7-106 of an authoritative
23 electronic copy of an electronic document of title shall transfer control of the electronic copy to

1 the debtor or a person designated by the debtor;

2 (7) a secured party having control under Section 9-105A of electronic money shall
3 transfer control of the electronic money to the debtor or a person designated by the debtor; and

4 (8) a secured party having control under Section 12-105 of a controllable
5 electronic record, other than a buyer of a controllable account or controllable payment intangible
6 evidenced by the controllable electronic record, shall transfer control of the controllable
7 electronic record to the debtor or a person designated by the debtor.

8 **Official Comment**

9 * * *

10
11 2. **Scope and Purpose.** This section imposes duties on a secured party who has
12 control of a deposit account, an electronic copy of a record evidencing chattel paper, investment
13 property, a letter-of-credit right, ~~or an electronic documents~~ document of title, electronic money,
14 or a controllable electronic record. The duty to terminate the secured party's control is
15 analogous to the duty to file a termination statement, imposed by Section 9-513. Under
16 subsection (a), it applies only when there is no outstanding secured obligation and the secured
17 party is not committed to give value. The requirements of this section can be varied by
18 agreement under Section 1-102(3). For example, a debtor could by contract agree that the
19 secured party may comply with subsection (b) by releasing control more than 10 days after
20 demand. Also, duties under this section should not be read to conflict with the terms of the
21 collateral itself. For example, if the collateral is a time deposit account, subsection (b)(2) should
22 not require a secured party with control to make an early withdrawal of the funds (assuming that
23 were possible) in order to pay them over to the debtor or put them in an account in the debtor's
24 name.

25
26 * * *

27
28 5. **"Signed" Replaces "Authenticated."** Consistent with the revised definition of
29 "sign" in Section 1-201, the cognate term "signed" replaces references to "authenticated" in the
30 previous text of this section.

31
32 **Section 9-209. Duties of Secured Party if Account Debtor Has Been Notified of**
33 **Assignment.**

34 (a) **[Applicability of section.]** Except as otherwise provided in subsection (c), this
35 section applies if:

1 (1) there is no outstanding secured obligation; and

2 (2) the secured party is not committed to make advances, incur obligations, or
3 otherwise give value.

4 (b) **[Duties of secured party after receiving demand from debtor.]** Within 10 days
5 after receiving ~~an authenticated~~ a signed demand by the debtor, a secured party shall send to an
6 account debtor that has received notification, under Section 9-406(a) or 12-106(b), of an
7 assignment to the secured party as assignee ~~under Section 9-406(a) an authenticated~~ a signed
8 record that releases the account debtor from any further obligation to the secured party.

9 (c) **[Inapplicability to sales.]** This section does not apply to an assignment constituting
10 the sale of an account, chattel paper, or payment intangible.

11 **Official Comment**

12 * * *

13 3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of
14 “sign” in Section 1-201, the cognate term “signed” replaces references to “authenticated” in the
15 previous text of this section.
16

17 **Section 9-210. Request for Accounting; Request Regarding List of Collateral or**
18 **Statement of Account.**

19 (a) **[Definitions.]** In this section:

20 (1) “Request” means a record of a type described in paragraph (2), (3), or (4).

21 (2) “Request for an accounting” means a record ~~authenticated~~ signed by a debtor
22 requesting that the recipient provide an accounting of the unpaid obligations secured by
23 collateral and reasonably identifying the transaction or relationship that is the subject of the
24 request.

1 (3) “Request regarding a list of collateral” means a record ~~authenticated~~ signed
2 by a debtor requesting that the recipient approve or correct a list of what the debtor believes to be
3 the collateral securing an obligation and reasonably identifying the transaction or relationship
4 that is the subject of the request.

5 (4) “Request regarding a statement of account” means a record ~~authenticated~~
6 signed by a debtor requesting that the recipient approve or correct a statement indicating what
7 the debtor believes to be the aggregate amount of unpaid obligations secured by collateral as of a
8 specified date and reasonably identifying the transaction or relationship that is the subject of the
9 request.

10 (b) **[Duty to respond to requests.]** Subject to subsections (c), (d), (e), and (f), a secured
11 party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or
12 a consignor, shall comply with a request within 14 days after receipt:

13 (1) in the case of a request for an accounting, by ~~authenticating~~ signing and
14 sending to the debtor an accounting; and

15 (2) in the case of a request regarding a list of collateral or a request regarding a
16 statement of account, by ~~authenticating~~ signing and sending to the debtor an approval or
17 correction.

18 (c) **[Request regarding list of collateral; statement concerning type of collateral.]** A
19 secured party that claims a security interest in all of a particular type of collateral owned by the
20 debtor may comply with a request regarding a list of collateral by sending to the debtor an
21 ~~authenticated~~ signed record including a statement to that effect within 14 days after receipt.

22 (d) **[Request regarding list of collateral; no interest claimed.]** A person that receives
23 a request regarding a list of collateral, claims no interest in the collateral when it receives the

request, and claimed an interest in the collateral at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an ~~authenticated~~ signed record:

(1) disclaiming any interest in the collateral; and

(2) if known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the collateral.

(e) [Request for accounting or regarding statement of account; no interest in obligation claimed.] A person that receives a request for an accounting or a request regarding a statement of account, claims no interest in the obligations when it receives the request, and claimed an interest in the obligations at an earlier time shall comply with the request within 14 days after receipt by sending to the debtor an ~~authenticated~~ signed record:

(1) disclaiming any interest in the obligations; and

(2) if known to the recipient, providing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

(f) [Charges for responses.] A debtor is entitled without charge to one response to a request under this section during any six-month period. The secured party may require payment of a charge not exceeding \$25 for each additional response.

Official Comment

* * *

8. "Signed" and "Signing" Replaces "Authenticated" and "Authenticating."
Consistent with the revised definition of "sign" in Section 1-201, the cognate terms "signed" and "signing" replace references to "authenticated" and "authenticating" in the previous text of this section.

* * *

Section 9-301. Law Governing Perfection and Priority of Security Interests.

Except as otherwise provided in Sections 9-303 through ~~9-306~~ 9-306B, the following

1 rules determine the law governing perfection, the effect of perfection or nonperfection, and the
2 priority of a security interest in collateral:

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

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

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

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

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

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

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

19 **Official Comment**

20
21 * * *

22
23 **5. Law Governing Perfection: Exceptions.** The general rule is subject to several
24 exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303),
25 deposit accounts (see Section 9-304), investment property (see Section 9-305), ~~or~~ letter-of-credit
26 rights (see Section 9-306), chattel paper (see Section 9-306A), or controllable accounts,
27 controllable electronic records, or controllable payment intangibles (see Section 9-306B). Nor
28 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 interest in a deposit account maintained with that bank, even if a transaction does not bear any relation to the bank’s jurisdiction.

(b) **[Bank’s jurisdiction.]** The following rules determine a bank’s jurisdiction for purposes of this part:

(1) If an agreement between the bank and its customer governing the deposit account expressly provides that a particular jurisdiction is the bank’s jurisdiction for purposes of

1 this part, this article, or [the Uniform Commercial Code], that jurisdiction is the bank's
2 jurisdiction.

3 (2) If paragraph (1) does not apply and an agreement between the bank and its
4 customer governing the deposit account expressly provides that the agreement is governed by the
5 law of a particular jurisdiction, that jurisdiction is the bank's jurisdiction.

6 (3) If neither paragraph (1) nor paragraph (2) applies and an agreement between
7 the bank and its customer governing the deposit account expressly provides that the deposit
8 account is maintained at an office in a particular jurisdiction, that jurisdiction is the bank's
9 jurisdiction.

10 (4) If none of the preceding paragraphs applies, the bank's jurisdiction is the
11 jurisdiction in which the office identified in an account statement as the office serving the
12 customer's account is located.

13 (5) If none of the preceding paragraphs applies, the bank's jurisdiction is the
14 jurisdiction in which the chief executive office of the bank is located.

15 **Official Comment**

16 * * *

17 4. No Relation to Bank's Jurisdiction Required. As to the final clause of
18 subsection (a), see Section 8-110, Comment 5A.

19 **Section 9-305. Law Governing Perfection and Priority of Security Interests in** 20 **Investment Property.**

21 (a) **[Governing law: general rules.]** Except as otherwise provided in subsection (c), the
22 following rules apply:

23 (1) While a security certificate is located in a jurisdiction, the local law of that
24 jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a
25

1 security interest in the certificated security represented thereby.

2 (2) The local law of the issuer's jurisdiction as specified in Section 8-110(d)
3 governs perfection, the effect of perfection or nonperfection, and the priority of a security
4 interest in an uncertificated security.

5 (3) The local law of the securities intermediary's jurisdiction as specified in
6 Section 8-110(e) governs perfection, the effect of perfection or nonperfection, and the priority of
7 a security interest in a security entitlement or securities account.

8 (4) The local law of the commodity intermediary's jurisdiction governs
9 perfection, the effect of perfection or nonperfection, and the priority of a security interest in a
10 commodity contract or commodity account.

11 (5) The local law of the issuer's jurisdiction, the securities intermediary's
12 jurisdiction, or the commodity intermediary's jurisdiction governs perfection, the effect of
13 perfection or nonperfection, and the priority of a security interest, even if a transaction does not
14 bear any relation to that jurisdiction.

15 (b) **[Commodity intermediary's jurisdiction.]** The following rules determine a
16 commodity intermediary's jurisdiction for purposes of this part:

17 (1) If an agreement between the commodity intermediary and commodity
18 customer governing the commodity account expressly provides that a particular jurisdiction is
19 the commodity intermediary's jurisdiction for purposes of this part, this article, or [the Uniform
20 Commercial Code], that jurisdiction is the commodity intermediary's jurisdiction.

21 (2) If paragraph (1) does not apply and an agreement between the commodity
22 intermediary and commodity customer governing the commodity account expressly provides that
23 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 intermediary's, or Commodity Intermediary Jurisdiction Required. As to subsection (a)(5), see Section 8-110, Comment 5A.

* * *

1 **Section 9-306A. Law Governing Perfection and Priority of Security Interests in**
2 **Chattel Paper.**

3 **(a) [Chattel paper evidenced by authoritative electronic copy.]** Except as provided in
4 subsection (e), if chattel paper is evidenced only by an authoritative electronic copy of the chattel
5 paper or is evidenced by an authoritative electronic copy and an authoritative tangible copy, the
6 local law of the electronic chattel paper's jurisdiction governs perfection, the effect of perfection
7 or nonperfection, and the priority of a security interest in the chattel paper, even if a transaction
8 does not bear any relation to the electronic chattel paper's jurisdiction.

9 **(b) [Electronic chattel paper's jurisdiction.]** The following rules determine the
10 electronic chattel paper's jurisdiction under this section:

11 **(1) If the authoritative electronic copy of the record evidencing chattel paper, or a**
12 record attached to or logically associated with the electronic copy and readily available for
13 review, expressly provides that a particular jurisdiction is the electronic chattel paper's
14 jurisdiction for purposes of this part, this article, or [the Uniform Commercial Code], that
15 jurisdiction is the electronic chattel paper's jurisdiction.

16 **(2) If paragraph (1) does not apply and the rules of the system in which the**
17 authoritative electronic copy is recorded are readily available for review and expressly provide
18 that a particular jurisdiction is the electronic chattel paper's jurisdiction for purposes of this part,
19 this article, or [the Uniform Commercial Code], that jurisdiction is the electronic chattel paper's
20 jurisdiction.

21 **(3) If paragraphs (1) and (2) do not apply and the authoritative electronic copy, or**
22 a record attached to or logically associated with the electronic copy and readily available for
23 review, expressly provides that the chattel paper is governed by the law of a particular

jurisdiction, that jurisdiction is the electronic chattel paper's jurisdiction.

(4) If paragraphs (1) through (3) do not apply and the rules of the system in which the authoritative electronic copy is recorded are readily available for review and expressly provide that the chattel paper or the system is governed by the law of a particular jurisdiction, that jurisdiction is the electronic chattel paper's jurisdiction.

(5) If paragraphs (1) through (4) do not apply, the electronic chattel paper's jurisdiction is the jurisdiction in which the debtor is located.

(c) [Chattel paper evidenced by authoritative tangible copy.] If an authoritative tangible copy of a record evidences chattel paper and the chattel paper is not evidenced by an authoritative electronic copy, while the authoritative tangible copy of the record evidencing chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(1) perfection of a security interest in the chattel paper by possession under Section 9-314A; and

(2) the effect of perfection or nonperfection and the priority of a security interest in the chattel paper.

(d) [When perfection governed by law of jurisdiction where debtor is located.] The local law of the jurisdiction in which the debtor is located governs perfection of a security interest in chattel paper by filing.

Official Comment

1. **Source.** Section 9-306A(a) and (b) derive from Sections 8-110(e) and 9-305 on law governing perfection and priority of security interests in investment property (as do Sections 9-306B and 12-107).

2. **Applicability of this Section.** This section determines the law governing perfection and priority of security interests in chattel paper. Subsections (a) and (b) apply to chattel paper that is evidenced only by an authoritative electronic copy of the chattel paper or by an authoritative electronic copy and an authoritative tangible copy. Subsection (c) applies to

1 chattel paper that is evidenced by an authoritative tangible copy but not evidenced by an
2 authoritative electronic copy. Subsection (d) applies to perfection by filing for all chattel paper.
3

4 **3. Authoritative Electronic Copy: Electronic Chattel Paper's Jurisdiction.**

5 Subsection (a) specifies the law governing perfection and priority of security interests in chattel
6 paper evidenced by an authoritative electronic copy of the chattel paper, even if it is also
7 evidenced by an authoritative tangible copy. Subject to subsection (d) on perfection by filing, the
8 law governing perfection and priority is the local law of the electronic chattel paper's
9 jurisdiction. Drawing on Sections 8-110 and 9-305, it is the authoritative electronic copy itself,
10 records attached thereto or associated therewith, or the system in which the authoritative
11 electronic copy is recorded that determines the electronic chattel paper's jurisdiction and,
12 therefore, the governing law. Subsection (b) provides a "waterfall" of rules based on provisions
13 that identify a particular jurisdiction as the electronic chattel paper's jurisdiction or alternatively
14 that provide the governing law of the chattel paper or of the system in which the electronic copy
15 is recorded. When no such identification or provision is made, it is the debtor's location,
16 determined under Section 9-307, that is the electronic chattel paper's jurisdiction. As to the final
17 clause of subsection (a), see Section 8-110, Comment 5A.
18

19 **4. Rationale for Subsection (a).** A buyer of, or secured lender against, chattel paper
20 may arrange for authoritative electronic copies of chattel paper that it wishes to have assigned to
21 it to be originated in or submitted into a system for the control and assignment of the chattel
22 paper. The secured parties and lessors that will be assigning the chattel paper may be located in
23 many different jurisdictions. As to assignments of the chattel paper by these secured parties and
24 lessors (assignor-debtors), but for this section perfection and priority would be governed by the
25 law of each assignor-debtor's location under Section 9-301(1). Under this section, however, the
26 law of a single jurisdiction—the electronic chattel paper's jurisdiction—could govern perfection
27 and priority with respect to all of the assignments. By avoiding the application of the laws of
28 multiple jurisdictions to perfection and priority, this rule could substantially reduce transaction
29 costs.
30

31 **5. Authoritative tangible copy.** Subsection (c) ties the choice-of-law rules to the
32 location of the authoritative tangible copy when no authoritative electronic copy exists. In that
33 circumstance, the local law of the jurisdiction where the authoritative tangible copy is physically
34 located governs perfection of a security interest in the chattel paper by possession, under Section
35 9-314A, and priority. Like its predecessor, subsection (c) assumes that all the authoritative
36 tangible copies are located in the same jurisdiction. However, assuming the secured party is in
37 possession of all the tangible copies, even if the copies are located in more than one jurisdiction
38 the situation is unlikely to be problematic.
39

40 **6. Perfection by filing.** Subsection (d) provides that the local law of the jurisdiction
41 where the debtor is located governs perfection by filing for all chattel paper.
42

43 **Section 9-306B. Law Governing Perfection and Priority of Security Interests in**

44 **Controllable Accounts, Controllable Electronic Records, and Controllable Payment**

1 **Intangibles.**

2 **(a) [Governing law: general rules.]** Except as provided in subsection (b), the local law
3 of the controllable electronic record's jurisdiction specified in Section 12-107(c) and (d) governs
4 perfection, the effect of perfection or nonperfection, and the priority of a security interest in a
5 controllable electronic record and a security interest in a controllable account or controllable
6 payment intangible evidenced by the controllable electronic record.

7 **(b) [When perfection governed by law of jurisdiction where debtor is located.]** The
8 local law of the jurisdiction in which the debtor is located governs:

9 (1) perfection of a security interest in a controllable account, controllable
10 electronic record, or controllable payment intangible by filing; and

11 (2) automatic perfection of a security interest in a controllable payment intangible
12 created by a sale of the controllable payment intangible.

13 **Official Comment**

14
15 **1. Perfection by control and priority.** Subsection (a) deals with perfection of a
16 security interest in a controllable account, controllable electronic record, or controllable payment
17 intangible other than by filing—i.e., perfection by control under Section 12-105—and priority.
18 For these purposes the governing law is that of the controllable electronic record's jurisdiction
19 under Section 12-107(c) and (d).

20
21 **2. Perfection by filing.** Under subsection (b) the local law of the jurisdiction of the
22 debtor's location governs perfection of a security interest in a controllable account, controllable
23 electronic record, or controllable payment intangible by filing (but not priority, as to which
24 subsection (a) would apply). Because controllable electronic records are general intangibles and
25 controllable accounts and controllable payment intangibles are subsets of accounts and payment
26 intangibles, this provision does not change prior law.'

27 * * *

28
29 **Section 9-310. When Filing Required to Perfect Security Interest or Agricultural**
30 **Lien; Security Interests and Agricultural Liens to Which Filing Provisions Do Not**
31 **Apply.**

* * *

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

* * *

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

(9) in chattel paper which is perfected by possession and control under Section 9-314A;

~~(9)~~(10) in proceeds which is perfected under Section 9-315; or

~~(10)~~(11) that is perfected under Section 9-316.

* * *

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 party's taking possession under Section 9-313; and

(4) a security interest in electronic money may be perfected only by control under Section 9-314.

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

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

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

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

goods may be perfected by:

- (1) issuance of a document in the name of the secured party;
- (2) the bailee's receipt of notification of the secured party's interest; or
- (3) filing as to the goods.

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

* * *

Official Comment

* * *

4A. Controllable Accounts, Controllable Electronic Records, and Controllable Payment Intangibles. Consistent with the treatment of chattel paper, instruments, investment property, and negotiable documents, under subsection (a) a security interest in controllable accounts, controllable electronic records, and controllable payment intangibles may be perfected by filing. A security interest in that collateral also may be perfected by control. Section 9-314.

* * *

6A. Money. Under subsection (b)(3), a security interest in tangible money may be perfected only by possession under Section 9-313. Similarly, a security interest in electronic money may be perfected only by control under Section 9-314.

7. Goods Covered by Document of Title. Subsection (c) applies to goods in the possession of a bailee who has issued a negotiable document covering the goods. Subsection (d) applies to goods in the possession of a bailee who has issued a nonnegotiable document of title, including a document of title that is "non-negotiable" under Section 7-104. Section 9-313 governs perfection of a security interest in goods in the possession of a bailee who has not issued a document of title.

Subsection (c) clarifies the perfection and priority rules in former Section 9-304(2). Consistently with the provisions of Article 7, subsection (c) takes the position that, as long as a negotiable document covering goods is outstanding, title to the goods is, so to say, locked up in the document. Accordingly, a security interest in goods covered by a negotiable document may

1 be perfected by perfecting a security interest in the document. The security interest also may be
2 perfected by another method, e.g., by filing. The priority rule in subsection (c) governs only
3 priority between (i) a security interest in goods which is perfected by perfecting in the document
4 and (ii) a security interest in the goods which becomes perfected by another method while the
5 goods are covered by the document.

6
7 **Example 1:** While wheat is in a grain elevator and covered by a negotiable warehouse
8 receipt, Debtor creates a security interest in the wheat in favor of SP-1 and SP-2. SP-1
9 perfects by filing a financing statement covering “wheat.” Thereafter, SP-2 perfects by
10 filing a financing statement describing the warehouse receipt. Subsection (c)(1) provides
11 that SP-2’s security interest is perfected. Subsection (c)(2) provides that SP-2’s security
12 interest is senior to SP-1’s.

13
14 **Example 2:** The facts are as in Example 1, but SP-1’s security interest attached and was
15 perfected before the goods were delivered to the grain elevator. Subsection (c)(2) does not
16 apply, because SP-1’s security interest did not become perfected during the time that the
17 wheat was in the possession of a bailee. Rather, the first-to-file-or-perfect priority rule
18 applies. See Sections 9-322 and 7-503.

19
20 A secured party may become “a holder to whom a negotiable document of title has been duly
21 negotiated” under Section 7-501. If so, the secured party acquires the rights specified by Article
22 7. Article 9 does not limit those rights, which may include the right to priority over an earlier-
23 perfected security interest. See Section 9-331(a).

24
25 Subsection (d) takes a different approach to the problem of goods covered by a
26 nonnegotiable document. Here, title to the goods is not looked on as being locked up in the
27 document: For example, a transferee that takes delivery of a nonnegotiable document receives,
28 under Section 7-504(a), “the title and rights” of the transferor, but the transferee would not
29 thereby become a “person entitled under the document” with a right to receive delivery of the
30 goods from the bailee. and the The secured party may perfect its security interest directly in the
31 goods by filing as to them. The subsection provides two other methods of perfection: issuance of
32 the document in the secured party’s name (as consignee of a straight bill of lading or the person
33 to whom delivery would be made under a non-negotiable warehouse receipt) and receipt of
34 notification of the secured party’s interest by the bailee. Issuance (or reissuance) of the
35 nonnegotiable document in the secured party’s name would allow the secured party to become a
36 “person entitled under the document.” However, the bailee’s receipt of notification would not
37 confer on the secured party the status of a person entitled unless the notification resulted from an
38 instruction under the document. See Section 7-102(a)(9) (defining “person entitled under the
39 document”) and Comment 6. Perfection under subsection (d) occurs when the bailee receives
40 notification of the secured party’s interest in the goods, regardless of who sends the notification.
41 Receipt of notification is effective to perfect, regardless of whether the bailee responds. Unlike
42 former Section 9-304(3), from which it derives, subsection (d) does not apply to goods in the
43 possession of a bailee who has not issued a document of title. Section 9-313(c) covers that case
44 and provides that perfection by possession as to goods not covered by a document requires the
45 bailee’s acknowledgment.

1 Subsection (a) makes clear that a security interest in negotiable documents (and other
2 collateral mentioned there) may be perfected by filing, but it makes no mention of nonnegotiable
3 documents. However, under the general rule of Section 9-310, a security interest in a
4 nonnegotiable document can be perfected by filing. A security interest in an electronic
5 document, negotiable or nonnegotiable, can be perfected by control under Section 7-106. Section
6 9-314(a). But a security interest in a nonnegotiable tangible document cannot be perfected by
7 possession. Section 9-313(a). Although a perfected security interest in a nonnegotiable document
8 might provide useful benefits for the secured party, it would not perfect a security interest in the
9 goods. And by perfecting a security interest in the nonnegotiable document the secured party
10 would not thereby become a “person entitled under the document.” Indeed, unless
11 the secured party also took delivery of the document (i.e., possession or control under Section 1-
12 201(b)(15)), it would not obtain the rights of a transferee under Section 7-504(a).

13
14 **8. Temporary Perfection Without Having First Otherwise Perfected.** Subsection (e)
15 follows former Section 9-304(4) in giving perfected status to security interests in certificated
16 securities, instruments, and negotiable documents for a short period (reduced from 21 to 20 days,
17 which is the time period generally applicable in this Article), although there has been no filing
18 and the collateral is in the debtor’s possession or control. The 20-day temporary perfection runs
19 from the date of attachment. There is no limitation on the purpose for which the debtor is in
20 possession, but the secured party must have given “new value” (defined in Section 9-102) under
21 ~~an authenticated~~ a signed security agreement.

22
23 * * *

24
25 **10. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of
26 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in
27 the previous text of this section.

28
29 **Section 9-313. When Possession by or Delivery to Secured Party Perfects**
30 **Security Interest Without Filing.**

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

36 * * *

37 (c) **[Collateral in possession of person other than debtor.]** With respect to collateral

1 other than certificated securities and goods covered by a document, a secured party takes
2 possession of collateral in the possession of a person other than the debtor, the secured party, or a
3 lessee of the collateral from the debtor in the ordinary course of the debtor's business, when:

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

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

9 * * *

10 Official Comment

11 * * *

12
13 2. **Perfection by Possession.** As under the common law of pledge, no filing is
14 required by this Article to perfect a security interest if the secured party takes possession of the
15 collateral. See Section 9-310(b)(6).

16
17 This section permits a security interest to be perfected by the taking of possession only
18 when the collateral is goods, instruments, ~~tangible~~ negotiable tangible documents, or tangible
19 money, ~~or tangible chattel paper~~. Accounts, commercial tort claims, deposit accounts,
20 investment property, letter-of-credit rights, letters of credit, and oil, gas, or other minerals before
21 extraction are excluded. (But see Comment 6, below, regarding certificated securities.) A
22 security interest in accounts and payment intangibles—property not ordinarily represented by any
23 writing whose delivery operates to transfer the right to payment—may under this Article be
24 perfected only by filing. This rule would not be affected by the fact that a security agreement or
25 other record described the assignment of such collateral as a “pledge.” Section 9-309(2) exempts
26 from filing certain assignments of accounts or payment intangibles which are out of the ordinary
27 course of financing. These exempted assignments are perfected when they attach. Similarly,
28 under Section 9-309(3), sales of payment intangibles are automatically perfected.

29
30 Perfection by possession of chattel paper evidenced by an authoritative tangible record
31 (formerly defined as “tangible chattel paper”) has been removed from this section. Instead,
32 perfection by possession and control of chattel paper is governed by Section 9-314A.

33 * * *

1 **4. Goods in Possession of Third Party: Perfection.** Former Section 9-305 permitted
2 perfection of a security interest by notification to a bailee in possession of collateral. This
3 Article distinguishes between goods in the possession of a bailee who has issued a document of
4 title covering the goods and goods in the possession of a third party who has not issued a
5 document. Section 9-312(c) or (d) applies to the former, depending on whether the document is
6 negotiable. Section 9-313(c) applies to the latter. It provides a method of perfection by
7 possession when the collateral is possessed by a third person who is not the secured party's
8 agent.

9
10 Notification of a third person does not suffice to perfect under Section 9-313(c). Rather,
11 perfection does not occur unless the third person ~~authenticates~~ signs an acknowledgment that it
12 holds possession of the collateral for the secured party's benefit. Compare Section 9-312(d),
13 under which receipt of notification of the security party's interest by a bailee holding goods
14 covered by a nonnegotiable document is sufficient to perfect, even if the bailee does not
15 acknowledge receipt of the notification. A third person may acknowledge that it will hold for the
16 secured party's benefit goods to be received in the future. Under these circumstances, perfection
17 by possession occurs when the third person obtains possession of the goods.

18
19 * * *

20
21 **9. Delivery to Third Party by Secured Party.** ~~New subsections~~ Subsections (h) and (i)
22 address the practice of mortgage warehouse lenders. These lenders typically send mortgage
23 notes to prospective purchasers under cover of letters advising the prospective purchasers that
24 the lenders hold security interests in the notes. These lenders relied on notification to maintain
25 perfection under former 9-305. Requiring them to obtain ~~authenticated~~ signed acknowledgments
26 from each prospective purchaser under subsection (c) could be unduly burdensome and
27 disruptive of established practices. Under subsection (h), when a secured party in possession
28 itself delivers the collateral to a third party, instructions to the third party would be sufficient to
29 maintain perfection by possession; an acknowledgment would not be necessary. Under
30 subsection (i), the secured party does not relinquish possession by making a delivery under
31 subsection (h), even if the delivery violates the rights of the debtor. That subsection also makes
32 clear that a person to whom collateral is delivered under subsection (h) does not owe any duty to
33 the secured party and is not required to confirm the delivery to another person unless the person
34 otherwise agrees or law other than this Article provides otherwise.

35
36 **10. "Signs" and "Signed" Replaces "Authenticates" and "Authenticated."**
37 Consistent with the revised definition of "sign" in Section 1-201, the terms "signs" and "signed"
38 replace the references to "authenticates" and "authenticated" in the previous text of this section.

39
40 **Section 9-314. Perfection by Control.**

41 **(a) [Perfection by control.]** A security interest in ~~investment property, deposit accounts,~~
42 ~~letter of credit rights, electronic chattel paper, or electronic documents~~ controllable accounts,
43 controllable electronic records, controllable payment intangibles, deposit accounts, electronic

documents, electronic money, investment property, or letter-of-credit rights may be perfected by control of the collateral under Section 7-106, 9-104, ~~9-105~~, 9-105A, 9-106, ~~or 9-107~~, or 9-107A.

(b) **[Specified collateral: time of perfection by control; continuation of perfection.]** A security interest in ~~deposit accounts, electronic chattel paper, letter-of-credit rights, or electronic documents~~, controllable accounts, controllable electronic records, controllable payment 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.

* * *

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, deposit accounts, electronic documents, electronic money, and letter-of-credit rights, ~~electronic chattel paper, 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, perfection by possession and control of chattel paper is governed by Section 9-314A.

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

1 that both a debtor and a secured party may have control of the relevant collateral by sharing an
2 exclusive power. Such shared control between a debtor and secured party does not necessarily
3 impair perfection of a security interest under this section or Section 9-314A. On shared exclusive
4 powers, see generally Section 12-105, Comment 5. However, if a secured party can exercise a
5 power only if the power is exercised also by the debtor, the power would not be shared and,
6 consequently, the secured party would not have control based on the exclusive power. This
7 result follows from Section 12-105(c) and corresponding subsections in the other provisions on
8 control cited above. Under Section 12-105(c), because a debtor would be a “transferor of an
9 interest” in a controllable electronic record or a controllable account or payment intangible
10 evidenced by the record, the debtor’s “blocking power” with respect to the secured party’s
11 exercise of the power would disqualify the secured party from sharing (and, consequently,
12 enjoying) the exclusive power and perfection by control based on exclusive powers. Similarly, a
13 purchaser in that situation would be disqualified from having control and thereby from enjoying
14 the status and benefits of a qualifying purchaser (Section 12-102(a)(2)) under Section 12-104(e)
15 and (g) if the purchaser takes from a transferor of an interest having such a blocking power
16 (whether or not the transferor is a debtor).

17
18 Section 12-105(e) contains a similar limitation in connection with control through
19 another person. An acknowledging person must be one “other than the transferor of an interest
20 in the electronic record.” The same or a similar limitation is found in the other provisions
21 relating to control through another person. See Sections 7-106(g) (control of electronic
22 document of title); 8-106(d)(3) (control of a security entitlement); 9-104(a)(4) (control of deposit
23 accounts); 9-105(g) (control of authoritative electronic copy of record evidencing chattel paper);
24 9-105A)(e) (control of electronic money).

25
26 For a discussion of the rationale for these limitations on sharing exclusive control and
27 control through another person, see Section 12-105, Comment 9.

28
29 * * *

30
31 **Section 9-314A. Perfection by Possession and Control of Chattel Paper.**

32 **(a) [Perfection by possession and control.] A secured party may perfect a security**
33 **interest in chattel paper by taking possession of each authoritative tangible copy of the record**
34 **evidencing the chattel paper and obtaining control of each authoritative electronic copy of the**
35 **electronic record evidencing the chattel paper.**

36 **(b) [Time of perfection; continuation of perfection.] A security interest is perfected**
37 **under subsection (a) no earlier than the time the secured party takes possession and obtains**
38 **control and remains perfected under subsection (a) only while the secured party retains**

possession and control.

(c) [Application of Section 9-313 to perfection by possession of chattel 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.

Official Comment

1. **“Authoritative copy.”** 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.

Like the previous text, Section 9-105(b) distinguishes between authoritative and nonauthoritative copies of electronic chattel paper and refers to copies that are “authoritative.” And, like its predecessor, Section 9-105(b) does not define the term. However, it also applies this concept to tangible records that evidence chattel paper.

To show that it has possession of all 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 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 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, 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 authoritative tangible copies of records evidencing
3 chattel paper.

4
5 4. **Shared control.** As to the sharing of powers over an authoritative electronic copy
6 of a record evidencing chattel paper (see Section 9-105(c)(2)) by a debtor and a secured party
7 and control through another person (see Section 9-105(g)), see Section 9-314, Comment 2A.

8
9 * * *

10 **Section 9-316. Continued Perfection of Security Interest Following Change in**
11 **Governing Law.**

12 (a) **[General rule: effect on perfection of change in governing law.]** A security interest
13 perfected pursuant to the law of the jurisdiction designated in Section 9-301(1), ~~or~~ 9-305(c), 9-
14 306A(d), or 9-306B(b) remains perfected until the earliest of:

15 (1) the time perfection would have ceased under the law of that jurisdiction;

16 (2) the expiration of four months after a change of the debtor's location to another
17 jurisdiction; or

18 (3) the expiration of one year after a transfer of collateral to a person that thereby
19 becomes a debtor and is located in another jurisdiction.

20 * * *

21 (c) **[Possessory security interest in collateral moved to new jurisdiction.]** A
22 possessory security interest in collateral, other than goods covered by a certificate of title and as-
23 extracted collateral consisting of goods, remains continuously perfected if:

24 (1) the collateral is located in one jurisdiction and subject to a security
25 interest perfected under the law of that jurisdiction;

26 (2) thereafter the collateral is brought into another jurisdiction; and

(3) upon entry into the other jurisdiction, the security interest is perfected under the law of the other jurisdiction.

* * *

(f) **[Change in jurisdiction of controllable electronic record, electronic chattel paper, bank, issuer, nominated person, securities intermediary, or commodity intermediary.] A security interest in controllable accounts, controllable electronic records, controllable payment intangibles, chattel paper, deposit accounts, letter-of-credit rights, or investment property which is perfected under the law of the controllable electronic record's jurisdiction, the electronic chattel paper's jurisdiction, the bank's jurisdiction, the issuer's jurisdiction, a nominated person's jurisdiction, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable, remains perfected until the earlier of:**

(1) the time the security interest would have become unperfected under the law of that jurisdiction; or

(2) the expiration of four months after a change of the applicable jurisdiction to another jurisdiction.

(g) **[Subsection (f) security interest perfected or unperfected under law of new jurisdiction.]** If a security interest described in subsection (f) becomes perfected under the law of the other jurisdiction before the earlier of the time or the end of the period described in that subsection, it remains perfected thereafter. If the security interest does not become perfected under the law of the other jurisdiction before the earlier of that time or the end of that period, it becomes unperfected and is deemed never to have been perfected as against a purchaser of the collateral for value.

* * *

Official Comment

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4. **Possessory Security Interests.** Subsection (c) deals with continued perfection of possessory security interests. It applies not only to security interests perfected solely by the secured party's having taken possession of the collateral. It also applies to security interests perfected by a method that includes as an element of perfection the secured party's having taken possession, such as perfection by taking delivery of a certificated security in registered form, see Section 9-313(a), ~~and perfection by obtaining control over a certificated security.~~ See, see Section 9-314(a), and perfection by taking possession of and control over authoritative copies of records evidencing chattel paper, see Section 9-314A(a).

* * *

6. **Controllable Accounts, Controllable Electronic Records, Controllable Payment Intangibles, Chattel Paper, Deposit Accounts, Letter-of-Credit Rights, and Investment Property.** Subsections (f) and (g) address changes in the jurisdiction of a controllable electronic record, electronic chattel paper, bank, issuer of an uncertificated security, issuer of or nominated person under a letter of credit, securities intermediary, and commodity intermediary. The provisions are analogous to those of subsections (a) and (b).

* * *

Section 9-317. Interests That Take Priority Over or Take Free of Security

Interest or Agricultural Lien.

* * *

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

(c) **[Lessees that receive delivery.]** Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and

1 receives delivery of the collateral without knowledge of the security interest or agricultural lien
2 and before it is perfected.

3 (d) **[Licensees and buyers of certain collateral.]** A Subject to subsections (f) through
4 (i), a licensee of a general intangible or a buyer, other than a secured party, of collateral other
5 than ~~tangible chattel paper~~, tangible documents, goods, instruments, or a certificated security
6 takes free of a security interest if the licensee or buyer gives value without knowledge of the
7 security interest and before it is perfected.

8 * * *

9 (f) **[Buyers of chattel paper.]** A buyer, other than a secured party, of chattel paper takes
10 free of a security interest if, without knowledge of the security interest and before it is perfected,
11 the buyer gives value and:

12 (1) receives delivery of each authoritative tangible copy of the record evidencing
13 the chattel paper; and

14 (2) if each authoritative electronic copy of the record evidencing the chattel paper
15 can be subjected to control under Section 9-105, obtains control of each authoritative electronic
16 copy.

17 (g) **[Buyers of electronic documents.]** A buyer of an electronic document takes free of a
18 security interest if, without knowledge of the security interest and before it is perfected, the
19 buyer gives value and, if each authoritative electronic copy of the document can be subjected to
20 control under Section 7-106, obtains control of each authoritative electronic copy.

21 (h) **[Buyers of controllable electronic records.]** A buyer of a controllable electronic
22 record takes free of a security interest if, without knowledge of the security interest and before it
23 is perfected, the buyer gives value and obtains control of the controllable electronic record.

(i) [Buyers of controllable accounts and controllable payment intangibles.] A buyer, other than a secured party, of a controllable account or a controllable payment intangible takes free of a security interest if, without knowledge of the security interest and before it is perfected, the buyer gives value and obtains control of the controllable account or controllable payment intangible.

Official Comment

* * *

6. Purchasers Other Than Secured Parties. Subsections (b), (c), and (d) afford priority over an unperfected security interest to certain purchasers (other than secured parties) of collateral. They derive from former (i.e., pre-1998) Sections 9-301(1)(c), 2A-307(2), and 9-301(d). Former Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are “subordinate” to the rights of certain purchasers. But, as former Comment 9 suggested, the practical effect of subordination in this context is that the purchaser takes free of the security interest. To avoid any possible misinterpretation, subsections (b) and (d) of this section use the phrase “takes free.”

Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (~~tangible chattel paper~~, tangible documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See Section 9-321.

Normally, there will be no question when a buyer of tangible chattel paper, tangible documents, instruments, or security certificates “receives delivery” of the property. See Section 1-201 (defining “delivery”). However, sometimes a buyer or lessee of goods, such as complex machinery, takes delivery of the goods in stages and completes assembly at its own location. Under those circumstances, the buyer or lessee “receives delivery” within the meaning of subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the seller or lessor, it would be apparent to a potential lender to the seller or lessor that another person might have an interest in the goods.

Subsection (b) no longer applies to chattel paper. The take-free rule in subsection (f) for buyers of chattel paper reflects the corresponding changes in the definition of chattel paper and in the methods of perfection. See Sections 9-102(a)(11) (defining “chattel paper”); 9-314A (perfection by possession and control). Note that subsection (f) applies only to a buyer of chattel

1 paper “other than a secured party” and most buyers of chattel paper are secured parties. See
2 Sections 9-102(a)(73) (defining “secured party” as a person to which chattel paper has been
3 sold); 9-109(a)(3) (Article 9 applies to a sale of chattel paper); 1-201(b)(35) (defining “security
4 interest” to include the interest of a buyer of chattel paper). However, Article 9 does not apply to
5 “a sale of . . . chattel paper . . . as part of a sale of the business out of which . . . [the chattel
6 paper] arose” and, accordingly, subsection (f) would apply to a buyer of chattel paper in a such a
7 sale of business transaction. Subsection (f) provides that such a buyer of chattel paper takes free
8 of a security interest if, without knowledge of the security interest and before it is perfected, the
9 buyer gives value and receives delivery of each authoritative tangible copy of the record
10 evidencing the chattel paper and, if the chattel paper can be subjected to control, the buyer
11 obtains control of each authoritative electronic copy.
12

13 Although chattel paper has been removed from subsection (b), the phrase “other than a
14 secured party” has been retained because buyers of instruments that are promissory notes, but not
15 buyers of other instruments, are secured parties. See Sections 9-109(a)(3) (Article 9 applies to a
16 sale of a promissory note); 1-201(b)(35) (defining “security interest” to include the interest of a
17 buyer of a promissory note).
18

19 The rule of subsection (b) obviously is not appropriate where the collateral consists of
20 intangibles and there is no representative piece of paper whose physical delivery is the only or
21 the customary method of transfer or no means of taking control of the collateral as a functional
22 equivalent of a delivery. Therefore, with respect to such intangibles (including accounts other
23 than controllable accounts, ~~electronic chattel paper,~~ electronic documents not subject to control,
24 general intangibles other than controllable payment intangibles, and investment property other
25 than certificated securities), subsection (d) gives priority to any buyer who gives value without
26 knowledge, and before perfection, of the security interest. A licensee of a general intangible
27 takes free of an unperfected security interest in the general intangible under the same
28 circumstances (to the extent of the licensee’s rights under the license). Note that a licensee of a
29 general intangible in ordinary course of business takes rights under a nonexclusive license free of
30 security interests created by the licensor, even if perfected. See Section 9-321.
31

32 Unless Section 9-109 excludes the transaction from this Article, a buyer of accounts,
33 ~~chattel paper,~~ payment intangibles, or promissory notes is a “secured party” (defined in Section
34 9-102), and ~~subsections (b) and (d) do~~ subsection (d) does not determine priority of the security
35 interest created by the sale. Rather, the priority rules generally applicable to competing security
36 interests apply. See Section 9-322.
37

38 **6A. [Buyers of Electronic Documents, Controllable Electronic Records,**
39 **Controllable Accounts, and Controllable Payment Intangibles.]** Subsection (g) provides a
40 take-free rule for electronic documents, subsection (h) so provides for controllable electronic
41 records, and subsection (i) so provides for controllable accounts and controllable payment
42 intangibles. Subsection (g) conditions the take-free rule on the buyer obtaining control of
43 authoritative electronic copies of the document only if the authoritative electronic copies can be
44 subjected to control. Subsection (h) conditions the take-free rule for a buyer of a controllable
45 electronic record on the buyer’s obtaining control of the electronic record. Similarly, under
46 subsection (i), the take-free rule for a buyer, other than a secured party, of a controllable account

1 or controllable payment intangible is conditioned on the buyer's obtaining control of the account
2 or payment intangible. Although in general a buyer of an account or a payment intangible is a
3 secured party, there are limited exceptions. See Sections 1-201(b)(35) ("security interest"
4 includes interest of buyer of accounts or payment intangibles); 9-109(d)(4) (inapplicability of
5 Article 9 to sale of accounts or payment intangibles as a part of the sale of a business).

6
7 * * *

8 **Section 9-322. Priorities Among Conflicting Security Interests in and Agricultural**
9 **Liens on Same Collateral.**

10 * * *

11 **Official Comment**

12 * * *

13
14 **6. Priority in Proceeds: General Rule.** Subsection (b)(1) follows former Section 9-
15 312(6). It provides that the baseline rules of subsection (a) apply generally to priority conflicts
16 in proceeds except where otherwise provided (e.g., as in subsections (c) through (e)). Under
17 Section 9-203, attachment cannot occur (and therefore, under Section 9-308, perfection cannot
18 occur) as to particular collateral until the collateral itself comes into existence and the debtor has
19 rights in it. Thus, a security interest in proceeds of original collateral does not attach and is not
20 perfected until the proceeds come into existence and the debtor acquires rights in them.

21
22 **Example 5:** On April 1, Debtor ~~authenticates~~ signs a security agreement granting to A a
23 security interest in all Debtor's existing and after-acquired inventory. The same day, A
24 files a financing statement covering inventory. On May 1, Debtor ~~authenticates~~ signs a
25 security agreement granting B a security interest in all Debtor's existing and future
26 accounts. The same day, B files a financing statement covering accounts. On June 1,
27 Debtor sells inventory to a customer on 30-day unsecured credit. When Debtor acquires
28 the account, B's security interest attaches to it and is perfected by B's financing
29 statement. At the very same time, A's security interest attaches to the account as
30 proceeds of the inventory and is automatically perfected. See Section 9-315. Under
31 subsection (b) of this section, for purposes of determining A's priority in the account, the
32 time of filing as to the original collateral (April 1, as to inventory) is also the time of
33 filing as to proceeds (account). Accordingly, A's security interest in the account has
34 priority over B's. Of course, had B filed its financing statement before A filed (e.g., on
35 March 1), then B would have priority in the accounts.

36
37 Section 9-324 governs the extent to which a special purchase-money priority in goods or
38 software carries over into the proceeds of the original collateral.

39 * * *

1 **Section 9-323. Future Advances.**

2 * * *

3 (d) **[Buyer of goods.]** Except as otherwise provided in subsection (e), a buyer of
4 goods ~~other than a buyer in ordinary course of business~~ takes free of a security interest to the
5 extent that it secures advances made after the earlier of:

- 6 (1) the time the secured party acquires knowledge of the buyer's purchase;
7 or
8 (2) 45 days after the purchase.

9 (e) **[Advances made pursuant to commitment: priority of buyer of goods.]**
10 Subsection (d) does not apply if the advance is made pursuant to a commitment entered into
11 without knowledge of the buyer's purchase and before the expiration of the 45-day period.

12 (f) **[Lessee of goods.]** Except as otherwise provided in subsection (g), a lessee of
13 goods, ~~other than a lessee in ordinary course of business~~, takes the leasehold interest free of a
14 security interest to the extent that it secures advances made after the earlier of:

- 15 (1) the time the secured party acquires knowledge of the lease; or
16 (2) 45 days after the lease contract becomes enforceable.

17 (g) **[Advances made pursuant to commitment: priority of lessee of goods.]**
18 Subsection (f) does not apply if the advance is made pursuant to a commitment entered into
19 without knowledge of the lease and before the expiration of the 45-day period.

20 **Official Comment**

21 * * *

22 **6. Competing Buyers and Lessees.** Under subsections (d) and (e), a buyer will not take
23 subject to a security interest to the extent it secures advances made after the secured party has
24 knowledge that the buyer has purchased the collateral or more than 45 days after the purchase
25 unless the advances were made pursuant to a commitment entered into before the expiration of

1 the 45-day period and without knowledge of the purchase. Subsections (f) and (g) provide an
2 analogous rule for lessees. Subsections (d) and (e) replace former Section 9-307(3), and
3 subsections (f) and (g) replace former Section 2A-307(4). No change in meaning is intended.
4

5 Of course, a buyer in ordinary course who takes free of the security interest under Section
6 9-320 and a lessee in ordinary course who takes free under Section 9-321 are not subject to any
7 future advances. However, the exceptions for a buyer in ordinary course of business and a lessee
8 in ordinary course of business in the previous text of subsections (d) and (f) have been deleted.
9 Even if such a buyer or lessee does not meet the requirements under Section 9-320 or 9-321 to
10 take free of a security interest, it should be entitled to the benefits of those subsections. This
11 change is consistent with the intended result under the previous text. Subsections (d) and (e)
12 replace former Section 9-307(3), and subsections (f) and (g) replace former Section 2A-307(4).
13 No change in meaning is intended.
14

15 **Section 9-324. Priority of Purchase-Money Security Interests.**

16 * * *

17 (b) **[Inventory purchase-money priority.]** Subject to subsection (c) and except
18 as otherwise provided in subsection (g), a perfected purchase-money security interest in
19 inventory has priority over a conflicting security interest in the same inventory, has priority over
20 a conflicting security interest in chattel paper or an instrument constituting proceeds of the
21 inventory and in proceeds of the chattel paper, if so provided in Section 9-330, and, except as
22 otherwise provided in Section 9-327, also has priority in identifiable cash proceeds of the
23 inventory to the extent the identifiable cash proceeds are received on or before the delivery of the
24 inventory to a buyer, if:

25 (1) the purchase-money security interest is perfected when the debtor
26 receives possession of the inventory;

27 (2) the purchase-money secured party sends ~~an authenticated~~ a signed
28 notification to the holder of the conflicting security interest;

29 (3) the holder of the conflicting security interest receives the notification
30 within five years before the debtor receives possession of the inventory; and

1 (4) the notification states that the person sending the notification has or
2 expects to acquire a purchase-money security interest in inventory of the debtor and describes the
3 inventory.

4 * * *

5 (d) **[Livestock purchase-money priority.]** Subject to subsection (e) and except
6 as otherwise provided in subsection (g), a perfected purchase-money security interest in livestock
7 that are farm products has priority over a conflicting security interest in the same livestock, and,
8 except as otherwise provided in Section 9-327, a perfected security interest in their identifiable
9 proceeds and identifiable products in their unmanufactured states also has priority, if:

10 (1) the purchase-money security interest is perfected when the debtor
11 receives possession of the livestock;

12 (2) the purchase-money secured party sends ~~an authenticated~~ a signed
13 notification to the holder of the conflicting security interest;

14 (3) the holder of the conflicting security interest receives the notification
15 within six months before the debtor receives possession of the livestock; and

16 (4) the notification states that the person sending the notification has or
17 expects to acquire a purchase-money security interest in livestock of the debtor and describes the
18 livestock.

19 **Official Comment**

20 * * *

21
22 14. “Signed” Replaces “Authenticated.” Consistent with the revised definition of
23 “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in
24 the previous text of this section.

25 * * *

Section 9-326A. Priority of Security Interest in Controllable Account, Controllable Electronic Record, and Controllable Payment Intangible. A security interest in a controllable account, controllable electronic record, or controllable payment intangible held by a secured party having control of the account, electronic record, or payment intangible has priority over a conflicting security interest held by a secured party that does not have control.

Official Comment

1. **[Control priority.]** This section adopts an approach to priority in controllable accounts, controllable electronic records, and controllable payment intangibles that is similar to the approach of Sections 9-327 (deposit accounts) and 9-328 (investment property): A security interest perfected by control has priority over conflicting security interests that are not perfected by control.

2. **[Multiple persons having control.]** This section does not apply if more than one secured party has control of a controllable account, controllable electronic record, or controllable payment intangible, which may occur through shared control or a person in control acknowledging that it has control on behalf of another person. See Section 12-105(b)(2) (shared control), (e) (control through another person). In those situations, the residual first-to-file-or-perfect rule of Section 9-322(a)(1) would apply. However, application of that first-in-time rule may not be appropriate in some circumstances. For example, a person (A) having control might acknowledge that it has control on behalf of another person (B), which did not have control. If B had filed a financing statement covering the collateral before A obtained control, however, the result would be to give B's security interest priority over A's previously senior security interest. To avoid that result, A might insist on B's subordination as a condition to A's acknowledgment. See Section 9-339 (subordination by agreement). In cases of multiple persons having control it will be important for interested persons to adjust priorities by agreement, when appropriate. See also Section 12-105, Comment 5.

* * *

Section 9-330. Priority of Purchaser of Chattel Paper or Instrument.

(a) **[Purchaser's priority: security interest claimed merely as proceeds.]** A purchaser of chattel paper has priority over a security interest in the chattel paper which is claimed merely as proceeds of inventory subject to a security interest if:

(1) in good faith and in the ordinary course of the purchaser's business, the

1 purchaser gives new value and takes possession of each authoritative tangible copy of the record
2 evidencing the chattel paper ~~or~~ and obtains control of under Section 9-105 of each authoritative
3 electronic copy of the record evidencing the chattel paper ~~under Section 9-105~~; and

4 (2) the ~~chattel paper does~~ authoritative copies of the record evidencing the chattel
5 paper do not indicate that it the chattel paper has been assigned to an identified assignee other
6 than the purchaser.

7 (b) **[Purchaser's priority: other security interests.]** A purchaser of chattel paper has
8 priority over a security interest in the chattel paper which is claimed other than merely as
9 proceeds of inventory subject to a security interest if the purchaser gives new value and takes
10 possession of each authoritative tangible copy of the record evidencing the chattel paper ~~or~~ and
11 obtains control of under Section 9-105 of each authoritative electronic copy of the record
12 evidencing the chattel paper ~~under Section 9-105~~ in good faith, in the ordinary course of the
13 purchaser's business, and without knowledge that the purchase violates the rights of the secured
14 party.

15 * * *

16 (f) **[Indication of assignment gives knowledge.]** For purposes of subsections (b) and
17 (d), if the authoritative copies of the record evidencing chattel paper or an instrument indicates
18 indicate that it the chattel paper or instrument has been assigned to an identified secured party
19 other than the purchaser, a purchaser of the chattel paper or instrument has knowledge that the
20 purchase violates the rights of the secured party.

21 Official Comment

22 * * *

23
24 2. **Non-Temporal Priority.** This Article permits a security interest to be perfected
25 in chattel paper either by filing or by the secured party's possession and control under Section 9-

1 314A and in or instruments ~~to be perfected~~ either by filing or by the secured party's taking
2 possession. This section enables secured parties and other purchasers of chattel paper (~~both~~
3 evidenced by authoritative electronic and tangible records) and instruments to obtain priority
4 over earlier-perfected security interests, thereby promoting the negotiability of these types of
5 receivables.

6
7 **3. Chattel Paper.** Subsections (a) and (b) follow former Section 9-308 in
8 distinguishing between earlier-perfected security interests in chattel paper that is claimed merely
9 as proceeds of inventory subject to a security interest and chattel paper that is claimed other than
10 merely as proceeds. Like former Section 9-308, this section does not elaborate upon the phrase
11 "merely as proceeds." For an elaboration, see PEB Commentary No. 8.

12
13 This section makes explicit the "good faith" requirement and retains the requirements of
14 "the ordinary course of the purchaser's business" and the giving of "new value" as conditions for
15 priority. Concerning the last, this Article deletes former Section 9-108 and adds to Section 9-102
16 a completely different definition of the term "new value." Under subsection (e), the holder of a
17 purchase-money security interest in inventory is deemed to give "new value" for chattel paper
18 constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may
19 qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even
20 if it does not make an additional advance against the chattel paper.

21
22 If a ~~possessory~~ security interest in ~~tangible~~ chattel paper ~~or a that is perfected by control~~
23 ~~security interest in electronic chattel paper by possession and control under Section 9-314A~~ does
24 not qualify for priority under this section, it may be subordinate to a perfected-by-filing security
25 interest under Section 9-322(a)(1).

26
27 **4. Possession and Control.** To qualify for priority under subsection (a) or (b), a
28 purchaser must "take[] possession of each authoritative tangible copy of the record evidencing
29 the chattel paper or and obtain[] control of under Section 9-105 of each authoritative electronic
30 copy of the record evidencing the chattel paper." ~~When chattel paper comprises one or more~~
31 ~~tangible records and one or more electronic records, a purchaser may satisfy the possession or~~
32 ~~control this requirement by taking possession of the tangible records under Section 9-313 and~~
33 ~~having control of the electronic records under Section 9-105. Note that this is a method of~~
34 perfection under Section 9-314A. In determining which of several related records constitutes
35 chattel paper and thus is relevant to possession or control, the form of the records is irrelevant.
36 Rather, the ~~touchstone is whether possession or control of the record would afford the~~
37 possession-and-control requirement is based on the premise that it affords public notice
38 ~~contemplated by the possession and control requirements.~~ For example, because possession or
39 control of an amendment extending the term of a lease would not afford the contemplated public
40 notice, the amendment would not constitute a record evidencing chattel paper regardless of
41 whether the amendment is in tangible form and the lease is in electronic form, the amendment is
42 electronic and the lease is tangible, the amendment and lease are both tangible, or the
43 amendment and lease are both electronic.

44
45 Two common practices have raised particular concerns with respect to the possession
46 requirement. First, in some cases the parties create more than one copy or counterpart of chattel

1 paper evidencing a single secured obligation or lease. This practice raises questions as to which
2 counterpart is the “original” and whether it is necessary for a purchaser to take possession of all
3 counterparts in order to “take possession” of the chattel paper. Second, parties sometimes enter
4 into a single “master” agreement. The master agreement contemplates that the parties will enter
5 into separate “schedules” from time to time, each evidencing chattel paper. Must a purchaser of
6 an obligation or lease evidenced by a single schedule also take possession of the record
7 evidencing the master agreement as well as the record evidencing the schedule in order to “take
8 possession” of each authoritative tangible copy of the record evidencing the chattel paper?”
9

10 The problem raised by the first practice is easily solved. The parties may in the terms of
11 their agreement and by designation on the chattel paper identify only one counterpart as the
12 original, authoritative tangible copy of the chattel paper for purposes of taking the possession of
13 the chattel paper requirement. Concerns about the second practice also are easily solved by
14 careful drafting. Each schedule should provide that it incorporates the terms of the master
15 agreement, not the other way around. This will make it clear that each schedule is a “stand
16 alone” document.
17

18 A secured party may wish to convert tangible chattel paper evidenced by authoritative
19 tangible copies to ~~electronic~~ chattel paper evidenced by electronic copies and vice versa. The
20 priority of a security interest in chattel paper under subsection (a) or (b) may be preserved, even
21 if the form of the chattel paper changes. The principle implied in the preceding paragraph, i.e.,
22 that not every copy of chattel paper is relevant, applies to “control” as well as to “possession.”
23 When there are multiple copies of chattel paper, a secured party may take “possession” or obtain
24 “control” of the chattel paper if it acts with respect to the copy or copies that are reliably
25 identified as the authoritative copy or copies ~~that are relevant for purposes of possession or~~
26 ~~control~~. Concerning the identification of copies as authoritative or nonauthoritative, see Section
27 9-105(c) and Comment 3. This principle applies as well to chattel paper that has been converted
28 from one form to another, even if the relevant copies are not the “original” chattel paper.
29

30 **5. Chattel Paper Claimed Merely as Proceeds.** ~~Subsection (a) revises the rule in~~
31 ~~former Section 9-308(b) to eliminate reference to what the purchaser knows. Instead~~ Under
32 subsection (a), a purchaser who meets the possession-or-control possession-and-control, good
33 faith, ordinary course, and new value requirements takes priority over a competing security
34 interest claimed merely as proceeds of inventory unless the authoritative copies of the record
35 evidencing the chattel paper itself indicates indicate that it has been assigned to an identified
36 assignee other than the purchaser. Thus subsection (a) recognizes the common practice of
37 placing a “legend” on chattel paper to indicate that it has been assigned. This approach, under
38 which the chattel paper purchaser who gives new value in ordinary course can rely on possession
39 and control of unlegended, ~~tangible~~ chattel paper without any concern for other facts that it may
40 know, comports with the expectations of both inventory and chattel paper financiers.
41

42 **6. Chattel Paper Claimed Other Than Merely as Proceeds.** ~~Subsection (b)~~
43 ~~eliminates the requirement that the purchaser take without knowledge that the “specific paper” is~~
44 ~~subject to the security interest and substitutes for it the requirement that the purchaser take~~ Under
45 subsection (b), a purchaser who meets the possession-and-control, good faith, ordinary course,
46 and new value requirements takes priority over a competing security interest claimed other than

1 merely as proceeds of inventory if it takes “without knowledge that the purchase violates the
2 rights of the secured party.” This standard derives from the definition of “buyer in ordinary
3 course of business” in Section 1-201(b)(9). The source of the purchaser’s knowledge is
4 irrelevant. Note, however, that “knowledge” means “actual knowledge.” Section 1-202(b).
5

6 In contrast to a junior secured party in accounts, who may be required in some special
7 circumstances to undertake a search under the “good faith” requirement, see Comment 5 to
8 Section 9-331, a purchaser of chattel paper under this section is not required as a matter of good
9 faith to make a search in order to determine the existence of prior security interests. There may
10 be circumstances where the purchaser undertakes a search nevertheless, either on its own volition
11 or because other considerations make it advisable to do so, e.g., where the purchaser also is
12 purchasing accounts. Without more, a purchaser of chattel paper who has seen a financing
13 statement covering the chattel paper or who knows that the chattel paper is encumbered with a
14 security interest, does not have knowledge that its purchase violates the secured party’s rights.
15 However, if a purchaser sees a statement in a financing statement to the effect that a purchase of
16 chattel paper from the debtor would violate the rights of the filed secured party, the purchaser
17 would have such knowledge. Likewise, under ~~new~~ subsection (f), if the authoritative copies of
18 the chattel paper itself indicates indicate that it had been assigned to an identified secured party
19 other than the purchaser, the purchaser would have wrongful knowledge for purposes of
20 subsection (b), thereby preventing the purchaser from qualifying for priority under that
21 subsection, even if the purchaser did not have actual knowledge. In the case of authoritative
22 tangible copies of a record evidencing chattel paper, the indication normally would consist of a
23 written legend on the copies ~~chattel paper~~. In the case of authoritative electronic copies of the
24 record evidencing chattel paper, this Article leaves to developing market and technological
25 practices the manner in which the ~~chattel paper~~ copies would indicate an assignment.
26

27 Subsections (a) and (f) each refer to the possibility that authoritative copies of records
28 evidencing chattel paper may indicate that the chattel paper has been assigned to an identified
29 assignee. Those subsections should be read and interpreted in a manner consistent with Section
30 9-105 on control of authoritative electronic copies of records evidencing chattel paper.
31 Accordingly, references in subsections (a) and (f) to an indication in a record evidencing chattel
32 paper also embrace, for authoritative electronic copies of such records, records attached to or
33 logically associated with the authoritative electronic copies and systems in which the
34 authoritative electronic copies are recorded. See Section 9-105(c) and (d)(1).
35

36 * * *

37
38 **11. Assignment of Lease Chattel Paper.** As defined in Section 9-102, “chattel
39 paper” includes not only ~~writings that evidence security interests in~~ rights to payment secured by
40 specific goods but also those that evidence rights to payment owed by a lessee under a true lease
41 lease of goods.
42

43 * * *

44 **Reporter’s Note**

Revised rules for purchasers of chattel paper. The revisions to the rules for purchasers of chattel paper reflect the corresponding changes in the definition of chattel paper and methods of perfection. See Sections 9-102(a)(11) (defining “chattel paper”); 9-314A (perfection by possession and control).

**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

1 and E-SIGN, 15 U.S.C. § 7021. When certain conditions have been met, those acts confer on a
2 person the status of a “holder” (as defined in 1-201(b)(21), formerly Section 1-201(20)) of an
3 “equivalent record” under former Section 9-308 (now, in part, Section 9-330) and the rights and
4 defenses of a “purchaser” under that section, among other effects. E-SIGN also refers to the
5 rights and defenses of a purchaser under Section 9-330. As a matter of the application of the
6 Uniform Commercial Code, those are not the only sections of the Uniform Commercial Code
7 that would logically be affected by UETA and E-SIGN. For example, the rights of a holder in
8 due course under Section 9-331(a) would also be covered by the application of those acts, when
9 the conditions for applicability have been satisfied.

10
11 * * *

12 Reporter’s Note

13 *Purpose of revisions to this section.* The revisions of this section ensure that Article 9
14 does not interfere with the protections that Article 12 affords to qualifying purchasers under the
15 take-free and no-action rules in Section 12-104(e) and (g).

16 Section 9-332. Transfer of Money; Transfer of Funds from Deposit Account.

17 (a) [Transferee of tangible money.] A transferee of tangible money takes the money
18 free of a security interest ~~unless the transferee acts~~ if the transferee receives possession of the
19 money without acting in collusion with the debtor in violating the rights of the secured party.

20 (b) [Transferee of electronic money.] A transferee of electronic money takes the money
21 free of a security interest if the transferee obtains control of the money without acting in
22 collusion with the debtor in violating the rights of the secured party.

23 (b)(c) [Transferee of funds from deposit account.] A transferee of funds from a deposit
24 account takes the funds free of a security interest in the deposit account ~~unless the transferee acts~~
25 if the transferee receives the funds without acting in collusion with the debtor in violating the
26 rights of the secured party.

27 Official Comment

28
29 * * *
30
31

1 2. **Scope of this Section.** This section affords broad protection ~~to~~ for transferees
2 who take of money and of funds from a deposit account and to those who take money to take
3 free of a security interest.
4

5 2A. **Meaning of “Transfer.”** The term “transferee” is not defined; however, the
6 debtor itself is not a transferee. Thus this section does not cover the case in which a debtor
7 withdraws money (currency) from its deposit account or the case in which a bank debits an
8 encumbered account and credits another account it maintains for the debtor.
9

10 A “transfer” of property occurs when the transferee has obtained a property interest in the
11 relevant property. See Section 9-102, Comment 26 (“In numerous provisions, this Article refers
12 to the “assignment” or the “transfer” of *property* interests.” (emphasis added)). Other law
13 determines when the transferee has acquired a property interest. See Section 9-408, Comment 3
14 (“Other law determines whether a debtor has a property interest (‘rights in the collateral’) and the
15 nature of that interest.”). Although the terms “transfer” and “transferee” are not defined in the
16 UCC, the term “transfer” is broader in scope than “purchase,” which requires taking in a
17 “voluntary transaction creating an interest in property.” Section ~~1-201(29)~~ 1-201(b)(29) . For
18 example, “transfer” includes involuntary transfers such as the acquisition of a judicial lien by a
19 lien creditor. See Section 9-102(a)(52) (defining “lien creditor”). However, many references to a
20 “transfer” in the UCC and official comments relate to a voluntary transfer to a purchaser, as
21 indicated by the context.
22

23 2B. **Transferees of Tangible Money and Electronic Money.** Subsection (a)
24 conditions the takes-free rule on the transferee’s receipt of possession of tangible money. This
25 reflects what had always been assumed under the previous text—that a transfer of an interest in
26 tangible money which is not accompanied by a physical transfer of possession would not impair
27 the rights of third parties. Inasmuch as “electronic money” is a new classification, no pattern of
28 past practices or understandings exists. However, subsection (b) provides a rule for electronic
29 money that complements subsection (a) by conditioning the takes-free rule on the transferee’s
30 obtaining control.
31

32 2C. **Transferees of Funds from Deposit Account.** Subsection (c) (formerly
33 subsection (b)) reflects the corresponding change for a transfer of funds from a deposit account.
34 To qualify for the take-free protection under subsection (c), the transferee must “receive[] the
35 funds without acting in collusion . . .” The amendments to subsections (a) and (c) clarify what
36 was implicit under the original text. Although “funds” is not defined in the UCC, if deposit
37 accounts with a central bank or another bank were to become money, as defined in Section 1-
38 201(b)(24), transfers from such deposit accounts would be covered by subsection (c) and not
39 subsection (b). See Section 9-102(a)(54A) (defining “money,” for purposes of Article 9, to
40 exclude deposit accounts).
41

42 A transfer of funds from a deposit account, to which subsection ~~(b)~~ (c) applies, normally
43 will be made by check, by funds transfer, or by debiting the debtor’s deposit account and
44 crediting another depositor’s account.
45

1 **Example 1:** Debtor maintains a deposit account with Bank A. The deposit account is
2 subject to a perfected security interest in favor of Lender. Debtor draws a check on the
3 account, payable to Payee. Inasmuch as the check is not the proceeds of the deposit
4 account (it is an order to pay funds from the deposit account), Lender's security interest in
5 the deposit account does not give rise to a security interest in the check. Payee deposits
6 the check into its own deposit account, and Bank A pays it. Unless Payee acted in
7 collusion with Debtor in violating Lender's rights, Payee takes the funds (the credits
8 running in favor of Payee) free of Lender's security interest. This is true regardless of
9 whether Payee is a holder in due course of the check and even if Payee gave no value for
10 the check.

11
12 **Example 2:** Debtor maintains a deposit account with Bank A. The deposit account is
13 subject to a perfected security interest in favor of Lender. At Bank B's suggestion,
14 Debtor moves the funds from the account at Bank A to Debtor's deposit account with
15 Bank B. Unless Bank B acted in collusion with Debtor in violating Lender's rights, Bank
16 B takes the funds (the credits running in favor of Bank B) free from Lender's security
17 interest. See subsection ~~(b)~~ (c). However, inasmuch as the deposit account maintained
18 with Bank B constitutes the proceeds of the deposit account at Bank A, Lender's security
19 interest would attach to that account as proceeds. See Section 9-315.

20
21 Subsection ~~(b)~~ (c) also would apply if, in ~~the example~~ these examples, Bank A debited
22 Debtor's deposit account in exchange for the issuance of Bank A's cashier's check. Lender's
23 security interest would attach to the cashier's check as proceeds of the deposit account, and the
24 rules applicable to instruments would govern any competing claims to the cashier's check. See,
25 e.g., Sections 3-306, 9-322, 9-330, 9-331.

26
27 If Debtor withdraws ~~money (currency)~~ funds from an encumbered deposit account,
28 receives the funds in the form of tangible money, and transfers the money to a third party, then
29 subsection (a), to the extent not displaced by federal law relating to money, applies to the
30 transfer. It contains substantially the same rule as subsection ~~(b)~~ (c).

31
32 Subsection ~~(b)~~ (c) applies to *transfers of funds from* a deposit account; it does not apply
33 to *transfers of the deposit account* itself or of an interest therein. Because a deposit account is a
34 monetary obligation (debt) of the depository bank to its depositor, a transfer of the deposit
35 account itself does not transfer the funds credited to the deposit account. For example, this
36 section does not apply to the creation of a security interest in a deposit account. Competing
37 claims to the deposit account itself are dealt with by other Article 9 priority rules. See Sections
38 9-317(a), 9-327, 9-340, 9-341. Similarly, a corporate merger normally would not result in a
39 transfer of funds from a deposit account. Rather, it might result in a transfer of the deposit
40 account itself. If so, the normal rules applicable to transferred collateral would apply; this
41 section would not.

42
43 The depositor's creditors (whether secured parties or lien creditors) do not have any
44 interest in the deposited funds (or any other assets of the depository bank) as a result of having an
45 interest in the deposit account (the right to payment of the bank's obligation). Consequently, a
46 transferee of funds that takes free of a security interest under subsection (c) does so whether the

1 security interest in the deposit account from which the funds were transferred arises as original
2 collateral or as proceeds.

3
4 A transferee of *an interest in the deposit account*, such as a garnishing lien creditor, does
5 not take free of a security interest in a deposit account under subsection (c). A transferee takes
6 free under subsection (c) only upon the actual receipt of *funds* from the deposit account. The
7 proper construction of subsection (c) (formerly subsection (b)) rejects cases that treat
8 garnishment of a deposit account as an immediate transfer of an interest in funds credited to the
9 deposit account.

10
11 The last event that provides a recovery for a creditor in a garnishment action virtually
12 always would be a transfer of funds from a deposit account. However, this does not mean that a
13 perfected security interest will always be cut off by a garnishing creditor. By intervening in the
14 garnishment proceeding to assert its senior security interest before funds are disbursed, the
15 secured party might assert and retain its priority. However, the relevant procedural law may not
16 provide the secured party with adequate advance notice. In some cases, a control agreement that
17 perfects a security interest in the deposit account may require the garnished bank to provide
18 prompt notice to the secured party. But not all control agreements will so provide. Moreover, the
19 secured party's priority is not absolute. See, e.g., Section 9-401, Comment 6 (explaining that the
20 equitable doctrine of marshaling may be appropriate in the case of a lien creditor's interest in
21 collateral when a senior secured party is oversecured).

22
23 **2D. Temporal Aspect of Collusion Test.** For a transferee to take free of a security
24 interest under this section the transferee must receive delivery of tangible money, obtain control
25 of electronic money, or receive funds from a deposit account without acting in collusion.
26 Whether the transferee is acting without collusion is determined as of the time of delivery to the
27 transferee or obtaining control or receipt of funds by the transferee.

28
29 **3. Policy.** Broad protection for transferees helps to ensure that security interests in
30 deposit accounts do not impair the free flow of funds. It also minimizes the likelihood that a
31 secured party will enjoy a claim to whatever the transferee purchases with the funds. Rules
32 concerning recovery of payments traditionally have placed a high value on finality. The
33 opportunity to upset a completed transaction, or even to place a completed transaction in
34 jeopardy by bringing suit against the transferee of funds, should be severely limited. Although
35 the giving of value usually is a prerequisite for receiving the ability to take free from third-party
36 claims, where payments are concerned the law is even more protective. Thus, Section 3-418(c)
37 provides that, even where the law of restitution otherwise would permit recovery of funds paid
38 by mistake, no recovery may be had from a person “who in good faith changed position in
39 reliance on the payment.” Rather than adopt this standard, this section eliminates all reliance
40 requirements whatsoever. Payments made by mistake are relatively rare, but payments of funds
41 from encumbered deposit accounts (e.g., deposit accounts containing collections from accounts
42 receivable) occur with great regularity. In most cases, unlike payment by mistake, no one would
43 object to these payments. In the vast proportion of cases, the transferee probably would be able
44 to show a change of position in reliance on the payment. This section does not put the transferee
45 to the burden of having to make this proof.

1 4. **“Bad Actors.”** To deal with the question of the “bad actor,” this section borrows
2 “collusion” language from Article 8. See, e.g., Sections 8-115, 8-503(e). This is the most
3 protective (i.e., least stringent) of the various standards now found in the UCC. Compare, e.g.,
4 Section 1-201(b)(9) (“without knowledge that the sale violates the rights of another person,” in
5 the definition of “buyer in ordinary course of business”); Section 1-201(b)(20) (defining “good
6 faith” as “honesty in fact and the observance of reasonable commercial standards of fair
7 dealing”); Section 3-302(a)(2)(v) (“without notice of any claim”).

8
9 5. **Transferee Who Does Not Take Free.** This section sets forth the circumstances
10 under which certain transferees of money or funds take free of security interests. It does not
11 determine the rights of a transferee who does not take free of a security interest.

12
13 **Example 3:** The facts are as in Example 2, but, in wrongfully moving the funds from the
14 deposit account at Bank A to Debtor’s deposit account with Bank B, Debtor acts in
15 collusion with Bank B. Bank B does not take the funds free of Lender’s security interest
16 under this section. If Debtor grants a security interest to Bank B, Section 9-327 governs
17 the relative priorities of Lender and Bank B. Under Section 9-327(3), Bank B’s security
18 interest in the Bank B deposit account is senior to Lender’s security interest in the deposit
19 account as proceeds. However, Bank B’s senior security interest does not protect Bank B
20 against any liability to Lender that might arise from Bank B’s wrongful conduct.

21
22 * * *

23 **Section 9-334. Priority of Security Interests in Fixtures and Crops.**

24 * * *

25 (f) **[Priority based on consent, disclaimer, or right to remove.]** A security
26 interest in fixtures, whether or not perfected, has priority over a conflicting interest of an
27 encumbrancer or owner of the real property if:

- 28 (1) the encumbrancer or owner has, in ~~an authenticated~~ a signed record,
29 consented to the security interest or disclaimed an interest in the goods as fixtures; or
30 (2) the debtor has a right to remove the goods as against the encumbrancer
31 or owner.

32 **Official Comment**

33 * * *

34
35 13. **“Signed” Replaces “Authenticated.”** Consistent with the revised definition of

1 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in
2 the previous text of this section.

3
4 * * *

5 **Section 9-341. Bank’s Rights and Duties with Respect to Deposit Account.**

6 Except as otherwise provided in Section 9-340(c), and unless the bank otherwise agrees
7 in ~~an authenticated~~ a signed record, a bank’s rights and duties with respect to a deposit account
8 maintained with the bank are not terminated, suspended, or modified by:

9 (1) the creation, attachment, or perfection of a security interest in the deposit
10 account;

11 (2) the bank’s knowledge of the security interest; or

12 (3) the bank’s receipt of instructions from the secured party.

13 **Official Comment**

14 * * *

15
16 **6. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of
17 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in
18 the previous text of this section.

19
20 * * *

21 **Section 9-404. Rights Acquired by Assignee; Claims and Defenses Against**
22 **Assignee.**

23 (a) **[Assignee’s rights subject to terms, claims, and defenses; exceptions.]** Unless an
24 account debtor has made an enforceable agreement not to assert defenses or claims, and subject
25 to subsections (b) through (e), the rights of an assignee are subject to:

26 (1) all terms of the agreement between the account debtor and assignor and any
27 defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment ~~authenticated~~ signed by the assignor or the assignee.

* * *

Official Comment

* * *

6. “Signed” Replaces “Authenticated.” Consistent with the revised definition of “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in the previous text of this section.

* * *

Section 9-406. Discharge of Account Debtor; Notification of Assignment; Identification and Proof of Assignment; Restrictions on Assignment of Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes Ineffective.

(a) **[Discharge of account debtor; effect of notification.]** Subject to subsections (b) through (i) and (l), an account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, ~~authenticated~~ signed by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor.

(b) **[When notification ineffective.]** Subject to ~~subsection~~ subsections (h) and (l), notification is ineffective under subsection (a):

(1) if it does not reasonably identify the rights assigned;

(2) to the extent that an agreement between an account debtor and a seller of a

1 payment intangible limits the account debtor's duty to pay a person other than the seller and the
2 limitation is effective under law other than this article; or

3 (3) at the option of an account debtor, if the notification notifies the account
4 debtor to make less than the full amount of any installment or other periodic payment to the
5 assignee, even if:

6 (A) only a portion of the account, chattel paper, or payment intangible has
7 been assigned to that assignee;

8 (B) a portion has been assigned to another assignee; or

9 (C) the account debtor knows that the assignment to that assignee is
10 limited.

11 (c) **[Proof of assignment.]** Subject to ~~subsection~~ subsections (h) and (l), if requested by
12 the account debtor, an assignee shall seasonably furnish reasonable proof that the assignment
13 has been made. Unless the assignee complies, the account debtor may discharge its obligation
14 by paying the assignor, even if the account debtor has received a notification under subsection
15 (a).

16 (d) **[Term restricting assignment generally ineffective.]** Except as otherwise
17 provided in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term
18 in an agreement between an account debtor and an assignor or in a promissory note is ineffective
19 to the extent that it:

20 (1) prohibits, restricts, or requires the consent of the account debtor or
21 person obligated on the promissory note to the assignment or transfer of, or the creation,
22 attachment, perfection, or enforcement of a security interest in, the account, chattel paper,
23 payment intangible, or promissory note; or

(2) provides that the assignment or transfer or the creation, attachment, perfection, or enforcement of the security interest may give rise to a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the account, chattel paper, payment intangible, or promissory note.

(d.1) [“Promissory note” as used in subsection (d).] As used in subsection (d), the term “promissory note” includes a negotiable instrument that is not an instrument solely because it is a writing that evidences chattel paper.

* * *

(g) [Subsection (b)(3) not waivable.] Subject to ~~subsection~~ subsections (h) and (l), an account debtor may not waive or vary its option under subsection (b)(3).

(h) [Rule for individual under other law.] This section is subject to law other than this article which establishes a different rule for an account debtor who is an individual and who incurred the obligation primarily for personal, family, or household purposes.

(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

1 apply to a controllable account or controllable payment intangible.

2 ***Legislative Note:*** *States that amend statutes, rules, and regulations to remove provisions*
3 *inconsistent with this section need not enact subsection (j).*

4
5 **Official Comment**

6
7 * * *

8
9 **2. Account Debtor's Right to Pay Assignor Until Notification.** Subsection (a)
10 provides the general rule concerning an account debtor's right to pay the assignor until the
11 account debtor receives appropriate notification. The revision makes clear that once the account
12 debtor receives the notification, the account debtor cannot discharge its obligation by paying the
13 assignor. It also makes explicit that payment to the assignor before notification, or payment to
14 the assignee after notification, discharges the obligation. No change in meaning from former
15 Section 9-318 is intended. Nothing in this section conditions the effectiveness of a notification
16 on the identity of the person who gives it. An account debtor that doubts whether the right to
17 payment has been assigned may avail itself of the procedures in subsection (c). See Comment 4.
18 As to the rights and powers of an assignee generally, see Sections 9-102(a)(7A) (defining
19 "assignee"); (7B) (defining "assignor") and Comment 2.c.

20
21 An effective notification under subsection (a) must be ~~authenticated~~ signed. This
22 requirement normally could be satisfied by sending notification on the notifying person's
23 letterhead or on a form on which the notifying person's name appears. In each case the printed
24 name would be a symbol adopted by the notifying person for the purpose of identifying the
25 person and adopting the notification. See Section ~~9-102~~ 1-201(b)(37) (defining "~~authenticate~~"
26 "sign").

27
28 * * *

29
30 **5. Contractual Restrictions on Assignment.** Former Section 9-318(4) rendered
31 ineffective an agreement between an account debtor and an assignor which prohibited
32 assignment of an account (whether outright or to secure an obligation) or prohibited a security
33 assignment of a general intangible for the payment of money due or to become due. Subsection
34 (d) essentially follows former Section 9-318(4), but expands the rule of free assignability to
35 chattel paper (subject to Sections 2A-303 and 9-407) and promissory notes and explicitly
36 overrides both restrictions and prohibitions of assignment. The policies underlying the
37 ineffectiveness of contractual restrictions under this section build on common-law developments
38 that essentially have eliminated legal restrictions on assignments of rights to payment as security
39 and other assignments of rights to payment such as accounts and chattel paper. Any that might
40 linger for accounts and chattel paper are addressed by ~~new~~ subsection (f). See Comment 6.

41
42 Subsection (d.1) ensures that subsection (d) applies to a negotiable instrument that would
43 be a promissory note but for (i) the exclusion of writings that evidence chattel paper from the
44 revised definition of "instrument" (Section 9-102(a)(47)) and (ii) the definition of "promissory
45 note" (Section 9-102(a)(65)) as a subset of "instrument." Subsection (d.1) also ensures that

1 subsection (d) applies to an obligor on such a negotiable instrument, even though the obligor is
2 not an “account debtor” (Section 9-102(a)(3)). The goal of subsection (d.1) is to restore the scope
3 of subsection (d) to apply to all obligations and obligors on chattel paper as was the case prior to
4 the revision of the definition of “instrument.”

5
6 Former Section 9-318(4) did not apply to a sale of a payment intangible (as described in
7 the former provision, “a general intangible for money due or to become due”) but did apply to an
8 assignment of a payment intangible for security. Subsection (e) continues this approach and also
9 makes subsection (d) inapplicable to sales of promissory notes. Section 9-408 addresses anti-
10 assignment clauses with respect to sales of payment intangibles and promissory notes.

11
12 * * *

13
14 10. **Inapplicability to Certain Ownership Interests.** ~~This section does~~ Subsection
15 (k) provides that subsections (d), (f), and (j) do not apply to an ownership interest in a limited
16 liability company, limited partnership, or general partnership, regardless of the name of the
17 interest and whether the interest: (i) pertains to economic rights, governance rights, or both; (ii)
18 arises under: (a) an operating agreement, the applicable limited liability company act, or both; or
19 (b) a partnership agreement, the applicable partnership act, or both; or (iii) is owned by: (a) a
20 member of a company or transferee or assignee of a member; or (b) a partner or a transferee or
21 assignee of a partner; or (iv) comprises contractual, property, other rights, or some combination
22 thereof. Ownership interests referred to in subsection (k) include interests in a series of a limited
23 liability company, limited partnership, or general partnership, if the series is a “person” (Section
24 1-201(b)(27)).

25
26 11. **Controllable Accounts and Controllable payment intangibles.** For controllable
27 accounts and controllable payment intangibles, subsections (a) through (c) and (g) are replaced
28 by analogous provisions in Section 12-106.

29
30 12. **“Signed” Replaces “Authenticated.”** Consistent with the revised definition of
31 “sign” in Section 1-201, the term “signed” replaces the reference to “authenticated” in the
32 previous text of this section.

33
34 * * *

35 **Section 9-502. Contents of Financing Statement; Record of Mortgage as**
36 **Financing Statement; Time of Filing Financing Statement.**

37 * * *

38 **Official Comment**

39 * * *

3. Debtor's Signature; Required Authorization. Subsection (a) sets forth the simple formal requirements for an effective financing statement. These requirements are: (1) the debtor's name; (2) the name of a secured party or representative of the secured party; and (3) an indication of the collateral.

* * *

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 Article. See Sections 1-103 and 9-509, Comment 3. However, under Section 9-509(b), the debtor's ~~authentication~~ signing of (or becoming bound by) 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.

*Amendment approved by the Permanent Editorial Board for Uniform Commercial Code
December 31, 2001.*

* * *

Section 9-508. Effectiveness of Financing Statement if New Debtor Becomes Bound by Security Agreement.

* * *

Official Comment

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3. How New Debtor Becomes Bound. Normally, a security interest is unenforceable unless the debtor has ~~authenticated~~ signed a security agreement describing the collateral. See Section 9-203(b). New Section 9-203(e) creates an exception, under which a security agreement entered into by one person is effective with respect to the property of another. This exception comes into play if a “new debtor” becomes bound as debtor by a security agreement entered into by another person (the “original debtor”). (The quoted terms are defined in Section 9-102.) If a new debtor does become bound, then the security agreement entered into by the original debtor satisfies the security-agreement requirement of Section 9-203(b)(3) as to existing or after-acquired property of the new debtor to the extent the property is described in the security agreement. In that case, no other agreement is necessary to make a security interest enforceable in that property. See Section 9-203(e).

* * *

Section 9-509. Persons Entitled to File a Record.

(a) **[Person entitled to file record.]** A person may file an initial financing statement, amendment that adds collateral covered by a financing statement, or amendment that adds a debtor to a financing statement only if:

(1) the debtor authorizes the filing in ~~an authenticated~~ a signed record or pursuant to subsection (b) or (c); or

(2) the person holds an agricultural lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds an agricultural lien.

(b) **[Security agreement as authorization.]** By authenticating signing or becoming bound as debtor by a security agreement, a debtor or new debtor authorizes the filing of an initial financing statement, and an amendment, covering:

(1) the collateral described in the security agreement; and

(2) property that becomes collateral under Section 9-315(a)(2), whether or 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

1 employ ~~authentication~~ signature procedures in connection with electronic communications, e.g.,
2 to verify the identity of a filer who seeks to charge the filing fee.

3
4 **3. Unauthorized Filings.** Records filed in the filing office do not require signatures for
5 their effectiveness. Subsection (a)(1) substitutes for the debtor's signature on a financing
6 statement the requirement that the debtor authorize in ~~an authenticated~~ a signed record the filing
7 of an initial financing statement or an amendment that adds collateral. Also, under subsection
8 (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment.
9 A person who files an unauthorized record in violation of subsection (a)(1) is liable under
10 Section 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing
11 statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-
12 510(a). Law other than this Article, including the law with respect to ratification of past acts,
13 generally determines whether a person has the requisite authority to file a record under this
14 section. See Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the
15 priority of a security interest perfected by the filing of a financing statement. See Section 9-322,
16 Comment 4. *Amendment approved by the Permanent Editorial Board for Uniform Commercial*
17 *Code December 31, 2001.*

18
19 **4. Ipso Facto Authorization.** Under subsection (b), the ~~authentication~~ signing of a
20 security agreement *ipso facto* constitutes the debtor's authorization of the filing of a financing
21 statement covering the collateral described in the security agreement. The secured party need
22 not obtain a separate authorization. Similarly, a new debtor's becoming bound by a security
23 agreement *ipso facto* constitutes the new debtor's authorization of the filing of a financing
24 statement covering the collateral described in the security agreement by which the new debtor
25 has become bound. And, under subsection (c), the acquisition of collateral in which a security
26 interest continues after disposition under Section 9-315(a)(1) *ipso facto* constitutes an
27 authorization to file an initial financing statement against the person who acquired the collateral.
28 The authorization to file an initial financing statement also constitutes an authorization to file a
29 record covering actual proceeds of the original collateral, even if the security agreement is silent
30 as to proceeds.

31
32 **Example 1:** Debtor ~~authenticates~~ signs a security agreement creating a security interest
33 in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement
34 covering inventory and accounts. The financing statement is authorized insofar as it
35 covers inventory and unauthorized insofar as it covers accounts. (Note, however, that the
36 financing statement will be effective to perfect a security interest in accounts constituting
37 proceeds of the inventory to the same extent as a financing statement covering only
38 inventory.)

39
40 **Example 2:** Debtor ~~authenticates~~ signs a security agreement creating a security interest
41 in Debtor's inventory in favor of Secured Party. Secured Party files a financing statement
42 covering inventory. Debtor sells some inventory, deposits the buyer's payment into a
43 deposit account, and withdraws the funds to purchase equipment. As long as the
44 equipment can be traced to the inventory, the security interest continues in the equipment.
45 See Section 9-315(a)(2). However, because the equipment was acquired with cash
46 proceeds, the financing statement becomes ineffective to perfect the security interest in

1 the equipment on the 21st day after the security interest attaches to the equipment unless
2 Secured Party continues perfection beyond the 20-day period by filing a financing
3 statement against the equipment or amending the filed financing statement to cover
4 equipment. See Section 9-315(d). Debtor's ~~authentication~~ signing of the security
5 agreement authorizes the filing of an initial financing statement or amendment covering
6 the equipment, which is "property that becomes collateral under Section 9-315(a)(2)."
7 See Section 9-509(b)(2).

8
9 * * *

10
11 **6. Amendments; Termination Statements Authorized by Debtor.** Most amendments
12 may not be filed unless the secured party of record, as determined under Section 9-511,
13 authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization
14 of the secured party of record is not required for the filing of a termination statement if the
15 secured party of record failed to send or file a termination statement as required by Section 9-
16 513, the debtor authorizes it to be filed, and the termination statement so indicates. An
17 authorization to file a record under subsection (d) is effective even if the authorization is not in
18 ~~an authenticated~~ a signed record. Compare subsection (a)(1). However, both the person filing
19 the record and the person giving the authorization may wish to obtain and retain a record
20 indicating that the filing was authorized.

21
22 * * *

23 **9. "Signed" and "Signing" Replace "Authenticated" and "Authenticating."**
24 Consistent with the revised definition of "sign" in Section 1-201, the terms "signed" and
25 "signing" replace the references to "authenticated" and "authenticating" in the previous text of
26 this section.

27
28 * * *

29 **Section 9-513. Termination Statement.**

30 (a) **[Consumer goods.]** A secured party shall cause the secured party of record
31 for a financing statement to file a termination statement for the financing statement if the
32 financing statement covers consumer goods and:

33 (1) there is no obligation secured by the collateral covered by the
34 financing statement and no commitment to make an advance, incur an obligation, or otherwise
35 give value; or

36 (2) the debtor did not authorize the filing of the initial financing statement.

1 (b) **[Time for compliance with subsection (a).]** To comply with subsection (a),
2 a secured party shall cause the secured party of record to file the termination statement:

3 (1) within one month after there is no obligation secured by the collateral
4 covered by the financing statement and no commitment to make an advance, incur an obligation,
5 or otherwise give value; or

6 (2) if earlier, within 20 days after the secured party receives ~~an~~
7 ~~authenticated~~ a signed demand from a debtor.

8 (c) **[Other collateral.]** In cases not governed by subsection (a), within 20 days
9 after a secured party receives ~~an authenticated~~ a signed demand from a debtor, the secured party
10 shall cause the secured party of record for a financing statement to send to the debtor a
11 termination statement for the financing statement or file the termination statement in the filing
12 office if:

13 (1) except in the case of a financing statement covering accounts or chattel
14 paper that has been sold or goods that are the subject of a consignment, there is no obligation
15 secured by the collateral covered by the financing statement and no commitment to make an
16 advance, incur an obligation, or otherwise give value;

17 (2) the financing statement covers accounts or chattel paper that has been
18 sold but as to which the account debtor or other person obligated has discharged its obligation;

19 (3) the financing statement covers goods that were the subject of a
20 consignment to the debtor but are not in the debtor's possession; or

21 (4) the debtor did not authorize the filing of the initial financing statement.

22 (d) **[Effect of filing termination statement.]** Except as otherwise provided in
23 Section 9-510, upon the filing of a termination statement with the filing office, the financing

statement to which the termination statement relates ceases to be effective. Except as otherwise provided in Section 9-510, for purposes of Sections 9-519(g), 9-522(a), and 9-523(c), the filing with the filing office of a termination statement relating to a financing statement that indicates that the debtor is a transmitting utility also causes the effectiveness of the financing statement to lapse.

Official Comment

* * *

2. Duty to File or Send. This section specifies when a secured party must cause the secured party of record to file or send to the debtor a termination statement for a financing statement. Because most financing statements expire in five years unless a continuation statement is filed (Section 9-515), no compulsion is placed on the secured party to file a termination statement unless demanded by the debtor, except in the case of consumer goods. Because many consumers will not realize the importance to them of clearing the public record, an affirmative duty is put on the secured party in that case. But many purchase-money security interests in consumer goods will not be filed, except for motor vehicles. See Section 9-309(1). Under Section 9-311(b), compliance with a certificate-of-title statute is “equivalent to the filing of a financing statement under this Article.” Thus, this section applies to a certificate of title unless the section is superseded by a certificate-of-title statute that contains a specific rule addressing a secured party’s duty to cause a notation of a security interest to be removed from a certificate of title. In the context of a certificate of title, however, the secured party could comply with this section by causing the removal itself or providing the debtor with documentation sufficient to enable the debtor to effect the removal.

Subsections (a) and (b) apply to a financing statement covering consumer goods. Subsection (c) applies to other financing statements. Subsection (a) and (c) each makes explicit what was implicit under former Article 9: If the debtor did not authorize the filing of a financing statement in the first place, the secured party of record should file or send a termination statement. The liability imposed upon a secured party that fails to comply with subsection (a) or (c) is identical to that imposed for the filing of an unauthorized financing statement or amendment. See Section 9-625(e).

References to a “termination statement” in this section and in Part 5 generally should be interpreted functionally, based on the purposes of the termination. A termination statement includes any amendment that meets the definition of that term by containing an indication that the amendment “is a termination statement” or that the identified financing statement “is no longer effective.” Section 9-102(a)(80). The amendment may terminate the effectiveness of a financing statement in whole or in part. For example, if a person did not authorize the filing of a financing statement against it as debtor, under subsection (a)(2) and (c)(4) the person may demand that the financing statement be terminated *as to that person*, even if the financing

1 statement remains of record and effective as to one or more other persons named as debtors in
2 the financing statement. Such a termination statement may take the form of an amendment that
3 deletes the person as a debtor. Similarly, if a person authorized the filing of a financing
4 statement as to some collateral but not as to other property identified as collateral on the
5 financing statement, the person may demand that the financing statement be terminated *as to the*
6 *unauthorized identified collateral*, even if the financing statement remains of record and
7 effective as to other collateral. Such a termination statement may take the form of an amendment
8 that deletes the unauthorized identified collateral from coverage of the financing statement. Even
9 if such amendments do not indicate explicitly that they are termination statements, they would
10 nonetheless indicate that the financing statement “is no longer effective” to the extent specified
11 and fall within the definition of “termination statement.”
12

13 **3. “Bogus” Filings.** A secured party’s duty to send a termination statement arises when
14 the secured party “receives” ~~an authenticated~~ a signed demand from the debtor. In the case of an
15 unauthorized financing statement, the person named as debtor in the financing statement may
16 have no relationship with the named secured party and no reason to know the secured party’s
17 address. Inasmuch as the address in the financing statement is “held out by [the person named as
18 secured party in the financing statement] as the place for receipt of such communications [i.e.,
19 communications relating to security interests],” the putative secured party is deemed to have
20 “received” a notification delivered to that address. See Section 1-202(e). If a termination
21 statement is not forthcoming, the person named as debtor itself may authorize the filing of a
22 termination statement, which will be effective if it indicates that the person authorized it to be
23 filed. See Sections 9-509(d)(2), 9-510(c).
24

25 * * *

26
27 **6. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of
28 “sign” in Section 1-201, the term “signed” replaces the references to “authenticated” in the
29 previous text of this section.
30

31 * * *

32 **Section 9-516. What Constitutes Filing; Effectiveness of Filing.**

33 * * *

34 **Official Comment**

35 * * *

36
37
38 **4. Method or Medium of Communication.** Rejection pursuant to subsection (b)(1) for
39 failure to communicate a record properly should be understood to mean noncompliance with
40 procedures relating to security, ~~authentication~~ signing, or other communication-related
41 requirements that the filing office may impose. Subsection (b)(1) does not authorize a filing
42 office to impose additional substantive requirements. See Section 9-520, Comment 2.
43

1 * * *

2
3 **Section 9-601. Rights After Default; Judicial Enforcement; Consignor or Buyer**
4 **of Accounts, Chattel Paper, Payment Intangibles, or Promissory Notes.**

5 * * *

6 (b) **[Rights and duties of secured party in possession or control.]** A secured
7 party in possession of collateral or control of collateral under Section 7-106, 9-104, 9-105, 9-
8 105A, 9-106, ~~or 9-107~~, or 9-107A has the rights and duties provided in Section 9-207.

9 * * *

10 **Section 9-602. Waiver and Variance of Rights and Duties.**

11 * * *

12 **Official Comment**

13
14 * * *

15
16 5. **Certain Post-Default Waivers.** Section 9-624 permits post-default waivers in
17 limited circumstances. These waivers must be made in agreements that are ~~authenticated~~ signed.
18 Under Section 1-201, an “‘agreement’ means the bargain of the parties in fact.” In considering
19 waivers under Section 9-624 and analogous agreements in other contexts, courts should carefully
20 scrutinize putative agreements that appear in records that also address many additional or
21 unrelated matters.

22
23 * * *

24
25 **Section 9-605. Unknown Debtor or Secondary Obligor.**

26 A (a) **[In general: No duty owed by secured party.]** Except as provided in subsection
27 (b), a secured party does not owe a duty based on its status as secured party:

28 (1) to a person that is a debtor or obligor, unless the secured party knows:

29 (A) that the person is a debtor or obligor;

30 (B) the identity of the person; and

31 (C) how to communicate with the person; or

(2) to a secured party or lienholder that has filed a financing statement against a person, unless the secured party knows:

(A) that the person is a debtor; and

(B) the identity of the person.

(b) [Exception: Secured party owes duty to debtor or obligor.] A secured party owes a duty based on its status as a secured party to a person that, at the later of the time the secured party obtains control of collateral that is a controllable account, controllable electronic record, or controllable payment intangible or the time the security interest attaches to that collateral, is a debtor or obligor, if at that time the secured party knows that the information specified in subsection (a)(1)(A), (B), or (C) with respect to the person is not provided by the collateral, a record attached to or logically associated with the collateral, or the system in which the collateral is recorded.

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

1 dispose of collateral subject to a security interest, resulting in the transferee becoming a debtor,
2 but the secured party may have no knowledge of the disposition or that the transferee has become
3 a debtor. In that situation the secured party will have no means of giving notice to or accounting
4 to the transferee debtor. Sections 9-605 and 9-628 contemplate such situations by relieving the
5 secured party of its duties to the debtor and limiting the secured party's liability to the debtor.

6
7 **3. Exceptions to Relief from Duties and Limitation of Liability.** In some cases,
8 lenders may extend secured credit without knowing, or having the ability to discover, the identity
9 of their borrowers. Sections 9-605(a) and 9-628(a) and (b) would excuse these secured parties
10 from having duties to their debtors and obligors, including, e.g., the duty to notify the debtor or
11 secondary obligor before disposing of the collateral and the duty to account to the debtor for any
12 surplus arising from a disposition, and would limit the secured parties' liability to their debtors
13 and obligors. In many cases these debtors and obligors may be aware that their identities are
14 unknown to their secured parties. By failing to make their identities and contact information
15 known, these debtors and obligors may be impairing the ability of their secured parties to comply
16 with their duties under Article 9. However, such debtor complicity notwithstanding, if secured
17 parties were relieved of their duties in these circumstances, it would conflict with the policy of
18 Section 9-602, which prohibits a waiver or variance of many rights of debtors and obligors and
19 duties of secured parties.

20
21 Sections 9-605(b) and 9-628(f) reflect the policy that a secured party should not be free to
22 avoid statutory duties or absolve itself from liability to a debtor or obligor when the secured
23 party knows that the collateral, records attached to or logically associated with the collateral, and
24 the system in which the collateral is recorded do not provide the secured party with the
25 information necessary to fulfill its statutory duties. As discussed in the following paragraph, the
26 secured party's knowledge that it may not be able to comply with its duties enables the secured
27 party to protect itself from being in breach of these duties. (A person has knowledge of or knows
28 a fact if it has "actual knowledge." Section 1-202(b).) The exceptions from the exculpatory
29 protections otherwise afforded to secured parties are determined by the secured party's
30 knowledge at the later of the time the secured party obtains control of a controllable account,
31 controllable electronic record, or controllable payment intangible or the time that the security
32 interest attaches to the collateral.

33
34 Obtaining control or attachment of the security interest serves as a rough proxy for the
35 context in which a secured party may know that it may be unable to comply with its duties,
36 usually because the transferor is pseudonymous. The carve-out from the exculpatory protection
37 is limited to duties owed to and liability to a debtor—the transferor of a controllable account,
38 controllable electronic record, or controllable payment intangible over which the secured party
39 obtains control—or obligor. The secured party in such situations could protect itself by choosing
40 not to enter into a transaction in which it might be unable to comply with its statutory duties or
41 by conditioning its participation on disclosure of the debtor's or obligor's identity and contact
42 information. Ideally, systems providing for the transfer of controllable electronic records would
43 provide mechanisms that would permit compliance with such duties (such as methods of
44 communication and making payments that would preserve a debtor's or obligor's pseudonymity,
45 where that is desired). The amendments to Sections 9-605 and 9-628 provide incentives for
46 system design that would allow for compliance with Article 9 duties.

1 Secured parties that enter into transactions with knowledge that they may not be able to
2 comply with their Article 9 duties do so at their own peril. Of course, if a secured party
3 possesses, or can obtain, the information necessary to comply with its duties, there is no need for
4 the exculpation from those duties. Note, however, that the limitation on a secured party's relief
5 from duties and liability relates only to secured transactions involving controllable accounts,
6 controllable electronic records, or controllable payment intangibles. Designing systems for these
7 assets that would afford secured parties with opportunities to comply with their Article 9 duties,
8 as suggested above, could eliminate the risks to secured parties and also provide for the
9 protection of debtors' and obligors' rights.

10
11 * * *

12 **Section 9-608. Application of Proceeds of Collection or Enforcement; Liability**
13 **for Deficiency and Right to Surplus.**

14 (a) [Application of proceeds, surplus, and deficiency if obligation secured.]

15 If a security interest or agricultural lien secures payment or performance of an obligation, the
16 following rules apply:

17 (1) A secured party shall apply or pay over for application the cash
18 proceeds of collection or enforcement under Section 9-607 in the following order to:

19 (A) the reasonable expenses of collection and enforcement and, to
20 the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and
21 legal expenses incurred by the secured party;

22 (B) the satisfaction of obligations secured by the security interest
23 or agricultural lien under which the collection or enforcement is made; and

24 (C) the satisfaction of obligations secured by any subordinate
25 security interest in or other lien on the collateral subject to the security interest or agricultural
26 lien under which the collection or enforcement is made if the secured party receives an
27 ~~authenticated~~ a signed demand for proceeds before distribution of the proceeds is completed.

28 * * *

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.

(a) **[Disposition after default.]** After default, a secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing.

(b) **[Commercially reasonable disposition.]** Every aspect of a disposition of collateral, including the method, manner, time, place, and other terms, must be commercially reasonable. If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms.

(c) **[Purchase by secured party.]** A secured party may purchase collateral:

- (1) at a public disposition; or
- (2) at a private disposition only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.

* * *

Official Comment

* * *

9. **“Recognized Market.”** A “recognized market,” as used in subsection (c)(2), ~~and~~ Section 9-611(d), and Section 9-627(b)(1) and (2), is one in which the items sold are fungible

1 and prices are not subject to individual negotiation. For example, the New York Stock Exchange
2 is a recognized market. A market in which prices are individually negotiated or the items are not
3 fungible is not a recognized market, even if the items are the subject of widely disseminated
4 price guides or are disposed of through dealer auctions, which generally produces market prices
5 that are not lower than those that would be expected to result from, as applicable, (i)
6 commercially reasonable dispositions to persons other than the secured party, (ii) commercially
7 reasonable dispositions made with otherwise required notifications to the debtor or other affected
8 persons, or (iii) dispositions otherwise made in a commercially reasonable manner. (As used
9 here, “fungible” items are those that are considered interchangeable in the relevant market and
10 not only items that are strictly “identical” to the other items.) The intended goals of the
11 recognized market exceptions are to ensure that neither the debtor nor other affected parties
12 would be disadvantaged by the special treatment given to recognized markets and to facilitate the
13 efficiencies and cost savings that the special treatment may provide. The purpose of including in
14 subsection (c)(2) collateral that is “the subject of widely distributed standard price quotations”
15 and the criteria for determining whether price quotations meet this standard in subsection (c)(2)
16 are the same as for a recognized market, although the availability of such standard price
17 quotations may be based on, but distributed independently of, a “market” in which acquisitions
18 and dispositions are made. Although a recognized market need not be subject to direct or indirect
19 (e.g., self-regulatory) regulation or supervision, the existence of regulatory requirements or
20 guidelines that are designed to arrive at prices consistent with those contemplated by subsection
21 (c)(2) may provide useful guidance for applying the regulated market standard.

22
23 Traditionally, it has been understood that a market in which prices are individually
24 negotiated is not a recognized market, even if the items are the subject of widely disseminated
25 price guides (such as the Kelly Blue Book for automobiles) or are disposed of through
26 specialized auctions (such as those conducted for dealers in livestock and automobiles).
27 However, this does not suggest that, for example, dispositions at prices reflected in such guides
28 or of livestock or automobiles at such auctions could not be commercially reasonable.

29
30 The New York Stock Exchange, NASDAQ, the Chicago Mercantile Exchange, and ICE
31 Futures U.S., Inc. are examples of recognized markets. Such exchanges match buy and sell
32 orders submitted by or on behalf of buyers and sellers that are not typically known to each other
33 and do not involve individual negotiations. Other parties, such as inter-dealer brokers in the on-
34 the-run U.S. Treasury market and broker-dealers in the equities market, often operate similar
35 trading facilities that would likewise not involve known buyers or sellers or individual
36 negotiations and may constitute recognized markets. These markets provide for robust trading
37 with active bidding on fungible assets. There is no reason to believe that prices obtained on these
38 markets would be less favorable to debtors, other obligors, and other interested persons than if
39 collateral were disposed of in an off-market public or private disposition.

40
41 Trading environments generally referred to as “over-the-counter” or “OTC” markets,
42 however, typically have involved prospective buyers and sellers that can know each other and
43 have direct communication in order to make trades. Unlike typical exchanges, OTC markets
44 normally do involve the individual negotiation of a price. See Carl S. Bjerre, *Investment*
45 *Securities*, 71 Bus. Law. 1311, 1316-17 (2016) (contrasting exchanges and typical OTC markets
46 for equity securities and explaining that OTC markets have tended to feature thinner markets

1 with less liquidity and more variability of pricing).

2
3 In considering the recognized market exceptions, it is important to appreciate that
4 recognized markets and other systems that produce equivalent “widely distributed standard price
5 quotations” are not limited to traditional exchanges, such as those mentioned above. In
6 particular, the exchange-OTC dichotomy no longer offers such a reliable, bright-line test for
7 determining status as a recognized market or as a source of widely distributed standard price
8 quotations. To be sure, some OTC markets do not qualify for the exceptions. However, recent
9 years have witnessed a variety of new trading platforms, the use of new technologies, and new
10 sources of providing and consuming information. There now exist markets, in particular for debt
11 securities (including United States Treasury securities), that might be classified as OTC markets
12 under the traditional taxonomy, but which qualify for the exceptions as recognized markets or as
13 sources of data for widely distributed standard price quotations. Market participants rely on
14 prices provided by these markets to the same extent and for the same purposes (including in
15 connection with default and enforcement of security interests) as they rely on prices generated by
16 traditional securities and commodities exchanges. These prices are widely available from
17 business publications and online sources as well as from private subscription-based service
18 providers. It can safely be assumed that these financial markets and the data that they provide to
19 the public will continue to evolve. The touchstone for determining whether a market structure is
20 a recognized market or one that produces equivalent price quotations is a functional one. It is not
21 based on the “type” of market (e.g., “exchange,” “OTC,” or other classification). It is based on
22 whether the market or distribution of price quotations provides reliable and trusted data on prices
23 consistent with the purposes of subsection (c)(2) and the corresponding provisions of Sections 9-
24 611 and 9-627.

25 **Reporter’s Note**

26
27 1. *Contexts of “recognized market” exceptions.* With the exception of Section 9-
28 627(b)(1), the special treatment afforded by the relevant sections involving a “recognized
29 market” rely on prices determined in such a market but do not involve dispositions actually made
30 on a recognized market. The official comment therefore does not limit its discussion to such
31 dispositions and uses neutral references to “exceptions” and “special treatment” that the relevant
32 sections provide.

33
34 2. *No change.* No change is proposed to Section 9-610, which is provided for
35 convenience.

36 **Section 9-611. Notification Before Disposition of Collateral.**

37
38 (a) [**“Notification date.”**] In this section, “notification date” means the earlier of
39 the date on which:

40 (1) a secured party sends to the debtor and any secondary obligor ~~an~~
41 ~~authenticated~~ a signed notification of disposition; or

1 (2) the debtor and any secondary obligor waive the right to notification.

2 (b) **[Notification of disposition required.]** Except as otherwise provided in
3 subsection (d), a secured party that disposes of collateral under Section 9-610 shall send to the
4 persons specified in subsection (c) a reasonable ~~authenticated~~ signed notification of disposition.

5 (c) **[Persons to be notified.]** To comply with subsection (b), the secured party
6 shall send ~~an authenticated~~ a signed notification of disposition to:

7 (1) the debtor;

8 (2) any secondary obligor; and

9 (3) if the collateral is other than consumer goods:

10 (A) any other person from which the secured party has received,
11 before the notification date, ~~an authenticated~~ a signed notification of a claim of an interest in the
12 collateral;

13 (B) any other secured party or lienholder that, 10 days before the
14 notification date, held a security interest in or other lien on the collateral perfected by the filing
15 of a financing statement that:

16 (i) identified the collateral;

17 (ii) was indexed under the debtor's name as of that date;

18 and

19 (iii) was filed in the office in which to file a financing
20 statement against the debtor covering the collateral as of that date; and

21 (C) any other secured party that, 10 days before the notification
22 date, held a security interest in the collateral perfected by compliance with a statute, regulation,
23 or treaty described in Section 9-311(a).

1 (d) [Subsection (b) inapplicable: perishable collateral; recognized market.]

2 Subsection (b) does not apply if the collateral is perishable or threatens to decline speedily in
3 value or is of a type customarily sold on a recognized market.

4 (e) [Compliance with subsection (c)(3)(B).] A secured party complies with the
5 requirement for notification prescribed by subsection (c)(3)(B) if:

6 (1) not later than 20 days or earlier than 30 days before the notification
7 date, the secured party requests, in a commercially reasonable manner, information concerning
8 financing statements indexed under the debtor's name in the office indicated in subsection
9 (c)(3)(B); and

10 (2) before the notification date, the secured party:

11 (A) did not receive a response to the request for information; or

12 (B) received a response to the request for information and sent ~~an~~
13 ~~authenticated~~ a signed notification of disposition to each secured party or other lienholder named
14 in that response whose financing statement covered the collateral.

15 Official Comment

16 * * *

17 2. **Reasonable Notification.** This section requires a secured party who wishes to
18 dispose of collateral under Section 9-610 to send "a reasonable ~~authenticated~~ signed notification
19 of disposition" to specified interested persons, subject to certain exceptions. The notification
20 must be reasonable as to the manner in which it is sent, its timeliness (i.e., a reasonable time
21 before the disposition is to take place), and its content. See Sections 9-612 (timeliness of
22 notification), 9-613 (contents of notification generally), 9-614 (contents of notification in
23 consumer-goods transactions).

24 * * *

25
26
27 5. **Authentication Signature Requirement.** Subsections (b), ~~and (c), and (e)~~
28 explicitly provide that a ~~notification of disposition~~ notification must be "~~authenticated.~~"
29 "signed." Some cases read former Section 9-504(3) as validating oral notification. Consistent
30 with the revised definition of "sign" in Section 1-201, the term "signed" replaces the references

1 to “authenticated” in the previous text of this section.

2
3 * * *

4 7. **Recognized Market; Perishable Collateral.** ~~New subsection~~ Subsection (d)
5 makes it clear that there is no obligation to give notification of a disposition in the case of
6 perishable collateral or collateral customarily sold on a recognized market (e.g., marketable
7 securities). ~~Former Section 9-504(3) might be read (incorrectly) to relieve the secured party from~~
8 ~~its duty to notify a debtor but not from its duty to notify other secured parties in connection with~~
9 ~~dispositions of such collateral. As to what constitutes a recognized market, see Section 9-610,~~
10 Comment 9.

11
12 * * *

13 9. **Waiver.** A debtor or secondary obligor may waive the right to notification under
14 this section only by a post-default ~~authenticated~~ signed agreement. See Section 9-624(a).

15
16 * * *

17 **Section 9-612. Timeliness of Notification Before Disposition of Collateral.**

18 * * *

19 **Official Comment**

20 * * *

21 2. **Reasonable Notification.** Section 9-611(b) requires the secured party to send a
22 “reasonable ~~authenticated~~ signed notification.” Under that section, as under former Section 9-
23 504(3), one aspect of a reasonable notification is its timeliness. This generally means that the
24 notification must be sent at a reasonable time in advance of the date of a public disposition or the
25 date after which a private disposition is to be made. A notification that is sent so near to the
26 disposition date that a notified person could not be expected to act on or take account of the
27 notification would be unreasonable.

28
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
37 **Section 9-613. Contents and Form of Notification Before Disposition of**

38 **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)³

We will sell (or lease or license, as applicable) the (describe collateral) privately
sometime after (day and date) .⁴

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

³ The sender must include this paragraph for a public disposition of the collateral.

⁴ The sender must include this paragraph for a private disposition of the collateral.

the notification is sent;

(C) a telephone number from which the amount that must be paid to the secured party to redeem the collateral under Section 9-623 is available; and

(D) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required.

(3) The following form of notification, when completed, provides sufficient information:

~~_____
[Name and address of secured party]
_____~~

~~_____
[Date]
_____~~

~~NOTICE OF OUR PLAN TO SELL PROPERTY~~

~~_____
[Name and address of any obligor who is also a debtor]
_____~~

Subject: ~~_____
[Identification of Transaction]
_____~~

We have your ~~_____
[describe collateral]
_____~~, because you broke promises in our agreement.

~~[For a public disposition:]~~

We will sell ~~_____
[describe collateral]
_____~~ at public sale. A sale could include a lease or license.

~~The sale will be held as follows:~~

Date: _____

Time: _____

Place: _____

~~You may attend the sale and bring bidders if you want.~~

1 ~~[For a private disposition:]~~

2 We will sell [describe collateral] at private sale sometime after [date]. A sale could
3 include a lease or license.

4
5 The money that we get from the sale (after paying our costs) will reduce the amount you owe. If
6 we get less money than you owe, you [will or will not, as applicable] still owe us the
7 difference. If we get more money than you owe, you will get the extra money, unless we must
8 pay it to someone else.

9 You can get the property back at any time before we sell it by paying us the full amount you owe
10 (not just the past due payments), including our expenses. To learn the exact amount you must
11 pay, call us at [telephone number].

12
13 If you want us to explain to you in writing how we have figured the amount that you owe us, you
14 may call us at [telephone number] [or write us at [secured party's address]] and
15 request a written explanation. [We will charge you \$ for the explanation if we sent you
16 another written explanation of the amount you owe us within the last six months.]

17
18 If you need more information about the sale call us at [telephone number] [or write us
19 at [secured party's address]].

20
21 We are sending this notice to the following other people who have an interest in [describe
22 collateral] or who owe money under your agreement:
23 [Names of all other debtors and obligors, if any]

1 ~~{End of Form}~~

2 **NOTICE OF OUR PLAN TO SELL PROPERTY**

3 (Name and address of any obligor who is also a debtor)

4 Subject: (Identification of Transaction) _____

5
6 We have your (describe collateral) , because you broke promises in our agreement.

7
8 We will sell (describe collateral) at public sale. A sale could include a lease or license. The
9 sale will be held as follows:

10 Date: (date)

11 Time: (time)

12 Place: (place)

13 You may attend the sale and bring bidders if you want.⁵

14
15 We will sell (describe collateral) at private sale sometime after (date). A sale could include a
16 lease or license.⁶

17 The money that we get from the sale (after paying our costs) will reduce the amount you owe. If
18 we get less money than you owe, you (will or will not, as applicable) still owe us the difference.
19 If we get more money than you owe, you will get the extra money, unless we must pay it to
20 someone else.

21

⁵ The sender must include this paragraph for a public disposition of the collateral.

⁶ The sender must include this paragraph for a private disposition of the collateral.

You can get the property back at any time before we sell it by paying us the full amount you owe (not just the past due payments), including our expenses. To learn the exact amount you must pay, call us at (telephone number).

If you want us to explain to you⁷ (in writing) (in writing or in an electronic document) (in an electronic document) how we have figured the amount that you owe us, you may call us at (telephone number) (or⁸ (write us at (secured party's address)) (description of electronic communication method)) and request⁹ (a written explanation) (or) (a written explanation or an explanation in an electronic document) (or) (an explanation in an electronic document). (We will charge you \$ (specify amount) for the explanation if we sent you another written explanation of the amount you owe us within the last six months.¹⁰)

If you need more information about the sale call us at (telephone number) (or¹¹ (write us at (secured party's address)) (description of electronic communication method)).

We are sending this notice to the following other people who have an interest in (describe

⁷ 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)

⁸ 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.

⁹ 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

¹⁰ 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.

¹¹ 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.

collateral) or who owe money under your agreement:

(Names of all other debtors and obligors, if any)

[End of Form]

* * *

Official Comment

* * *

4. [Style Changes in Safe-Harbor Form and Medium Neutrality] The form contained in paragraph (3) of the previous text of this section has been simplified. No change in substance is intended by these changes in style. In furtherance of medium neutrality, references to “electronic document” and “electronic communication method” have been added to the form.

Section 9-615. Application of Proceeds of Disposition; Liability for Deficiency and Right to Surplus.

(a) **[Application of proceeds.]** A secured party shall apply or pay over for application the cash proceeds of disposition under Section 9-610 in the following order to:

(1) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, 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;

(2) the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) the satisfaction of obligations secured by any subordinate security interest in or other subordinate lien on the collateral if:

(A) the secured party receives from the holder of the subordinate security interest or other lien ~~an authenticated~~ a signed demand for proceeds before distribution of the proceeds is completed; and

(B) in a case in which a consignor has an interest in the collateral,
the subordinate security interest or other lien is senior to the interest of the consignor; and

(4) a secured party that is a consignor of the collateral if the secured party
receives from the consignor ~~an authenticated~~ a signed demand for proceeds before distribution of
the proceeds is completed.

* * *

Official Comment

* * *

8. “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 9-616. Explanation of Calculation of Surplus or Deficiency.

(a) [Definitions.] In this section:

(1) “Explanation” means a ~~writing~~ record that:

(A) states the amount of the surplus or deficiency;

(B) provides an explanation in accordance with subsection (c) of how the
secured party calculated the surplus or deficiency;

(C) states, if applicable, that future debits, credits, charges, including
additional credit service charges or interest, rebates, and expenses may affect the amount of the
surplus or deficiency; and

(D) provides a telephone number or mailing address from which additional
information concerning the transaction is available.

(2) “Request” means a record:

(A) ~~authenticated~~ signed by a debtor or consumer obligor;

1 (B) requesting that the recipient provide an explanation; and

2 (C) sent after disposition of the collateral under Section 9-610.

3 (b) **[Explanation of calculation.]** In a consumer-goods transaction in which the debtor is
4 entitled to a surplus or a consumer obligor is liable for a deficiency under Section 9-615, the
5 secured party shall:

6 (1) send an explanation to the debtor or consumer obligor, as applicable, after the
7 disposition and:

8 (A) before or when the secured party accounts to the debtor and pays any
9 surplus or first makes ~~written~~ demand in a record on the consumer obligor after the disposition
10 for payment of the deficiency; and

11 (B) within 14 days after receipt of a request; or

12 (2) in the case of a consumer obligor who is liable for a deficiency, within 14 days
13 after receipt of a request, send to the consumer obligor a record waiving the secured party's right
14 to a deficiency.

15 (c) **[Required information.]** To comply with subsection (a)(1)(B), ~~a writing~~ an
16 explanation must provide the following information in the following order:

17 (1) the aggregate amount of obligations secured by the security interest under
18 which the disposition was made, and, if the amount reflects a rebate of unearned interest or credit
19 service charge, an indication of that fact, calculated as of a specified date:

20 (A) if the secured party takes or receives possession of the collateral after
21 default, not more than 35 days before the secured party takes or receives possession; or

22 (B) if the secured party takes or receives possession of the collateral
23 before default or does not take possession of the collateral, not more than 35 days before the

1 disposition;

2 (2) the amount of proceeds of the disposition;

3 (3) the aggregate amount of the obligations after deducting the amount of
4 proceeds;

5 (4) the amount, in the aggregate or by type, and types of expenses, including
6 expenses of retaking, holding, preparing for disposition, processing, and disposing of the
7 collateral, and attorney's fees secured by the collateral which are known to the secured party and
8 relate to the current disposition;

9 (5) the amount, in the aggregate or by type, and types of credits, including rebates
10 of interest or credit service charges, to which the obligor is known to be entitled and which are
11 not reflected in the amount in paragraph (1); and

12 (6) the amount of the surplus or deficiency.

13 * * *

14 Official Comment

15 * * *

16
17 **2. Duty to Send Information Concerning Surplus or Deficiency.** This section reflects
18 the view that, in every consumer-goods transaction, the debtor or obligor is entitled to know the
19 amount of a surplus or deficiency and the basis upon which the surplus or deficiency was
20 calculated. Under subsection (b)(1), a secured party is obligated to provide this information (an
21 "explanation," defined in subsection (a)(1)) no later than the time that it accounts for and pays a
22 surplus or the time of its first ~~written attempt~~ demand in a record in an attempt to collect the
23 deficiency. The obligor need not make a request for an accounting in order to receive an
24 explanation. A secured party who does not attempt to collect a deficiency in ~~writing a demand in~~
25 a record or account for and pay a surplus has no obligation to send an explanation under
26 subsection (b)(1) and, consequently, cannot be liable for noncompliance.

27
28 A debtor or secondary obligor need not wait until the secured party commences ~~written~~
29 collection efforts in a demand in a record in order to receive an explanation of how a deficiency
30 or surplus was calculated. Subsection (b)(1)(B) obliges the secured party to send an explanation
31 within 14 days after it receives a "request" (defined in subsection (a)(2)).
32

1 * * *

2
3 **5. “Signed” Replaces “Authenticated”; Medium Neutrality.** Consistent with the
4 revised definition of “sign” in Section 1-201, the term “signed” replaces the reference to
5 “authenticated” in the previous text of this section. In furtherance of medium neutrality, the
6 reference in the previous text of this section to a “written demand” has been replaced by a
7 reference to refer to a “demand in a record” and the reference to a “writing” has been replaced by
8 a reference to a “record.”

9
10 * * *

11
12 **Section 9-619. Transfer of Record or Legal Title.**

13 (a) [**“Transfer statement.”**] In this section, “transfer statement” means a record
14 ~~authenticated~~ signed by a secured party stating:

15 (1) that the debtor has defaulted in connection with an obligation secured
16 by specified collateral;

17 (2) that the secured party has exercised its post-default remedies with
18 respect to the collateral;

19 (3) that, by reason of the exercise, a transferee has acquired the rights of
20 the debtor in the collateral; and

21 (4) the name and mailing address of the secured party, debtor, and
22 transferee.

23 * * *

24 **Official Comment**

25 * * *

26 **4. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of
27 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in
28 the previous text of this section.

29
30 **Section 9-620. Acceptance of Collateral in Full or Partial Satisfaction of**
31 **Obligation; Compulsory Disposition of Collateral.**

1 (a) **[Conditions to acceptance in satisfaction.]** Except as otherwise provided in
2 subsection (g), a secured party may accept collateral in full or partial satisfaction of the
3 obligation it secures only if:

4 (1) the debtor consents to the acceptance under subsection (c);

5 (2) the secured party does not receive, within the time set forth in
6 subsection (d), a notification of objection to the proposal ~~authenticated~~ signed by:

7 (A) a person to which the secured party was required to send a
8 proposal under Section 9-621; or

9 (B) any other person, other than the debtor, holding an interest in
10 the collateral subordinate to the security interest that is the subject of the proposal;

11 (3) if the collateral is consumer goods, the collateral is not in the
12 possession of the debtor when the debtor consents to the acceptance; and

13 (4) subsection (e) does not require the secured party to dispose of the
14 collateral or the debtor waives the requirement pursuant to Section 9-624.

15 (b) **[Purported acceptance ineffective.]** A purported or apparent acceptance of
16 collateral under this section is ineffective unless:

17 (1) the secured party consents to the acceptance in ~~an authenticated~~ a
18 signed record or sends a proposal to the debtor; and

19 (2) the conditions of subsection (a) are met.

20 (c) **[Debtor's consent.]** For purposes of this section:

21 (1) a debtor consents to an acceptance of collateral in partial satisfaction of
22 the obligation it secures only if the debtor agrees to the terms of the acceptance in a record
23 ~~authenticated~~ signed after default; and

1 (2) a debtor consents to an acceptance of collateral in full satisfaction of
2 the obligation it secures only if the debtor agrees to the terms of the acceptance in a record
3 ~~authenticated~~ signed after default or the secured party:

4 (A) sends to the debtor after default a proposal that is
5 unconditional or subject only to a condition that collateral not in the possession of the secured
6 party be preserved or maintained;

7 (B) in the proposal, proposes to accept collateral in full satisfaction
8 of the obligation it secures; and

9 (C) does not receive a notification of objection ~~authenticated~~
10 signed by the debtor within 20 days after the proposal is sent.

11 * * *

12 (f) **[Compliance with mandatory disposition requirement.]** To comply with
13 subsection (e), the secured party shall dispose of the collateral:

14 (1) within 90 days after taking possession; or

15 (2) within any longer period to which the debtor and all secondary
16 obligors have agreed in an agreement to that effect entered into and ~~authenticated~~ signed after
17 default.

18 * * *

19 Official Comment

20 * * *

21
22 **3. Conditions to Effective Acceptance.** Subsection (a) contains the conditions
23 necessary to the effectiveness of an acceptance of collateral. Subsection (a)(1) requires the
24 debtor's consent. Under subsections (c)(1) and (c)(2), the debtor may consent by agreeing to the
25 acceptance in writing after default. Subsection (c)(2) contains an alternative method by which to
26 satisfy the debtor's-consent condition in subsection (a)(1). It follows the proposal-and-objection
27 model found in former Section 9-505: The debtor consents if the secured party sends a proposal

1 to the debtor and does not receive an objection within 20 days. Under subsection (c)(1),
2 however, that silence is not deemed to be consent with respect to acceptances in partial
3 satisfaction. Thus, a secured party who wishes to conduct a “partial strict foreclosure” must
4 obtain the debtor’s agreement in a record ~~authenticated~~ signed after default. In all other respects,
5 the conditions necessary to an effective partial strict foreclosure are the same as those governing
6 acceptance of collateral in full satisfaction. (But see subsection (g), prohibiting partial strict
7 foreclosure of a security interest in consumer transactions.)

8
9 * * *

10
11 **4. Proposals.** Section 9-102 defines the term “proposal.” It is necessary to send a
12 “proposal” to the debtor only if the debtor does not agree to an acceptance in ~~an authenticated~~ a
13 signed record as described in subsection (c)(1) or (c)(2). Section 9-621(a) determines whether it
14 is necessary to send a proposal to third parties. A proposal need not take any particular form as
15 long as it sets forth the terms under which the secured party is willing to accept collateral in
16 satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating
17 the amount, such as by including a per diem accrual figure) of the secured obligations to be
18 satisfied, state the conditions (if any) under which the proposal may be revoked, and describe
19 any other applicable conditions. Note, however, that a conditional proposal generally requires
20 the debtor’s agreement in order to take effect. See subsection (c).

21
22 **5. Secured Party’s Agreement; No “Constructive” Strict Foreclosure.** The
23 conditions of subsection (a) relate to actual or implied consent by the debtor and any secondary
24 obligor or holder of a junior security interest or lien. To ensure that the debtor cannot
25 unilaterally cause an acceptance of collateral, subsection (b) provides that compliance with these
26 conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under
27 subsection (b), acceptance does not occur unless, in addition, the secured party consents to the
28 acceptance in ~~an authenticated~~ a signed record or sends to the debtor a proposal. For this reason,
29 a mere delay in collection or disposition of collateral does not constitute a “constructive” strict
30 foreclosure. Instead, delay is a factor relating to whether the secured party acted in a
31 commercially reasonable manner for purposes of Section 9-607 or 9-610. A debtor’s voluntary
32 surrender of collateral to a secured party and the secured party’s acceptance of possession of the
33 collateral does not, of itself, necessarily raise an implication that the secured party intends or is
34 proposing to accept the collateral in satisfaction of the secured obligation under this section.

35
36 * * *

37
38 **10. Accounts, Chattel Paper, Payment Intangibles, and Promissory Notes.** If the
39 collateral is accounts, chattel paper, payment intangibles, or promissory notes, then a secured
40 party’s acceptance of the collateral in satisfaction of secured obligations would constitute a sale
41 to the secured party. That sale normally would give rise to a new security interest (the ownership
42 interest) under Sections 1-201(37) and 9-109. In the case of accounts and chattel paper, the new
43 security interest would remain perfected by a filing that was effective to perfect the secured
44 party’s original security interest. In the case of payment intangibles or promissory notes, the
45 security interest would be perfected when it attaches. See Section 9-309. However, the

1 procedures for acceptance of collateral under this section satisfy all necessary formalities and a
2 new security agreement ~~authenticated~~ signed by the debtor would not be necessary.

3
4 * * *

5 **13. “Signed” Replaces “Authenticated.”** Consistent with the revised definition of
6 “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in
7 the previous text of this section.
8

9 **Section 9-621. Notification Of Proposal to Accept Collateral.**

10 (a) **[Persons to which proposal to be sent.]** A secured party that desires to
11 accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal
12 to:

13 (1) any person from which the secured party has received, before the
14 debtor consented to the acceptance, ~~an authenticated~~ a signed notification of a claim of an
15 interest in the collateral;

16 (2) any other secured party or lienholder that, 10 days before the debtor
17 consented to the acceptance, held a security interest in or other lien on the collateral perfected by
18 the filing of a financing statement that:

19 (A) identified the collateral;
20 (B) was indexed under the debtor’s name as of that date; and
21 (C) was filed in the office or offices in which to file a financing
22 statement against the debtor covering the collateral as of that date; and

23 (3) any other secured party that, 10 days before the debtor consented to the
24 acceptance, held a security interest in the collateral perfected by compliance with a statute,
25 regulation, or treaty described in Section 9-311(a).

26 * * *

27 **Official Comment**

1 * * *

2 3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of
3 “sign” in Section 1-201, the cognate term “signed” replaces the reference to “authenticated” in
4 the previous text of this section.

5
6 * * *

7
8 **Section 9-624. Waiver.**

9 (a) **[Waiver of disposition notification.]** A debtor or secondary obligor may
10 waive the right to notification of disposition of collateral under Section 9-611 only by an
11 agreement to that effect entered into and ~~authenticated~~ signed after default.

12 (b) **[Waiver of mandatory disposition.]** A debtor may waive the right to
13 require disposition of collateral under Section 9-620(e) only by an agreement to that effect
14 entered into and ~~authenticated~~ signed after default.

15 (c) **[Waiver of redemption right.]** Except in a consumer-goods transaction, a
16 debtor or secondary obligor may waive the right to redeem collateral under Section 9-623 only
17 by an agreement to that effect entered into and ~~authenticated~~ signed after default.

18 **Official Comment**

19
20 * * *

21
22 3. “Signed” Replaces “Authenticated.” Consistent with the revised definition of
23 “sign” in Section 1-201, the cognate term “signed” replaces the references to “authenticated” in
24 the previous text of this section.

25
26 * * *

27
28 **Section 9-627. Determination of Whether Conduct Was Commercially**
29 **Reasonable.**

30 * * *

31 (b) **[Dispositions that are commercially reasonable.]** A disposition of collateral is made

1 in a commercially reasonable manner if the disposition is made:

2 (1) in the usual manner on any recognized market;

3 (2) at the price current in any recognized market at the time of the disposition; or

4 (3) otherwise in conformity with reasonable commercial practices among dealers

5 in the type of property that was the subject of the disposition.

6 * * *

7 **Official Comment**

8 * * *

9 4. **“Recognized Market.”** As in Sections 9-610(c) and 9-611(d), the concept of a
10 “recognized market” in subsections (b)(1) and (2) is quite limited; it applies only to markets in
11 which there are standardized price quotations for property that is essentially fungible, such as
12 (but not limited to) stock securities and commodities exchanges. See Section 9-610, Comment 9
13 (discussing standards for a “recognized market”).

14
15 * * *

16 **Reporter’s Note**

17 *No change.* No change is proposed to Section 9-627, which is provided for convenience.

18 **Section 9-628. Nonliability and Limitation on Liability of Secured Party;** 19 **Liability of Secondary Obligor.**

20 (a) **[Limitation of liability of secured party for noncompliance with article.]**

21 ~~Unless~~ Subject to subsection (f), unless a secured party knows that a person is a debtor or
22 obligor, knows the identity of the person, and knows how to communicate with the person:

23 (1) the secured party is not liable to the person, or to a secured party or
24 lienholder that has filed a financing statement against the person, for failure to comply with this
25 article; and

26 (2) the secured party’s failure to comply with this article does not affect

1 the liability of the person for a deficiency.

2 (b) **[Limitation of liability based on status as secured party.]** ~~A~~ Subject to
3 subsection (f), a secured party is not liable because of its status as secured party:

4 (1) to a person that is a debtor or obligor, unless the secured party knows:

5 (A) that the person is a debtor or obligor;

6 (B) the identity of the person; and

7 (C) how to communicate with the person; or

8 (2) to a secured party or lienholder that has filed a financing statement
9 against a person, unless the secured party knows:

10 (A) that the person is a debtor; and

11 (B) the identity of the person.

12 * * *

13 **(f) [Exception: Limitations of liability under subsections (a) and (b) do not**
14 **apply.]** Subsections (a) and (b) do not apply to limit the liability of a secured party to a person
15 that, at the later of the time the secured party obtains control of collateral that is a controllable
16 account, controllable electronic record, or controllable payment intangible or the time the
17 security interest attaches to that collateral, is a debtor or obligor, if at that time the secured party
18 knows that the information specified in subsection (b)(1)(A), (B), or (C) is not provided by the
19 collateral, a record attached to or logically associated with the collateral, or the system in which
20 the collateral is recorded.

21 **Official Comment**

22 * * *

23
24 **2. Exculpatory Provisions.** ~~Subsections (a), (b), and (c) contain exculpatory~~
25 ~~provisions that should be read in conjunction with Section 9-605 and Comments. 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. With respect to subsection (f), see Section 9-605, Comments 2 and 3.

* * *

ARTICLE 12

CONTROLLABLE ELECTRONIC RECORDS

Prefatory Note to Article 12

1. *Introduction to controllable electronic records.* Article 12, which deals with controllable electronic records, and the conforming amendments to Articles 1 and 9, in particular, are a major part of the effort to adapt the UCC to emerging technologies as they might affect electronic commerce.

Article 12 creates a legal regime that is meant to apply more broadly than to electronic (intangible) assets that are created using existing technologies such as distributed ledger technology (DLT), including blockchain technology, which records transactions in bitcoin and other digital assets. It also aspires to apply to electronic assets that may be created using technologies that have yet to be developed, or even imagined.

The adoption of DLT has underscored two important trends in electronic commerce. First, people have begun to assign economic value to some electronic records that bear no relationship to extrinsic rights and interests. For example, without any law or legally enforceable agreement, people around the world have agreed to treat virtual currencies such as bitcoin (or, more precisely “transaction outputs” generated by the Bitcoin protocol) as a medium of exchange and store of value. Second, people are using the creation or transfer of electronic records to transfer rights to receive payment, rights to receive performance of other obligations (e.g., services or delivery of goods), and other rights and interests in personal and real property.

These trends will inevitably result in disputes among claimants to electronic records and their related rights and other benefits. Uncertainty as to the criteria for resolving these claims creates commercial risk. The magnitude of these risks will grow as these trends continue.

As explained in more detail below, Article 12 is designed to reduce these risks by providing legal rules governing the transfer—both outright and for security—of interests in some, but not all, electronic records (*controllable electronic records*). These rules specify certain rights in a controllable electronic record that a purchaser would acquire. Many systems for transferring controllable electronic records are pseudonymous, so that the transferee of a controllable electronic record may be unable to verify the identity of the transferor or the source of the transferor’s title. Accordingly, the Article 12 rules would make controllable electronic records negotiable, in the sense that a qualifying good faith purchaser for value would take a controllable electronic record free of third-party claims of a property interest in the controllable

1 electronic record.

2
3 Experience with DLT and other records-management systems has established some
4 general functions required for electronic records to serve as an effective and reliable means of
5 transferring economic value.

- 6
7
 - The electronic record must have some “use” or benefit that one person can enjoy
8 and can exclude all others from enjoying, e.g., the power to “spend” a bitcoin (or,
9 more precisely, the power to include an unspent transaction output (a UTXO) in a
10 message that the Bitcoin protocol will record to its blockchain).
 - A person must be able to transfer to another person this exclusive power to use
12 and the exclusive power to transfer the electronic record. To remain exclusive, the
13 transfer must divest the transferor of the power to use the electronic record.
 - A person must be able to demonstrate to others that the person has the power to
15 use and transfer control of the electronic record.

17
18

19 As discussed in the Comments to Section 12-105, these functions form the basis of the
20 Article 12 concept of *control*. To receive the benefits of negotiability and take free of third-party
21 claims of a property interest in a controllable electronic record, a person must have control of the
22 controllable electronic record. In addition, control serves as a method of perfection of a security
23 interest in a controllable electronic record and as a condition for achieving a non-temporal
24 priority of a security interest. In this context, it may be useful to think of control as the functional
25 analogue of possession of tangible personal property such as goods. Note that the concept of
26 control allows for certain exceptions to the exclusivity of powers.

27
28 Article 12 governs certain rights (primarily property rights) of transacting parties and
29 other persons that might be affected by the transactions. Article 12 does not govern assets other
30 than controllable electronic records except, in coordination with Article 9, controllable accounts
31 and controllable payment intangibles evidenced by controllable electronic records (discussed
32 below). Like the UCC in general, Article 12 is not a regulatory statute. The fact that an asset is or
33 is not a controllable electronic record under the UCC would not necessarily affect the application
34 of laws regulating, for example, securities, commodities, money transmission, and taxation.

35 36 2. *What is the scope of Article 12?*

37

38 Article 12 applies to *controllable electronic records*. Controllable electronic records are a
39 subset of what often are referred to as digital assets. Article 12 is designed to work for both
40 technologies that are known and those that may be developed in the future. Whether an asset is a
41 controllable electronic record (and therefore within the scope of Article 12) depends on whether
42 the characteristics of the asset and the protocols of any system on which the asset is recorded
43 make it suitable for the application of Article 12’s substantive rules. The nature of electronic
44 commerce is constantly changing. For this reason, the technology on which an asset depends, the
45 type of asset, and the prevailing use of the asset should all be irrelevant to whether the asset is a
46 controllable electronic record.

1 To determine whether Article 12 applies to a particular asset, e.g., bitcoin, one must
2 determine whether the asset falls within the definition of *controllable electronic record*. A
3 controllable electronic record is a *record*, as the UCC defines the term. A record is information
4 that is retrievable in perceivable form.¹² A controllable electronic record is a record that is stored
5 in an electronic medium¹³ and that can be subjected to *control*, as defined in Section 12-105. An
6 electronic record that cannot be subjected to control under Section 12-105 is outside the scope of
7 Article 12.¹⁴ As already mentioned, Article 12 addresses primarily certain property rights in
8 controllable electronic records.

9
10 The meaning of control in the UCC depends on the type of property involved.¹⁵ The
11 Comments to Section 12-105 explain the requirements for obtaining control of a controllable
12 electronic record. For present purposes, it is sufficient to think of bitcoin as the prototypical
13 controllable electronic record.

14
15 The provisions under other law that govern control and other matters for some types of
16 electronic records (some of which are modified by these amendments) are not addressed by
17 Article 12 and these electronic records are excluded from Article 12.¹⁶

18 3. *What are the substantive provisions of Article 12?*

19
20

21 The principal function of Article 12 is to specify certain rights of a *purchaser* of a
22 controllable electronic record. A purchaser is a person that acquires an interest in property by a
23 voluntary transaction, such as a sale.¹⁷ Purchasers include both buyers and secured parties. Law
24 other than Article 12 would determine whether a person acquires any rights in a controllable
25 electronic record and so would be eligible to be a purchaser.

26
27 Section 12-104 adopts the “shelter” principle, under which a purchaser of a controllable
28 electronic record acquires whatever rights the transferor had or had power to transfer. This rule
29 appears in Article 2 with respect to goods and Article 8 with respect to securities.¹⁸

¹² See Section 1-201(b)(31).

¹³ See Section 12-102(a)(2) (defining “electronic record”).

¹⁴ 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.

¹⁵ 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).

¹⁶ See Section 12-102(a)(1) (defining “controllable electronic record”).

¹⁷ “‘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).

¹⁸ 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

1 The ability to take a controllable electronic record free of third-party property claims
2 appears to be necessary for a controllable electronic record to have commercial utility. As is the
3 case with Articles 2, 3, 7, and 9, Article 12 would facilitate commerce by affording to certain
4 good-faith purchasers for value greater rights than their transferors had or had power to
5 transfer.¹⁹ Article 12 refers to these purchasers as *qualifying purchasers*. Qualifying purchasers
6 are purchasers that obtain control of a controllable electronic record for value, in good faith, and
7 without notice of any claim of a property interest in the controllable electronic record. Like a
8 holder in due course of a negotiable instrument, a qualifying purchaser of a controllable
9 electronic record takes the controllable electronic record free of property claims.

10
11 Consider the case in which *B* contracts to buy bitcoin from *S*.

- 12
13 • Law other than Article 12 generally would determine whether *S* is the owner of
14 the bitcoin.
- 15
16 • Law other than Article 12 would resolve issues concerning the formation of the
17 contract of sale between *B* and *S* and the obligations of the parties under the
18 contract.
- 19
20 • Except to the extent provided by Article 12, law other than Article 12 would
21 determine what steps are necessary for *B* to acquire rights in the bitcoin.²⁰
- 22
23 • By acquiring rights in the bitcoin by sale, *B* would become a purchaser of the
24 bitcoin within the meaning of UCC Article 1.
- 25
26 • Article 12 provides that if *B* becomes a purchaser, *B* will acquire whatever rights
27 *S* had or had power to transfer. As a general matter, law other than Article 12
28 would define these rights. *B* would acquire these rights regardless of whether *B*
29 obtained control of the bitcoin.

30
31 Now assume that *O* is the owner of the bitcoin and that *S* is a hacker, who acquired
32 control of the bitcoin illegally from *O*.

- 33
34 • Just as a buyer of goods can obtain possession from a seller that has no rights in
35 the goods, *B* can obtain control of the bitcoin, even if *S* “stole” it from *O*.

36

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).

¹⁹ 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.

²⁰ 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).

- 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*. 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.²¹)

4. How would Article 12 deal with rights or property that is linked to a controllable electronic record?

a. The general rules.

Recall that a controllable electronic record is a record, i.e., information. Some records have what one might call “inherent value” solely because the market treats them as having value. Bitcoin would be an example of such a record. Bitcoin can be exchanged (sold) for cash or other valuable assets. Or, the owner of bitcoin can hold the bitcoin as an investment.

The value of many (if not most) records, however, is as evidence of the rights of the parties to a transaction or of the rights of a party in other property. In these situations, it is essential to differentiate between the *record* and the *rights* that are evidenced by the record.

Suppose, for example, that *S* and *B* enter into a written contract for the sale of 100 air purifiers. The contract provides that at a specified time in the future, *S* is to deliver the goods and *B* is to pay for them. *B* may sell (assign) to *P* the right to receive delivery of the goods from *S*. *P* has acquired a valuable asset, i.e., the right to receive delivery.

In contrast, if *B* sells to *P* only the paper (record) on which the contract is written, *P* might or might not acquire the right to delivery of the goods, depending on whether applicable law treats the sale of the paper as an assignment of the right to delivery (as can be the case with a negotiable document of title under UCC Article 7). *P* would become the owner of the paper in any event, but the paper itself may be of little value.

If the contract for the sale of air purifiers were electronic rather than written, the same analysis would apply. The right evidenced by the electronic record (i.e., *B*’s right to receive delivery from *S*) would be the valuable asset, not the record itself.

Suppose that the contract of sale between *B* and *S* is evidenced by a controllable electronic record that *B* sells to *P*. Under Section 12-104(d), *P* would acquire all rights *in the controllable electronic record* that the transferor (*B*) had or had power to transfer. If *P* obtains

²¹ This distinguishes “negotiable” property from property such as goods, as to which a buyer from a thief normally obtains no rights.

1 control of the controllable electronic record for value, in good faith, and without notice of any
2 claim of a property right in the controllable electronic record, *P* will become a qualifying
3 purchaser and, as such, would acquire its rights *in the controllable electronic record* free of any
4 claim of a property right under Section 12-104.

5
6 But the controllable electronic record itself may or may not be a valuable asset. In this
7 example, unlike bitcoin, the record would have value to *P* only if by virtue of acquiring rights in
8 the controllable electronic record, *P* would also acquire the right to receive delivery of the goods
9 from *S*.

10
11 Except to the extent provided by Article 12, that Article leaves to other law the question
12 whether *P*'s acquisition of rights in the controllable electronic record gives *P* the right to receive
13 delivery of the goods. We would typically expect that under other law *P* would not acquire the
14 right to receive the goods merely by acquiring rights in the controllable electronic record, any
15 more than *P* would have acquired the right to receive the goods if the record were in paper form
16 and physically delivered to *P*.

17
18 Suppose, however, that other law does provide that, by acquiring the controllable
19 electronic record, *P* would acquire the right to receive delivery of the goods from *S*. Suppose also
20 that *P* becomes a qualifying purchaser of the controllable electronic record. As we have seen, as
21 a qualifying purchaser, *P* would take its rights in the controllable electronic record free of
22 property claims. But even though under non-Article 12 law *P* would (as posited) acquire the right
23 to receive delivery of the goods, *P* would not acquire that right free of property claims unless
24 non-Article 12 law also were to provide otherwise.

25
26 b. *The exceptions: controllable accounts and controllable payment intangibles.*

27
28 As a general rule, Article 12 applies to records and not to rights evidenced by records (or
29 to rights that records purport to evidence). And, in general, law other than Article 12 would
30 govern what steps must be taken for a person to acquire an interest in a controllable electronic
31 record and the rights, if any, that the person acquires in other property as a result of acquiring an
32 interest in the record. This "other" law includes UCC Article 9.

33
34 Article 12 provides an important exception to this general rule. The exception concerns
35 rights to payment (specifically, accounts and payment intangibles) that are evidenced by a
36 controllable electronic record that provides that the obligor (account debtor) undertakes to pay
37 the person that has control of the controllable electronic record. These rights to payment are
38 referred to as "controllable accounts" and "controllable payment intangibles."²² A qualifying

²² 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 purchaser of a controllable account or controllable payment intangible takes free of property
2 claims.

3
4 The revisions amend several sections of Article 9 to deal with various aspects of security
5 interests in controllable accounts, controllable electronic records, and controllable payment
6 intangibles. Comment 5 to Section 9-101 and the comments to those sections discuss those
7 amendments.

8
9 Finally, Section 12-107 provides rules on governing law. The general rule under
10 subsection (a) is that the local law of a “controllable record’s jurisdiction” governs matters
11 covered by Article 12. The controllable record’s jurisdiction is determined by an express
12 provision in the record or in the system in which the record is recorded. If not so designated, it is
13 determined based on the designation of the law governing the record or the system generally.
14 Absent such designations, at the bottom of this “waterfall” of alternatives, the governing law will
15 be that of the District of Columbia. Subsection (b) provides an exception for the rights and duties
16 of account debtors under Section 12-106 if an agreement between the account debtor and an
17 assignor of the record provides for the law of another jurisdiction to govern those rights and
18 duties.

19
20 **Section 12-101. Title.**

21 This article may be cited as Uniform Commercial Code—Controllable Electronic
22 Records.

23 **Official Comment**

24 **Subsection headings.** Subsection headings are not a part of the official text itself and
25 have not been approved by the sponsors. See Section 1-107, Comment 1.

26
27 **Section 12-102. Definitions.**

28 **(a) [Article 12 definitions.]**

29 In this article:

30 (1) “Controllable electronic record” means a record stored in an electronic
31 medium that can be subjected to control under Section 12-105. The term does not include a
32 controllable account, a controllable payment intangible, a deposit account, an electronic copy of
33 a record evidencing chattel paper, an electronic document of title, electronic money, investment
34 property, or a transferable record.

(2) “Qualifying purchaser” means a purchaser of a controllable electronic record or an interest in the controllable electronic record that obtains control of the controllable electronic record for value, in good faith, and without notice of a claim of a property right in the controllable electronic record.

(3) “Transferable record” has the meaning provided for that term in either:

(A) the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7021(a)(1) [as amended]; or

(B) [cite to Uniform Electronic Transactions Act Section 16(a)].

(4) “Value” has the meaning provided in Section 3-303(a), as if references in that subsection to an “instrument” were references to a controllable account, controllable electronic record, or controllable payment intangible.

(b) **[Definitions in Article 9.]** The definitions in Article 9 of “account debtor”, “controllable account”, “controllable payment intangible”, “chattel paper”, “deposit account”, “electronic money”, and “investment property” apply to this article.

(c) **[Article 1 definitions and principles.]** Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article.

Legislative Note: *It is the intent of this act to incorporate future amendments to the federal law cited in subsection (a)(3)(A). A state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law should omit the phrase “[as amended]”. A state in which, in the absence of a legislative declaration, future amendments are incorporated into state law also should omit the phrase.*

In subsection (a)(3)(B), the state should cite to the state’s version of the Uniform Electronic Transactions Act Section 16(a) or comparable state law.

Official Comment

1. **Source.** Subsection (a)(2), defining “qualifying purchaser,” derives from Section 3-302(a)(2), which defines “holder in due course” of a negotiable instrument.

1 2. **“Controllable electronic record.”** To be a “controllable electronic record”
2 (CER) within the scope of Article 12, an electronic record must be susceptible of control under
3 Section 12-105. Unlike “transferable records” under the Electronic Signatures in Global and
4 National Commerce Act (E-SIGN) or a “transferable record” under the Uniform Electronic
5 Transactions Act (UETA), a record can be a CER under Article 12 in the absence of an
6 agreement to that effect.
7

8 This definition uses the term “record,” defined in Section 1-201 to include
9 “information . . . that is stored in an electronic or other medium and is retrievable in perceivable
10 form,” and the term “electronic,” also defined in Section 1-201.
11

12 The provisions of Article 12 do not apply to certain types of electronic records, and the
13 definition has been limited accordingly. For example, the definition does not include a
14 “transferable record” under E-SIGN or UETA. It also does not include “investment property,” as
15 defined in Section 9-102(a)(49). For this reason, the rights of an entitlement holder in a
16 controllable electronic record that is a financial asset with respect to which the entitlement holder
17 has a security entitlement are excluded from the definition (although the entitlement holder’s
18 securities intermediary may hold directly an interest in a controllable electronic record that it has
19 credited to a securities account). See Sections 8-102(a)(9) (defining “financial asset”), (a)(14)
20 (defining “securities intermediary”), (a)(17) (defining “security entitlement”) and Comment 9; 9-
21 102(a)(49) (defining “investment property”). See also Section 8-103(h), clarifying that a
22 controllable electronic record is not a “financial asset” except pursuant to Section 8-
23 102(a)(9)(iii).
24

25 A CER is not itself a “security,” defined in part in Section 8-102(a)(15) as “an obligation
26 of an issuer or a share, participation, or other interest in an issuer or in property or an enterprise
27 of an issuer.” It also is not “a share or similar equity interest,” an “investment company
28 security,” or “an interest in a partnership or limited liability company.” See Section 8-103(a), (b),
29 and (c). Of course, a CER might be involved in the issuance and distribution of something that is
30 a security for other, non-Article 8 purposes, including the federal securities laws. For example, a
31 CER (perhaps labeled as a “token” or “coin”) might provide a mechanism for facilitating
32 investments in such other securities. As Section 8-102(d) makes clear, however, characterization
33 under Article 8 does not determine characterization for other purposes. The converse is also
34 true—characterization for other purposes does not determine characterization under Article 8.
35

36 Although a CER is not an Article 8 security, CERs might play a role in the facilitating
37 transactions in Article 8 securities. The following examples address situations in which CERs
38 may have such a role as well as situations in which investment property is not involved.

39 **Example 1 (corporate shares: Article 8 uncertificated securities; token as**
40 **instruction).** A Delaware corporation (D Corp) issues shares of stock and maintains
41 books and records evidencing the registered ownership of the shares. Because the shares
42 are not represented by security certificates, they are uncertificated securities. Pursuant to
43 the applicable law, other than the UCC, and the organic documentation of D Corp, CERs
44 (“tokens”) are created to facilitate transfers of the shares. Also pursuant to that law and
45 documentation, the transfer of control of a token on the platform on which the token is
46 recorded constitutes an instruction to D Corp, as issuer, for the transfer of registration of

1 the share(s) represented by the token to the transferee of control. Following receipt of the
2 instruction upon transfer of control of a token, D Corp transfers registration of the
3 share(s) on its books and records. See Sections 8-102(a)(12) (defining “instruction”); 8-
4 401 (duty of issuer to register transfer). Although Article 12 governs the tokens (as
5 CERs) and the transfer of control, other law, including Delaware corporate law and
6 Delaware Article 8 (and Article 9, where applicable) governs rights in the uncertificated
7 securities and the transfer of registration. See Sections 8-110(a); 12-104(f).

8
9 **Example 2 (LLC membership interests: Article 8 uncertificated securities; token as**
10 **instruction).** A Delaware limited liability company (LLC) issues membership interests
11 that are dealt in or traded on securities exchanges or in securities markets and which by
12 their terms are securities governed by Article 8. See Section 8-103(c). LLC maintains
13 books and records evidencing the registered ownership of the interests. Because the
14 interests are not represented by security certificates, they are uncertificated securities.
15 Pursuant to the applicable law, other than the UCC, and the organic documentation of
16 LLC, CERs (“tokens”) are created to facilitate transfers of the interests. Also pursuant to
17 that law and documentation, the transfer of control of a token on the platform on which
18 the token is recorded constitutes an instruction to LLC, as issuer, for the transfer of
19 registration of the interest(s) represented by the token to the transferee of control.
20 Following receipt of the instruction upon transfer of control of a token, LLC transfers
21 registration of the interest(s) on its books and records. See Sections 8-102(a)(12)
22 (defining “instruction”); 8-401 (duty of issuer to register transfer). Although Article 12
23 governs the tokens (as CERs) and the transfer of control, other law, including Delaware
24 LLC law and Delaware Article 8 (and Article 9, where applicable), governs rights in the
25 uncertificated securities and the transfer of registration. See Sections 8-110(a); 12-104(f).

26
27 **Example 3 (LLC membership interests not covered by Article 8; interests are**
28 **general intangibles).** A Delaware limited liability company issues membership interests
29 that are not securities governed by UCC Article 8 and, consequently, are not investment
30 property. See Section 8-103(c). Instead, the membership interests are general intangibles.
31 LLC maintains books and records evidencing ownership of the interests. Pursuant to the
32 applicable law and the organic documentation of LLC, CERs (“tokens”) are created to
33 facilitate transfers of the interests. Also pursuant to that law and documentation, the
34 transfer of control of a token on the platform on which the token is recorded constitutes a
35 request to LLC, as issuer, for the transfer of the interest(s) represented by the token.
36 Following receipt of the request upon transfer of control of a token, LLC transfers the
37 interest(s) on its books and records. Although Article 12 governs the tokens (as CERs)
38 and the transfer of control, other law (including Article 9, where applicable, but not
39 Article 8) governs rights in the interests (general intangibles). See Section 12-104(f).

40
41 Examples 1 and 2 posit that CERs function as instructions to the issuers. The central
42 point is that the roles of the CERs must comply with the organic corporate and LLC laws and
43 documentation as well as the Article 8 regime for uncertificated securities. Although CERs might
44 be structured to functionally “represent” the underlying uncertificated securities, Article 8 makes
45 no provision for such a “representation” for uncertificated securities (unlike the role of security
46 certificates for certificated securities). Whether it would be possible and feasible to expand the

1 structure contemplated in Examples 1 and 2 so that transfer of control of a CER would, *ipso*
2 *facto*, constitute a transfer of registration on the issuer's books and records would depend on the
3 terms of and compliance with both the underling organic laws and documentation for the
4 uncertificated securities and the requirements of Article 8.

5
6 If the securities issued by D Corp or LLC in Examples 1 and 2 were payment obligations
7 of the issuers that met the definition of "security" in Section 8-102(a)(15)—i.e., debt securities—
8 the same analysis discussed in those examples as to the applicability and scope of Articles 8 and
9 12 would apply. However, if the debt obligations were not Article 8 securities (as in Example 3)
10 but were obligations of account debtors on controllable accounts or controllable payment
11 intangibles, then the relevant provisions of Articles 9 and 12, and not those of Article 8, would
12 apply. See, e.g., Sections 9-107A; 9-306B; 9-314; 12-104(a), (b), and (e) and Comments 6 – 10;
13 Article 12, Prefatory Note 4.

14
15 3. **"Qualifying purchaser."** The conditions for becoming a qualifying purchaser
16 were drawn from Article 3. More specifically, the conditions for becoming a qualifying
17 purchaser were drawn from Section 3-302(a)(2), which defines "holder in due course" of a
18 negotiable instrument. Among these conditions is that a person take the instrument "for value."
19 As Comment 10 to Section 12-104 explains, the concept of value in Article 3 differs from the
20 concept of value that is generally applicable in the UCC. Article 12 adopts the Article 3 concept.
21 To qualify as a qualifying purchaser under subsection (a)(2), there must be a time at which all of
22 the requirements are satisfied. For example, if a purchaser obtains notice of a claim of a property
23 right before giving value or satisfying the requirements for control, the purchaser cannot be a
24 qualifying purchaser.

25
26 Under Section 12-104(a), not only a purchaser of a controllable electronic record but also
27 a purchaser of a controllable account or controllable payment intangible may be a qualifying
28 purchaser. Moreover, a purchaser of a controllable account or a controllable payment intangible
29 may be a qualifying purchaser even if the purchaser does not also purchase the controllable
30 electronic record that evidences the account or payment intangible. For example, a secured party
31 having a security interest in all of a debtor's accounts and payment intangibles would be a
32 purchaser of those rights to payment, which would include the debtor's controllable accounts and
33 payment intangibles. If the secured party were to obtain control of the debtor's controllable
34 account or payment intangible, it would become a qualifying purchaser if it also met the other
35 conditions for that status. However, to obtain control of the controllable account or controllable
36 payment intangible, a requirement for qualifying purchaser status, the purchaser must obtain
37 control of the controllable electronic record evidencing the controllable account or controllable
38 payment intangible. Section 12-104(b); see also Section 9-107A. A person need not be a
39 purchaser, however, to obtain control of a controllable electronic record.

40
41 4. **"Transferable record."** This definition facilitates the exclusion of transferable
42 records from the definition of controllable electronic record.

43
44 5. **"Value."** The concept of value in Section 3-303 is narrower than the generally
45 applicable concept in Section 1-201. Comment 9 to Section 12-104 explains the difference
46 between the two concepts and that the Article 12 adopts the Article 3 approach.

Section 12-103. Relation to Article 9 and Consumer Laws.

(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 9-201(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.

1 (c) **[Applicability of other law to acquisition of rights.]** Except as provided in this
2 section, law other than this article determines whether a person acquires a right in a controllable
3 electronic record and the right the person acquires.

4 (d) **[Shelter principle and purchase of limited interest.]** A purchaser of a controllable
5 electronic record acquires all rights in the controllable electronic record that the transferor had or
6 had power to transfer, except that a purchaser of a limited interest in a controllable electronic
7 record acquires rights only to the extent of the interest purchased.

8 (e) **[Rights of qualifying purchaser.]** A qualifying purchaser acquires its rights in the
9 controllable electronic record free of a claim of a property right in the controllable electronic
10 record.

11 (f) **[Limitation of rights of qualifying purchaser in other property.]** Except as
12 provided in subsections (a) and (e) for controllable accounts and controllable payment
13 intangibles or law other than this article, a qualifying purchaser takes a right to payment, right to
14 performance, or other interest in property evidenced by the controllable electronic record subject
15 to a claim of a property right in the right to payment, right to performance, or other interest in
16 property.

17 (g) **[No-action protection for qualifying purchaser.]** An action may not be asserted
18 against a qualifying purchaser based on both a purchase by the qualifying purchaser of a
19 controllable electronic record and a claim of a property right in another controllable electronic
20 record, whether the action is framed in conversion, replevin, constructive trust, equitable lien, or
21 other theory.

22 (h) **[Filing not notice.]** Filing of a financing statement under Article 9 is not notice of a
23 claim of a property right in a controllable electronic record.

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Official Comment

1. **Source.** Subsection (d) derives from Section 2-403(1) (concerning the rights of a 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 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 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

1 would be determined by subsections (e) and (g). See Comments 7 and 8, below.
2

3 The “law other than this article” that may apply to the transfer of rights in a controllable
4 electronic record under subsection (c) includes UCC Article 9. Section 9-203 would apply, for
5 example, to determine whether a purported secured party acquired an enforceable security
6 interest in a controllable electronic record.
7

8 **4. Purchaser and transferor under subsection (d): shelter principle and**
9 **resulting controllable electronic records.** Subsection (d) sets forth the familiar “shelter”
10 principle, under which a purchaser of a controllable electronic record acquires whatever rights
11 the transferor had or had power to transfer. However, in some cases the controllable electronic
12 record that is acquired by the purchaser will not be the “same” controllable electronic record that
13 was transferred by the transferor. Such a transfer might involve the elimination of a “transferred”
14 controllable electronic record and the resulting and corresponding derivative creation and
15 acquisition of a new controllable electronic record. An example of such a resulting controllable
16 electronic record is the unspent transaction output (UTXO) generated by a transaction in bitcoin.
17 Bitcoin’s protocol operates by allowing users to “spend” their UTXOs to create one or more new
18 UTXOs for the same amount of bitcoin, so each transfer produces new UTXOs controlled by the
19 transferees (one of which may be the transferor—spender—of the bitcoin). Subsection (d) should
20 be construed broadly to encompass such transfers and resulting derivative controllable electronic
21 records acquired by a purchaser. Because subsection (d) addresses the rights of a purchaser in the
22 “purchased” asset and not the “transferred” asset, this construction is wholly consistent with the
23 statutory text.
24

25 Notwithstanding the broad subsection (d) shelter principle, which provides that a
26 purchaser acquires “all rights” of the transferor, those rights are subject to the reach of Section 1-
27 304. Under that section a contract or duty under the UCC imposes an overarching “obligation of
28 good faith in its performance and enforcement.” Section 1-304. In this context, “performance and
29 enforcement” include the exercise of rights under the UCC, such as the rights conferred on a
30 purchaser by the subsection (d) shelter principle. See Section 1-304, Comment 2. For example,
31 consider a qualifying purchaser of a controllable electronic record, controllable account, or
32 controllable payment intangible who then sells that asset to a person who is not a qualifying
33 purchaser. If the second purchaser had previously engaged in fraudulent or illegal activity in
34 connection with the purchased asset or an asset to which the purchased asset is attributable, the
35 purchaser’s exercise of rights under subsection (d) as to the purchased asset may be in breach of
36 its obligation of good faith. Section 3-203(b) states this result directly with respect to a transferee
37 of a negotiable instrument if the transferee previously engaged in fraud or illegality with respect
38 to the same instrument. Section 3-203(b). The same result would apply under subsection (d).
39 Subsection (d) relies on the application of the general obligation of good faith under Section 1-
40 304 to reach the appropriate result. However, unlike negotiable instruments, many controllable
41 electronic records are fungible. For this reason, in some cases it might not be possible to
42 establish that an acquired controllable electronic record has a sufficient nexus with a transferee’s
43 earlier fraud or illegality.
44

45 **5. Nonpurchaser having control.** Under Section 12-105, a person may have control
46 of a controllable electronic record even if the person has no property interest in the controllable

1 electronic record. A person that has control of, but no property interest in, a controllable
2 electronic record would not be a purchaser of the controllable electronic record and so would not
3 be eligible to be a qualifying purchaser under this section.
4

5 **Example:** Debtor granted to Secured Party a security interest in all Debtor's existing and
6 after-acquired accounts, chattel paper, and payment intangibles. Secured Party perfected
7 its security interest in a specific controllable account by obtaining control of the
8 controllable electronic record that evidences the controllable account. See Section 9-
9 107A.

10
11 Because Debtor's security agreement does not cover controllable electronic records, Secured
12 Party would have no interest in the controllable electronic record. Accordingly, Secured Party
13 would not be a purchaser of the controllable electronic record. However, as a purchaser of the
14 controllable accounts and controllable payment intangibles, Secured Party could benefit from the
15 take-free rule in subsection (e) (discussed in Comment 7). Having taken control of the specific
16 controllable account, Secured Party may be a qualifying purchaser. Even if Secured Party were
17 not a qualifying purchaser of the controllable account, its security interest in the account over
18 which it obtained control would, however, have priority over a conflicting security interest that
19 was perfected by a method other than control. Section 9-326A.
20

21 **6. Distinction between controllable electronic record and controllable account**
22 **or controllable payment intangible evidenced by the controllable electronic record.** Even
23 though a controllable electronic record evidences a controllable account or controllable payment
24 intangible, the controllable electronic record is distinct from the account or payment intangible
25 that it evidences. The account or payment intangible is connected with (or "tethered" to) the
26 electronic record by virtue of the relevant account debtor's obligation to pay the person in
27 control of the controllable electronic record. Moreover, control of the controllable account or
28 payment intangible is achieved only by obtaining control of the controllable electronic record
29 that evidences the account or payment intangible. The Example in Comment 5 explains that a
30 purchaser may obtain a property interest in the controllable account or controllable payment
31 intangible even if it does not acquire any interest in the controllable electronic record that
32 evidences the account or payment intangible. (On the other hand, merely obtaining control of a
33 controllable electronic record does not result in the acquisition of an interest in the record.) This
34 approach is intended to avoid a trap for the unwary purchaser that obtains an interest in the
35 account or payment intangible (which is the asset that has stand-alone value) but might fail to
36 acquire an interest in the related controllable electronic record. However, good practice may
37 encourage a purchaser to acquire an interest in the controllable electronic record as well, which
38 would eliminate any potential confusion
39

40 **7. The take-free rule.** Subsection (e) makes controllable electronic records and,
41 under subsection (a), controllable accounts and controllable payment intangibles, highly
42 negotiable. Subsection (e) derives from Section 3-306, under which a holder in due course takes
43 a negotiable instrument free of a claim of a property right in the instrument. A qualifying
44 purchaser of a controllable electronic record, controllable account, or controllable payment
45 intangible takes free of all claims of a property right in the purchased controllable electronic
46 record, account, or payment intangible.

1 As a general matter, law other than Article 12 would determine whether any particular
2 transaction creates a property interest in a controllable electronic record. Section 12-104(c). The
3 applicable law may provide that a hacker, who is essentially a thief, acquires no rights in a
4 “stolen” controllable electronic record. Even if this is the case, subsection (e) would enable a
5 purchaser that obtains control from a hacker and that otherwise meets the definition of
6 “qualifying purchaser” (for value, in good faith, and without notice of a claim of a property right)
7 to take the controllable electronic record (or any purchased controllable account or controllable
8 payment intangible) free of property claims. A person in control of a controllable electronic
9 record therefore has the power, even if not the right, to transfer rights in the record to a
10 qualifying purchaser. Of course, if the qualifying purchaser is a secured party whose security
11 interest secures an obligation, the purchaser would take free of the conflicting property right only
12 to the extent of the obligation secured. See Section 12-104(d) (purchaser of a limited interest); *cf.*
13 Section 3-302(e).
14

15 8. **Subsection (g)—the “no-action” rule.** Subsection (g) applies in the situation
16 (explained in Comment 4) in which the “resulting” controllable electronic record (or controllable
17 account or controllable payment intangible) purchased by a qualifying purchaser is not the
18 “same” record, account, or payment intangible that was transferred. In such a situation, a person
19 claiming a property right in the transferred asset may assert a claim against a purchaser of the
20 “resulting” asset even though the claimant is *not* asserting a claim of a *property right* in the
21 purchased asset. If the claim is based on both the purchaser’s purchase of the acquired asset and
22 the claimant’s claim of a property right in the transferred asset, subsection (g) protects the
23 qualifying purchaser from liability to the claimant based on any theory. The qualifying
24 purchaser’s protection from the assertion of such a claim does not depend on any proof that the
25 purchased asset is somehow “traceable” to the transferred asset.
26

27 If instead, such a claimant were to assert a claim based on a property right in the
28 purchased asset, then the qualifying purchaser would take free of that claim under subsection (e).
29 Subsection (e) applies whether or not the acquired asset is the same asset that was transferred.
30

31 9. **“Tethered” assets.** Certain controllable electronic records may carry with them
32 rights to other assets, e.g., goods or rights to payment. By its terms, the take-free rule in
33 subsection (e) applies to controllable electronic records (and, under subsection (a), controllable
34 accounts and controllable payment intangibles evidenced by a controllable electronic record).
35 One might argue that the inclusion of controllable accounts and controllable payment intangibles
36 in the scope of subsection (e) is unnecessary. By taking a controllable electronic record free of
37 property claims, the argument would be that a person takes not only the controllable electronic
38 record itself but also all rights that are “carried” in the controllable electronic record free and
39 clear.
40

41 *Subsection (f) defeats that argument.* It limits the application of the take-free rule in
42 subsection (e) to controllable electronic records and, through the application of subsection (a),
43 controllable accounts and controllable payment intangibles evidenced by a controllable
44 electronic record. Under subsection (f), except as provided in subsections (a) and (e), a
45 qualifying purchaser takes rights to payment (other than controllable accounts and controllable
46 payment intangibles), rights to performance, and interests in property that are evidenced by a

1 controllable electronic record subject to third-party property claims, unless law other than Article
2 12 provides to the contrary. The reference in subsection (f) to “law other than this article”
3 contemplates that another article of the UCC might provide a contrary rule for some types of
4 property that might be tethered to a controllable electronic record.
5

6 **10. Creating the functional equivalent of a negotiable instrument.** Two defining
7 characteristics of an Article 3 negotiable instrument are that a holder in due course (i) takes free
8 of claims of a property or possessory right to the instrument (Section 3-306) and (ii) takes free of
9 most defenses and claims in recoupment (Section 3-305). Article 3 applies only to written
10 instruments. Article 12 and the revisions to Article 9 provide a method for reaching a similar
11 result with respect to controllable accounts and controllable payment intangibles.
12

13 As regards the first characteristic, a qualifying purchaser could acquire the controllable
14 account or controllable payment intangible free of any claim of a property interest. As regards
15 the second characteristic, the definition of “qualifying purchaser” omits some of the conditions
16 for becoming a holder in due course. For example, to qualify as a holder in due course, a holder
17 must take “without notice that any party has a defense or claim in recoupment” Section 3-
18 302(a)(2)(vi). A controllable electronic record is information; there are no parties to a
19 controllable electronic record. However, there are parties to a controllable account or
20 controllable payment intangible. Accordingly, Sections 9-404 and 9-403 would determine
21 whether a purchaser of the controllable account or controllable payment intangible takes free of a
22 defense. Section 9-403 ordinarily would give effect to the account debtor’s agreement not to
23 assert claims or defenses.
24

25 Section 9-403 adopts the meaning of value in Section 3-303, as does Article 12. The
26 concept of value in Section 3-303 is narrower than the concept in Section 1-204, which applies
27 generally to UCC transactions. Under Section 1-204, a person gives value for rights if the person
28 acquires them in return for a promise. However, under Section 3-303, if a negotiable instrument
29 is issued or transferred for a promise of performance, the instrument is transferred for value only
30 to the extent that the promise has been performed.
31

32 **Section 12-105. Control of Controllable Electronic Record.**

33 **(a) [General rule: control of controllable electronic record.]** A person has control of a
34 controllable electronic record if the electronic record, a record attached to or logically associated
35 with the electronic record, or a system in which the electronic record is recorded:

36 (1) gives the person:

37 (A) the power to avail itself of substantially all the benefit from the
38 electronic record; and

39 (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.]** 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) **[When power is not shared with another person.]** A power of a person is not
17 shared with another person under subsection (b)(2) and the person's power is not exclusive if:

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

20 (2) the other person either:

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

22 (B) is the transferor to the person of an interest in the controllable
23 electronic record or a controllable account or controllable payment intangible evidenced by the

controllable electronic record.

(d) **[Presumption of exclusivity of certain powers.]** If a person has the powers that are specified in subsection (a)(1)(B)(i) and (ii), the powers are presumed to be exclusive.

(e) **[Control through another person.]** A person has control of a controllable electronic record if another person, other than the transferor to the person of an interest in the controllable electronic record or a controllable account or controllable payment intangible evidenced by the controllable electronic record:

(1) has control of the electronic record and acknowledges that it has control on behalf of the person; or

(2) obtains control of the electronic record after having acknowledged that it will obtain control of the electronic record on behalf of the person.

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

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

Official Comment

1. **Why “control” matters.** Control serves two major functions in Article 12. An electronic record is a “controllable electronic record” and is subject to the provisions of this Article only if it can be subjected to control under this section. See Section 12-102(a)(1) (defining “controllable electronic record”). And only a person having control of a controllable electronic record is eligible to become a qualifying purchaser and so to take free of claims of a property interest in the controllable electronic record, or any controllable account or controllable payment intangible evidenced by the controllable electronic record, and to be protected by the “no-action” rule. See Section 12-104(e) and (g).

Article 9 provides that obtaining control of a controllable electronic record is one method

1 by which to perfect a security interest in the controllable electronic record or in any controllable
2 account or controllable payment intangible evidenced by the controllable electronic record. See
3 Sections 9-107A; 9-314. Moreover, a security interest perfected by control has priority over a
4 conflicting security interest that was perfected by a method other than control and “control . . .
5 pursuant to the debtor’s agreement” may substitute for ~~an authenticated~~ a signed security
6 agreement as an element of attachment. See Sections 9-326A; 9-203(b)(3)(D).
7

8 **2. Powers and sources of powers; inability to exercise a power.** This section
9 conditions control on a person’s having the three powers specified in subsection (a)(1). A person
10 would have the powers described in that subsection if the controllable electronic record, a record
11 attached to or logically associated with the controllable electronic record, or any system in which
12 it is recorded gives the purchaser those powers. This description of the source of the relevant
13 powers should be construed broadly and functionally. For example, a person would have a power
14 even if the characteristics of the particular purchaser disable the person from exercising the
15 power. This would be the case, for example, when the purchaser holds the private key required to
16 access the benefit of the controllable electronic record but lacks the hardware required to use it.
17 In addition, a system in which the person in control is identified is a permissible source of a
18 power even if it is related to but not precisely the “same” system in which the controllable
19 electronic record is recorded. Moreover, this broad and functional construction is particularly
20 important for references to “a record attached to or logically associated with the electronic
21 record, or a system in which the electronic record is recorded,” as used in Section 12-105(a) and
22 (b) (and elsewhere). For example, overly literal or technical interpretations of the terminology
23 “attached to” or “logically associated” are inappropriate. The statutory language must be adapted
24 and applied in a functional manner to technology, systems, and infrastructure that may be
25 developed and employed in the future. The goal is to embrace records and systems that are
26 connected to a particular electronic record in such a manner that the information contained in or
27 the functions performed by those “attached” or “associated” records are appropriately and
28 reasonably attributable to and identifiable as connected with the electronic record itself. See also
29 Sections 7-106, 9-105, 9-105A, 9-306A, 9-605, 9-628, and 12-107.
30

31 **3. “Benefit.”** Subsection (a)(1)(A) and (a)(1)(B)(i) condition control of a
32 controllable electronic record on a person’s relationship to the benefit of the controllable
33 electronic record.
34

35 As used in this section, the “benefit” of a controllable electronic record refers to the rights
36 that are afforded by the controllable electronic record and the uses to which the controllable
37 electronic record can be put. These, in turn, depend on the characteristics of the controllable
38 electronic record in question. For example, the benefit afforded by control of a bitcoin is that it
39 can be held or disposed of (sold or spent). And control of a controllable electronic record
40 evidencing a controllable account or controllable payment intangible affords the benefit of the
41 right to collect from the account debtor (obligor).
42

43 The system in which a controllable electronic record is recorded may limit the benefit
44 from the controllable electronic record that is available to those who interact with the system. In
45 determining whether a person has the power to avail itself of substantially all the benefit from a
46 controllable electronic record under subsection (a)(1)(A), or to prevent others from availing

1 themselves of substantially all the benefit from a controllable electronic record under subsection
2 (a)(1)(B)(i), only the benefit that the system makes available should be considered and
3 limitations inherent in the system should be ignored.
4

5 **4. Power to retrieve information.** By definition, the information constituting an
6 electronic record must be “retrievable in perceivable form.” Section 1-201(b)(31) (defining
7 “record”). The power to retrieve the record in perceivable form is included in the benefit of a
8 controllable electronic record. “Perceivable form” means that the contents of the record are
9 intelligible; the ability to perceive the indecipherable jumble of an encrypted record does not
10 give a person the power to retrieve the record in perceivable form.
11

12 To have control of a controllable electronic record under subsection (a)(1)(A), a person
13 must have at least the nonexclusive power to avail itself of this benefit. If a person also has the
14 exclusive power to decrypt the encrypted record, the person will have the exclusive power to
15 prevent others from availing themselves of substantially all the benefit from the controllable
16 electronic record and thereby will satisfy the condition in subsection (a)(1)(B)(i).
17

18 **5. Exclusive powers.** Unlike the power in subsection (a)(1)(A), the powers in
19 subsection (a)(1)(B)(i) and (a)(1)(B)(ii) must be held exclusively by the person claiming control
20 in order to establish control. However, once it is established that a person has received those
21 powers, subsection (d) provides a presumption of exclusivity. Consequently, a person asserting
22 control need not prove exclusivity in order to make out a *prima facie* case. Application of the
23 presumption will be governed also by Section 1-206 (effects of a presumption under the UCC)
24 and applicable non-UCC law (including rules of procedure and evidence). In addition, subsection
25 (b) contains two qualifications of the term “exclusive” as used in subsection (a)(1)(B). A power
26 can be “exclusive” under subsection (a)(1)(B) even if one or both of these qualifications apply.
27

28 Subsection (b)(1) takes account of the fact that the powers of a purchaser of a
29 controllable electronic record necessarily are subject to the attributes of the controllable
30 electronic record, records associated with the controllable electronic record, and the protocols of
31 any system in which the controllable electronic record is recorded. For example, a transfer of
32 control resulting from a program that is a part of a system’s protocol is inherent in the
33 controllable electronic record and does not impair the exclusivity of the power of the person in
34 control of the record. Subsection (b)(1) also contemplates that the potential for the system to
35 otherwise modify (or even destroy) controllable electronic records would not impair the
36 exclusivity.
37

38 **Example 1.** Pursuant to the governance apparatus of a system (Propofolium) for a
39 cryptocurrency (propofol), an upgrade to the system was made that modified the
40 consensus mechanism for determining the effectiveness of transfers of propofols within
41 the system. Although this change did not divest any holder of propofols of its control, it
42 prospectively modified the system for all propofols. The adoption of this change and the
43 potential for such a change (or any other change) are functions of the attributes of the
44 system and, consequently, of all propofols. Neither this change nor such potential
45 impaired the exclusivity, for purposes of subsection (a)(1)(B), of the powers of a person
46 in control of propofols.

1 Subsection (b)(2) allows for a power to be shared with another person without impairing
2 the exclusivity of the power. One effect of subsection (b)(2) is that, under a multi-signature
3 (multi-sig) agreement, any person that is readily identifiable under subsection (a)(2) and shares
4 the relevant power would be eligible to have control, even if the action of another person is a
5 condition for the exercise of the power. For example, a person in control may agree that another
6 person's action on the relevant system would be required to effect a transfer of control without
7 impairing the requisite exclusivity.

8
9 **Example 2.** Pursuant to a multi-sig arrangement, control of propofols (in the system
10 described in Example 1) is shared by Campbell, Elizabeth, Mia, and Natasha. Under the
11 multi-sig arrangement, the exercise of powers over the propofols requires action by three
12 of the four persons having control. None of the participants acting alone has the power to
13 exercise the relevant powers. Subsection (b)(2) makes clear that all four participants have
14 control over the propofols and exclusivity is not impaired by the shared control under the
15 multi-sig arrangement.

16
17 Although all four persons in Example 2 have control, that may leave many questions as to the
18 rights of the four as among themselves. For example, if more than one of the four were secured
19 parties, it would be important for them to settle by agreement issues such as relative priorities
20 and enforcement rights. Similar situations can arise in other contexts and with respect to other
21 types of collateral.

22
23 A multi-sig arrangement for a controllable electronic record, such as that described in
24 Example 2, may provide enhanced security. For example, if the power of one participant is
25 compromised by a "hacker," the required actions by the other participants would prevent the
26 hacker from exercising unauthorized power over the record. Although the hacker might possess
27 the power along with the remaining multi-sig participants, those participants would continue to
28 have control. A multi-sig structure also may protect against the misuse of a record by ensuring
29 that actions by multiple persons are required for exercising power over the record.

30
31 Subsection (c) provides that in certain circumstances a power is not shared within the
32 meaning of subsection (b)(2), the relaxation of the exclusivity requirement provided by
33 subsection (b)(2) does not apply, and, consequently, a person's power is not exclusive.
34 Subsection (c) provides that a person does not share an exclusive power with another person if
35 the person can exercise the power only with the other person's cooperation (subsection (c)(1))
36 but the other person either (i) can exercise the power without the person's cooperation
37 (subsection (c)(2)(A)) or (ii) is the transferor to the person (transferee) of an interest in the
38 controllable electronic record or a controllable account or controllable payment intangible
39 evidenced by the controllable electronic record (subsection (c)(2)(B)). It follows that a person to
40 which subsection (c) applies does not have control based on its exclusive powers (although it
41 might have control through another person under subsection (e), discussed below, or if another
42 person having control is acting as the person's agent).

43
44 Comment 9, below, addresses the rationale for disqualifying the transferee from a
45 transferor under subsection (c)(2)(B) from the benefit of sharing a power under subsection (b)(2).

1 The following examples illustrate the application of subsection (c):

2
3 **Example 3.** Under a multi-sig arrangement, exercise by any two of Campbell, Elizabeth,
4 and Mia is required to exercise a power with respect to a controllable electronic record
5 (CER). None of the three can exercise a power without the cooperation of another, so all
6 three have control because they share the power. Even if Campbell were the transferor of
7 the CER to Elizabeth, Elizabeth's power is shared, and therefore treated as exclusive,
8 because Campbell cannot block Elizabeth's exercise of the power if Mia acts with
9 Elizabeth. It follows that subsection (c)(1) does not apply, subsection (b)(2) does apply,
10 and Elizabeth shares the power with Campbell. (The same result would apply with
11 respect to Mia's power if Campbell were the transferor of the CER to Mia.)
12

13 **Example 4.** Under a multi-sig arrangement, exercise by both Campbell and Elizabeth are
14 required to exercise a power, so subsection (c)(1) applies with respect to each person.
15 However, neither Campbell nor Elizabeth can exercise the power without cooperation of
16 the other and neither is the transferor to the other, so subsection (c)(2)(A) and (2)(B) does
17 not apply with respect to either person. It follows that Campbell and Elizabeth each share
18 the power.
19

20 **Example 5.** The facts are the same as in Example 4, but Campbell is the transferor of an
21 interest in the CER to Elizabeth. Elizabeth does not share the power with Campbell and
22 Elizabeth's power is not exclusive because subsection (c)(1) and (2)(B) applies.
23

24 **Example 6.** Under a multi-sig arrangement, Mia or Natasha can exercise a power only
25 with the exercise by Campbell, but Campbell can exercise the power unilaterally without
26 the exercise by either Mia or Natasha. Neither Mia nor Natasha shares the power with
27 Campbell because subsection (c)(1) and (2)(A) apply, so neither Mia's nor Natasha's
28 power is treated as exclusive. Campbell's power is exclusive *in fact* and Campbell need
29 not rely on subsection (b)(2) for shared power.
30

31 **Example 7.** Under a multi-sig arrangement, Mia can exercise a power only with exercise
32 by Elizabeth or Natasha, but Elizabeth and Natasha each can exercise the power
33 unilaterally without the exercise by the other or by Mia. Elizabeth and Natasha share the
34 power, but Mia does not share the power with Elizabeth or Natasha. Mia's power is not
35 exclusive because subsection (c)(1) and (2)(A) applies.
36

37 Although the presumption in subsection (d) is not expressly made subject to subsection
38 (c), it is functionally so. Under Section 1-206, once evidence is introduced that subsection (c)
39 applies and that, accordingly, a person relying on the presumption cannot rely on the relaxation
40 of the exclusivity requirement provided by subsection (b)(2), the presumption would no longer
41 apply.
42

43 **6. Transfer of control.** The power to transfer control of a controllable electronic
44 record under subsection (a)(1)(B)(ii) includes the power to cause another person to obtain control
45 of another derivative and resulting controllable electronic record that results from the transfer of
46 the controllable electronic record. See Section 12-104, Comment 4.

1 7. **Readily identify.** Subsection (a)(2) provides that a person does not have control
2 of a controllable electronic record unless the controllable electronic record, a record attached to
3 or logically associated with the controllable electronic record, or any system in which the
4 controllable electronic record is recorded enables the person readily to identify itself as the
5 person having the requisite powers. This subsection does not obligate a person to identify itself
6 as having control. However, to prove that it has control, a person would need to prove that the
7 relevant records or any system in which the controllable electronic record is recorded readily
8 identifies the person as such. Consistent with the subsection (d) presumption of exclusivity,
9 proof that a person has the powers specified in section (a)(1) does not require proof of
10 exclusivity—i.e., proof of a negative (that no one else has such powers). The means of
11 identification mentioned in subsection (a)(2) derive from Section 3-110(c). Subsection (a)(2)
12 adds “cryptographic key” as an example of a way in which a person may be identified.
13

14 8. **Control through another person.** Neither Article 12 nor any other provision of
15 the UCC (or other law that has been brought to the attention of the Drafting Committee) would
16 restrict or render ineffective any agreement of a person in control of a controllable electronic
17 record to hold control on behalf of another person. This result is implicit from subsection (b)(2)
18 dealing with sharing of control. It also would follow under principles of agency. But such an
19 arrangement should be effective regardless of any agency or fiduciary relationship.
20

21 This concept is expressly addressed in Section 8-106(d)(3), on control of a security
22 entitlement, which achieves perfection of a security interest under Sections 9-106(a) and 9-
23 314(a). It also applies to perfection by possession under Section 9-313(c) if a person other than
24 the debtor or the secured party (or the secured party’s agent) is in possession of collateral. Under
25 those provisions, however, effectiveness is conditioned in some circumstances on an
26 “acknowledgment” by the person in control or possession. Under Section 9-313(c) the
27 acknowledgment must be in a signed record. These provisions appear to derive from practices
28 involving bailees of tangible property, such as goods, chattel paper, and certificated securities.
29 See Section 9-313, Comment 4.
30

31 Subsection (e) likewise provides for control by a person through another person’s
32 acknowledgement that is has control on behalf of the person. Subsection (e) is patterned on
33 Section 9-313(c), but like Section 8-106(d)(3), subsection (e) omits the requirement in Section 9-
34 313(c) that an acknowledgment be made in a signed record. Although best practices would
35 suggest the wisdom of relying on a signed record to evidence such an acknowledgment,
36 subsection (e) would permit proof by other means. Under subsection (e) for an acknowledgement
37 by another person to be effective to confer control on a person, the other person making the
38 acknowledgment must be one “other than the transferor of an interest in the electronic record” to
39 the person. The rationale for this limitation is discussed in Comment 9, below.
40

41 The combined operation of subsections (b)(2) and (e) ensure that the continuance of
42 various existing practices would not prevent or cause the loss of control. For example, a person
43 in control may wish to grant another person the power to approve or disapprove a transfer of
44 control on the system. Alternatively, a person in control may wish to permit a system
45 administrator or the system itself to transfer control to another person under specified conditions
46 without participation by the person in control. And, of course, a person in control may wish to

1 delegate the power to transfer control to an agent or fiduciary.

2
3 Provisions substantially similar to subsection (e) are included in Section 7-106 (control of
4 electronic documents of title), Section 8-106(d)(3) (control of security entitlement), 9-104
5 (control of deposit accounts), 9-105 (control of authoritative electronic copies of records
6 evidencing chattel paper), and 9-105A (control of electronic money).

7
8 **9. Shared powers under subsection (b)(2) and control through another person**
9 **under subsection (e): Limitations related to transferors and transferees of interests in**
10 **controllable electronic records.** Subsection (c)(2)(B) disqualifies a transferee (which includes a
11 secured party in a secured transaction) of an interest in a controllable electronic record (or
12 controllable account or controllable payment intangible) from the benefit of a shared power
13 under subsection (b)(2) when the transferor retains a blocking power. In similar fashion, under
14 subsection (e), an acknowledgment by a transferor of an interest in a controllable electronic
15 record (or controllable account or controllable payment intangible) that the transferor has control
16 for the benefit of a person is ineffective to confer control on the person. Each of these limitations
17 is premised on the view that the transferor has not been divested sufficiently of its powers over
18 the relevant controllable electronic record so as to warrant treating the transferee as a secured
19 party having a security interest perfected by control or as having the requisite control to be a
20 qualifying purchaser.

21
22 In the case of subsection (c)(2)(B), the transferor has retained a blocking power over the
23 transferee's exercise of a power. In the case of subsection (e), the transferor remains in control
24 and has merely acknowledged that its control is for the transferee's benefit. Although the concept
25 of shared control is newly introduced in the UCC, holding possession or control for another is
26 not. Section 9-313(c) expressly provides in this context that an acknowledging person having
27 possession of goods must be a person "other than the debtor" for a secured party to take
28 possession through the acknowledging person. The official comments to Section 8-106 are to the
29 same effect in the context of control of a security entitlement. Section 8-106(d)(3), Comment 4.
30 The same policy that underpins the inapplicability of this method of control to an
31 acknowledgment by a debtor applies as well to a transferor that is not an Article 9 debtor.
32 Control is intended to be a proxy for and a functional equivalent of the transfer of physical
33 possession of goods. In general, a person can obtain control through control by an agent, but
34 under subsection (e) an acknowledgment by a debtor or transferor that acknowledges control on
35 behalf of a secured party or other transferee would be ineffective. This corresponds to the policy
36 underlying Section 9-313 that "the debtor cannot qualify as an agent for the secured party for
37 purposes of the secured party's taking possession." Section 9-313, Comment 3.

38
39 Notwithstanding these limitations, they would not impair the continued perfection by
40 control upon a secured party's assignment of a perfected-by-control security interest in a
41 controllable electronic record to a successor secured party. The following example illustrates.

42
43 **Example 8.** Debtor (D) buys a CER and obtains control. D then grants a security interest
44 in the CER to Secured Party A (SPA) to secure D's obligation to SPA and transfers to
45 SPA control of the CER (*not* pursuant to shared control with D or pursuant to subsection

1 (e)). SPA then assigns to Secured Party B (SPB) the secured obligation owed by D to
2 SPA.
3

4 As to perfection of the security interest granted by D, perfection by control is not
5 affected even if SPA retains powers over the CER (as between SPA and SPB) following
6 the assignment to SPB. The security interest remains perfected. This is consistent with
7 the policy underlying 9-310(c)—an assignment of a security interest should not require
8 the assignee to refile or take an assignment of record of a filed financing statement in
9 favor of the assignor for protection against a debtor’s creditors and transferees.
10

11 The economic interest being assigned by SPA to SPB is primarily the *right to payment or*
12 *performance* of the obligation of D that is secured by the CER. If the transfer of the secured
13 obligation by SPA to SPB itself creates a security interest securing an obligation (e.g., owed by
14 SPA to SPB), then SPB should perfect the security interest granted by SPA (which is distinct
15 from the security interest in the CER granted by D and assigned by SPA to SPB). The method of
16 perfection will depend on the nature of the secured obligation—the type of collateral—being
17 assigned. Is the right to payment an instrument, an account, or a payment intangible? Or is
18 performance of the secured obligation pursuant to another type of general intangible? SPB
19 should file a financing statement against SPA, as debtor, or take possession of the instrument, if
20 applicable. However, as to the underlying collateral securing the assigned obligation—the
21 CER—attachment and perfection of SPB’s security interest in the obligation of D owed to SPA
22 would also constitute attachment and perfection as to the security interest in the CER securing
23 that obligation. Sections 9-203(g); 9-308(e); see also 1 Restatement (Second) of Contracts § 340,
24 Comment b (“b. Security follows the debt. Where a secured claim is assigned, the collateral is
25 ordinarily assigned as well.”).
26

27 If the transfer by SPA to SPB is an outright transfer (a sale) of an account, a payment
28 intangible, or a promissory note, the transfer creates a security interest and the analysis in the
29 preceding paragraph applies (except that the security interest arising from the sale of a payment
30 intangible or promissory note is automatically perfected under Section 9-309(a)(3) and (4)). If
31 the transfer is a sale of is another type of general intangible or instrument that is secured by the
32 CER, then non-Article 9 law applies to the transfer. However, the same result may occur under
33 the common-law rule that the collateral (the CER) follows a secured obligation that is
34 transferred. See Sections 9-203, Comment 9; 9-308, Comment 6.
35

36 For obvious business reasons, SPB may not wish to allow SPA to remain in control of the
37 CER and may require SPA to transfer control to it as a condition to the transaction.
38 Alternatively, SPB may obtain control through sharing powers with SPA or through SPA’s
39 acknowledgement pursuant to subsection (e). It is true that SPA’s assignment to SPB of D’s
40 secured obligation carried with it the collateral—the CER—securing the obligation. But such a
41 derivative acquisition (through the operation of Sections 9-203(g) and 9-308(e)) by SPB would
42 not be a transfer by SPA of “an interest in” the CER within the meaning of the limitations
43 imposed in subsections (c)(2)(B) or (e). The operation of these rules, providing that collateral
44 follows the transfer of a secured obligation, are based on the premise that any necessary public
45 notice provided in connection with the assignment of the obligation provides, in turn, sufficient

1 public notice with respect to the underlying collateral. It follows that the policy to be
2 implemented by subsections (c)(2)(B) and (e) is not implicated by such an assignment.
3

4 10. **No requirement to acknowledge, no duties, and no requirement to confirm**
5 **acknowledgment.** Subsections (f) and (g) derive from Section 9-313(f) and (g). Subsection (f)
6 makes clear that a person that has control under this section has no duty to acknowledge that it
7 has or will obtain control on behalf of another person. Arrangements for a person to
8 acknowledge that it has or will obtain control on behalf of another person are not standardized.
9 Accordingly, subsection (g) leaves to the agreement of the parties and to any other applicable
10 law any duties of a person that does acknowledge that it has or will obtain control on behalf of
11 another person and provides that a person making an acknowledgment is not required to confirm
12 the acknowledgment to another person.
13

14 For example, subsection (e) would apply to give control to a person, Alpha, when another
15 person, Beta, has control of a controllable electronic record and acknowledges that it has control
16 on behalf of Alpha. However, under subsection (f), Beta is not required to so acknowledge. And
17 under subsection (g), even if Beta does so acknowledge, Beta owes no duty to Alpha unless Beta
18 agrees or other law so provides, and Beta is not required to confirm its acknowledgment to any
19 other person.
20

21 **Section 12-106. Discharge of Account Debtor on Controllable Account or**
22 **Controllable Payment Intangible.**

23 (a) **[Discharge of account debtor.]** An account debtor on a controllable account or
24 controllable payment intangible may discharge its obligation by paying:

25 (1) the person having control of the controllable electronic record that evidences
26 the controllable account or controllable payment intangible; or

27 (2) except as provided in subsection (b), a person that formerly had control of the
28 controllable electronic record.

29 (b) **[Content and effect of notification.]** Subject to subsection (d), an account debtor
30 may not discharge its obligation by paying a person that formerly had control of the controllable
31 electronic record if the account debtor receives a notification that:

32 (1) is signed by a person that formerly had control or the person to which control
33 was transferred;

(2) reasonably identifies the controllable account or controllable payment intangible;

(3) notifies the account debtor that control of the controllable electronic record that evidences the controllable account or controllable payment intangible was transferred;

(4) identifies the transferee, in any reasonable way, including by name, identifying number, cryptographic key, office, or account number; and

(5) provides a commercially reasonable method by which the account debtor is to pay the transferee.

(c) **[Discharge following effective notification.]** After receipt of a notification that complies with subsection (b), the account debtor may discharge its obligation by paying in accordance with the notification and may not discharge the obligation by paying a person that formerly had control.

(d) **[When notification ineffective.]** Subject to subsection (h), notification is ineffective under subsection (b):

(1) unless, before the notification is sent, an account debtor and the person that, at that time, had control of the controllable electronic record that evidences the controllable account or controllable payment intangible agree in a signed record to a commercially reasonable method by which a person may furnish reasonable proof that control has been transferred;

(2) to the extent an agreement between an account debtor and seller of a payment intangible limits the account debtor's duty to pay a person other than the seller and the limitation is effective under law other than this article; or

(3) at the option of an account debtor, if the notification notifies the account debtor to:

1 (A) divide a payment;
2 (B) make less than the full amount of an installment or other periodic
3 payment; or
4 (C) pay any part of a payment by more than one method or to more than
5 one person.

6 (e) **[Proof of transfer of control.]** Subject to subsection (h), if requested by the account
7 debtor, the person giving the notification under subsection (b) seasonably shall furnish
8 reasonable proof, using the agreed method, that control of the controllable electronic record has
9 been transferred. Unless the person complies with the request, the account debtor may discharge
10 its obligation by paying a person that formerly had control, even if the account debtor has
11 received a notification under subsection (b).

12 (f) **[What constitutes reasonable proof.]** A person furnishes reasonable proof that
13 control has been transferred if the person demonstrates, using the agreed method, that the
14 transferee has the power to:

15 (1) avail itself of substantially all the benefit from the controllable electronic
16 record;

17 (2) prevent others from availing themselves of substantially all the benefit from
18 the controllable electronic record; and

19 (3) transfer the powers under in paragraphs (1) and (2) to another person.

20 (g) **[Rights not waivable.]** Subject to subsection (h), an account debtor may not waive or
21 vary its rights under subsections (d)(1) and (e) or its option under subsection (d)(3).

22 (h) **[Rule for individual under other law.]** This section is subject to law other than this
23 article which establishes a different rule for an account debtor who is an individual and who

1 incurred the obligation primarily for personal, family, or household purposes.

2 **Official Comment**

3 1. **Source.** These provisions derive from Section 3-602, which governs the discharge
4 of a person obligated on a negotiable instrument, and Section 9-406(a) – (c), which governs the
5 discharge of an account debtor, including a person obligated on an account or payment
6 intangible.

7
8 2. **The basic rules.** This section applies only to an account debtor that has
9 undertaken to pay the person that has control of the controllable electronic record that evidences
10 the obligation to pay. See Section 9-102 (defining “controllable account” and “controllable
11 payment intangible”). Section 9-406 would continue to apply in other respects and to all other
12 account debtors. As to the relationship between this section and Section 9-406, see Comment 5.

13
14 Under subsection (a)(1), an account debtor may discharge its obligation on the
15 controllable account or controllable payment intangible by paying the person that has control of
16 the related controllable electronic record at the time of payment. Subsections (a)(2) and (b)
17 would remove from an account debtor the burden of determining who has control of the related
18 controllable electronic record at any given time—a burden that, with respect to some controllable
19 electronic records, an account debtor may be unable to satisfy. Under subsection (a)(2), subject
20 to subsection (b), an account debtor may discharge its obligation by paying a person that
21 formerly had control of the related controllable electronic record, which presumably would
22 include the initial obligee.

23
24 Subsection (b) reflects the fact that a person to which control has been transferred may
25 not wish to take the risk that the account debtor will discharge its obligation by paying the
26 transferor. Subsection (b) would protect the transferee by providing that if the account debtor
27 receives an effective notification that control has been transferred, the account debtor may
28 discharge its obligation by paying in accordance with the notification and may not discharge its
29 obligation by paying a person that formerly had control. The notification must be signed by a
30 person formerly having control or by the transferee.

31
32 To be effective under subsection (b), a notification must reasonably identify the
33 controllable account or controllable payment intangible, notify the account debtor that control of
34 the controllable electronic record that evidences the controllable account or controllable payment
35 intangible was transferred, identify the transferee in any reasonable way, and provide a
36 commercially reasonable method by which the account debtor is to make payments to the
37 transferee. A change in the identity of the person to which the account debtor must make
38 payment should not, and typically will not, impose a significant burden on the account debtor.
39 However, one can imagine a method of making payment that would be burdensome, e.g., making
40 a payment through a trading platform or payment service with which the account debtor does not
41 have an account. For this reason, the designated method of making payment must be
42 “commercially reasonable.”

43
44 3. **“Reasonable proof.”** As noted above, this section derives in large part from

1 Section 9-406, which provides for notification that an account or payment intangible has been
2 assigned. Account debtors that have received notification of an assignment under Section 9-406
3 almost always make payments in accordance with the notice. Recognizing that an account debtor
4 may be uncertain whether a notification is legitimate, Section 9-406 affords to an account debtor
5 the right to request proof that the account or payment intangible was assigned. See generally,
6 Section 9-406, Comment 4.

7
8 Subsection (e) contains a similar provision. On the account debtor's request, the person
9 giving the notification must seasonably furnish reasonable proof that control of the controllable
10 electronic record has been transferred. If the person does not comply with the request, the
11 account debtor may ignore the notification and discharge its obligation by a paying a person
12 formerly in control.

13
14 "Reasonable proof" requires evidence that would be understood by a typical account
15 debtor to whom it is proffered as demonstrating to a reasonably high probability that control of
16 the controllable electronic record has been transferred to the transferee. Subsection (f) provides a
17 safe harbor for providing reasonable proof. It enables a person to satisfy the account debtor's
18 request by demonstrating that the transferee has the power to avail itself of substantially all the
19 benefit from the controllable electronic record, to prevent others from availing themselves of
20 substantially all the benefit from the controllable electronic record, and to transfer these powers
21 to another person. This demonstration would not necessarily prove that a person actually has
22 control of a controllable electronic record because it need not show that the transferee held the
23 last two powers exclusively. Nevertheless, such a demonstration would constitute "reasonable
24 proof" under subsection (f). A person that has control should have little difficulty providing this
25 proof, as a person cannot have control unless it can readily identify itself as having the requisite
26 powers. See Section 12-105(a)(2). Reasonable proof that is seasonably furnished by a person
27 other than the person that gave the notification would constitute compliance with the account
28 debtor's request.

29
30 Subsection (e) requires that reasonable proof be provided "using the agreed method."
31 Subsection (f) requires that a person use "the agreed method" to demonstrate that the transferee
32 has the specified powers. "Agreed method" refers to the commercially reasonable method to
33 which the parties agreed, in a signed record, before the notification was sent. If parties did not so
34 agree, the notification is ineffective under subsection (d)(1).

35 An account debtor may agree to participate in a system providing for the control of
36 controllable accounts or controllable payment intangibles. If the system is programmed to
37 provide for notification to the account debtor upon the transfer of control, the account debtor's
38 agreement and the operation of the system may satisfy the requirements of subsections (d)(1),
39 (e), and (f).

40
41 **4. Additional considerations for account debtors.** The requirement in subsection
42 (e) that reasonable proof be furnished using the "agreed method" provides considerable
43 protection for account debtors upon receipt of a notification of assignment and making a request
44 for proof. There are, however, other considerations that are of importance to account debtors but
45 are beyond the scope of the frameworks provided by Articles 9 and 12. One such consideration is
46 the potential involvement of pseudonymous payees, which may raise issues such as compliance

1 with anti-money laundering regulations and sanctions compliance. These are examples of issues
2 that a well-structured program for controllable accounts and controllable payment intangibles
3 might address.

4
5 **5. Relationship to Section 9-406.** Section 9-406 governs the discharge of the
6 obligation of an account debtor. Section 9-406 carves out of its scope transactions to the extent
7 covered by this section. See Section 9-406(l).

8
9 **Section 12-107. Governing Law.**

10 **(a) [Governing law: general rule.]** Except as provided in subsection (b), the local law of
11 a controllable electronic record's jurisdiction governs a matter covered by this article.

12 **(b) [Governing law: Section 12-106.]** For a controllable electronic record that evidences
13 a controllable account or controllable payment intangible, the local law of the controllable
14 electronic record's jurisdiction governs a matter covered by Section 12-106 unless an effective
15 agreement determines that the local law of another jurisdiction governs.

16 **(c) [Controllable electronic record's jurisdiction.]** The following rules determine a
17 controllable electronic record's jurisdiction under this section:

18 **(1)** If the controllable electronic record, or a record attached to or logically
19 associated with the controllable electronic record and readily available for review, expressly
20 provides that a particular jurisdiction is the controllable electronic record's jurisdiction for
21 purposes of this article or [the Uniform Commercial Code], that jurisdiction is the controllable
22 electronic record's jurisdiction.

23 **(2)** If paragraph (1) does not apply and the rules of the system in which the
24 controllable electronic record is recorded are readily available for review and expressly provide
25 that a particular jurisdiction is the controllable electronic record's jurisdiction for purposes of
26 this article or [the Uniform Commercial Code], that jurisdiction is the controllable electronic
27 record's jurisdiction.

1 (3) If paragraphs (1) and (2) do not apply and the controllable electronic record,
2 or a record attached to or logically associated with the controllable electronic record and readily
3 available for review, expressly provides that the controllable electronic record is governed by the
4 law of a particular jurisdiction, that jurisdiction is the controllable electronic record's
5 jurisdiction.

6 (4) If paragraphs (1) through (3) do not apply and the rules of the system in which
7 the controllable electronic record is recorded are readily available for review and expressly
8 provide that the controllable electronic record or the system is governed by the law of a
9 particular jurisdiction, that jurisdiction is the controllable electronic record's jurisdiction.

10 (5) If paragraphs (1) through (4) do not apply, the controllable electronic record's
11 jurisdiction is the District of Columbia.

12 (d) **[Applicability of Article 12.]** If subsection (c)(5) applies and Article 12 is not in
13 effect in the District of Columbia without material modification, the governing law for a matter
14 covered by this article is the law of the District of Columbia as though Article 12 were in effect
15 in the District of Columbia without material modification. In this subsection, "Article 12" means
16 [Uniform Commercial Code—Controllable Electronic Records (with Conforming Amendments
17 to Articles 1 and 9), 2022 Official Text], which is available at [indicate where and how the
18 official text may be found].

19 (e) **[Relation of transaction to controllable electronic record's jurisdiction not**
20 **necessary.]** To the extent subsections (a) and (b) provide that the local law of the controllable
21 electronic record's jurisdiction governs matters covered by this article, that law governs even if a
22 matter or transaction does not bear any relation to the controllable electronic record's
23 jurisdiction.

(f) **[Rights of purchasers determined at time of purchase.]** The rights acquired by a purchaser or a qualifying purchaser under Section 12-104 are governed by the law applicable under this section at the time of purchase.

Legislative Note: *The definition of “Article 12” in subsection (d) should cite the official “title” of the official text of Article 12 and should indicate where and how the official text is made available to the public. See, e.g., TRADES Regulations, 31 CFR 357.2, defining “Revised Article 8.”*

Official Comment

1. **Source.** The provisions of Section 12-107 (as well as Sections 9-306A and 9-306B) 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. The “matters covered by” this 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 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—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, including matters as to which this 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 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

1 general rule of subsection (a) that “the local law of a controllable electronic record’s jurisdiction
2 governs the matters covered by this Article.” The exception recognizes that an account debtor’s
3 rights and duties generally are governed by the law applicable to the underlying contract between
4 the account debtor and an assignor, and not by the law applicable to the agreement between the
5 assignor (debtor) and the assignee (secured party)—a security agreement. See Section 9-401,
6 Comment 3. Subsection (b) recognizes that an effective agreement (i.e., one effective under
7 Section 1-301(a)) between the account debtor and assignor may choose a different law to cover
8 the matters covered by Section 12-106 (i.e., the account debtor’s rights and duties addressed in
9 that section).

10
11 **5. Determination of controllable electronic record’s jurisdiction.** The basic rule
12 that the law of a controllable electronic record’s jurisdiction governs the matters covered by
13 Article 12 might be viewed as a rough proxy for the traditional role of the location of tangible
14 asset (e.g., goods) in determining the applicable law (*lex rei sitae*). Drawing on the analogous
15 provisions in Sections 8-110 and 9-305 in the context of a security entitlement or securities
16 account or a commodity contract or commodity account, under subsection (c) it is the
17 controllable electronic record itself, records attached thereto or associated therewith, or the
18 system in which the controllable electronic record is recorded that determines the controllable
19 electronic record’s jurisdiction and, thereby, the governing law. Subsection (c) provides a
20 “waterfall” of rules based on provisions that identify a particular jurisdiction as the controllable
21 electronic record’s jurisdiction or alternatively that provide the governing law for a controllable
22 electronic record or the system in which the record is recorded. As to subsection (e), see Section
23 8-110, Comment 5A.

24
25 Paragraphs (1) through (4) of the subsection (c) waterfall each relies on information
26 available from a controllable electronic record, an attached or logically associated record, or
27 rules of a system in which the record is recorded. A controllable electronic record’s jurisdiction
28 is determined by one of these sources that “expressly provide[s]” that a jurisdiction is the
29 controllable electronic record’s jurisdiction or that a particular jurisdiction’s law is the governing
30 law. These paragraphs refer to attached or logically associated records or system rules that are
31 “readily available.” They also assume that the controllable electronic record is itself readily
32 available to anyone choosing to deal with the record. These provisions are based on the
33 assumption that the relevant express provision will be available to an interested person without
34 the imposition of unreasonable burdens.

35
36 **6. Bottom of the waterfall: District of Columbia.** Currently, many controllable
37 electronic records, associated records, and systems in which such records are recorded do not
38 identify the “controllable electronic record’s jurisdiction” or the governing law (some
39 permitted systems being exceptions). (One hopes that once Article 12 and accompanying
40 amendments are widely adopted, systems will adapt and the waterfall will become more
41 generally viable for identifying a controllable electronic record’s jurisdiction.) Consequently,
42 subsection (c)(5) addresses a problem that does not normally exist in the context of Sections 8-
43 110 and 9-305. The likely choice for the bottom of the waterfall ordinarily might be the location
44 of the debtor. That approach would follow the role of the location of a debtor under Sections 9-
45 301 and 9-307. However, that location may not readily be determined by parties to a transaction,
46 primarily because in many cases involving controllable electronic records the transferor is not

1 known to or easily discoverable by a purchaser. See Prefatory Note 1 to Article 12.
2 Consequently, Subsection (c)(5) resolves this dilemma by providing that the controllable
3 electronic record's jurisdiction is DC.
4

5 **7. District of Columbia as controllable electronic record's jurisdiction.** The
6 designation of DC as the controllable electronic record's jurisdiction assumes that DC will have
7 adopted Article 12 and the conforming amendments to Articles 1 and 9 in substantially the
8 uniform version. This is a plausible assumption based on the history of adoptions in that
9 jurisdiction. Subsection (d) addresses the unlikely situation that DC might not so adopt Article
10 12 or might later adopt materially non-uniform amendments. Subsection (d) is patterned loosely
11 (but as closely as feasible) on the TRADES Regulations, 31 CFR § 357.11(d), for U.S. Treasury
12 securities.
13

14 The term "Article 12" is defined in subsection (d) as the officially promulgated version of
15 Article 12 and conforming amendments. In determining whether DC has enacted Article 12
16 without material modification a tribunal should consider the materiality of any provision in the
17 context of the issue or issues before it. A modification of a provision that would be material in
18 another context should be disregarded if it would have no bearing on the issue or issues before
19 the tribunal.
20

21 **8. Relevant time for determination of governing law.** Subsection (f) provides that
22 the rights of purchasers are governed by the applicable law as of the time of purchase. Note that
23 Sections 8-110 and 9-305 do not contain an analogous rule with respect to a securities
24 intermediary's jurisdiction. However, Section 8-110(c) does provide a similar rule for the
25 delivery of a security certificate and adverse claims. As to the timing of the determination of the
26 governing law for other issues under Article 12, such as the rights and duties of account debtors
27 under Section 12-106, the section does not specify a time. As with most statutory provisions
28 relating to governing law, courts are free to determine the appropriate relevant time taking into
29 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 1998 Revisions to
12 Article 9. In particular, the substantial amendments to Article 9 and the new Article 12 require
13 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 1998
24 amendments with the uniform effective date.). However, for practical reasons many states may
25 wish to provide an effective date for this act that is consistent with their usual timing for
26 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 of*
44 *this Annex, the actual date on which this act takes effect, as specified in Section 4-101.*

1 *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 *A state should codify Parts 1 through 3 of this annex as a part of the state’s [Uniform*
6 *Commercial Code].*

7
8 *A state (i) should insert in Part 4 (Section 4-101) of this Annex the actual date on which this act*
9 *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 commentary. The 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

1 of the Uniform Commercial Code and are intended to modify some pre-effective-date judicial
2 interpretations. Examples include (i) the amendment to Section 3-104, which clarifies that
3 neither a choice-of-law nor a choice-of-forum clause prevents a promise from being a negotiable
4 instrument, (ii) the amendments to Section 4A-201, which indicate that a security procedure may
5 impose an obligation on both the receiving bank and the customer and may involve the use of
6 symbols, sounds, or biometrics, (iii) the clarifying revision of Section 5-116, (iv) the new
7 definitions of “assignee” and “assignor” in Section 9-102(a)(7A) and (7B), and (v) clarification
8 of the attachment of a security interest in consumer goods as proceeds or commingled goods and
9 in a commercial tort claim as proceeds in Section 9-204(c). However, this transition rule will be
10 important in situations in which the controlling pre-effective-date case law is not consistent with
11 the amended provisions.

12 13 **PART 3**

14 **TRANSITION PROVISIONS FOR ARTICLES 9 AND 12**

15 **Section A-301. Saving Clause.**

16 (a) **[Pre-effective-date transactions, liens, or interests.]** Except as provided in this part,
17 Article 9 as amended by this act and Article 12 apply to a transaction, lien, or other interest in
18 property, even if the transaction, lien, or interest was entered into, created, or acquired before
19 **[the effective date of this act]**.

20 (b) **[Continuing validity]** Except as provided in subsection (c) and Sections A-302
21 through A-306:

22 (1) a transaction, lien, or interest in property that was not governed by [the
23 Uniform Commercial Code], was validly entered into, created, or transferred before **[the**
24 **effective date of this act]**, and would be subject to Article 9 as amended by this act or Article 12
25 if it had been entered into, created, or transferred after **[the effective date of this act]**, including
26 the rights, duties, and interests flowing from the transaction, lien, or interest in property, remains
27 valid after **[the effective date of this act]**; and

28 (2) the transaction, lien, or interest in property may be terminated, completed,
29 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 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, in chattel paper under former
33 Section 9-105, in chattel paper evidenced by authoritative electronic records under amended
34 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.

9
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.

30
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

1 9).

2
3 **Example 1.** Prior to the effective date Debtor obtained a loan from Secured Party and
4 signed a security agreement covering, among other collateral, “money,” “accounts,”
5 “chattel paper,” and “general intangibles.” Secured Party filed a financing statement
6 covering “all assets.” If, under the applicable former Article 9 as interpreted by the
7 courts, electronic currency was “money” as defined in former Section 1-201 even though
8 as an intangible it could not be possessed, then under the applicable former Section 9-
9 312(b)(3), filing a financing statement was not an effective method of perfection.
10 Assume, however, that under revised Articles 1 and 9, the electronic currency is not
11 “money,” and is instead a general intangible. Under revised Article 9, filing is an
12 effective method of perfection. Upon the effective date of revised Article 9, the security
13 interest became perfected by the pre-effective-date filed financing statement.
14

15 **Example 2.** Prior to the effective date Debtor obtained a loan from Secured Party and
16 signed a security agreement covering, among other collateral, “accounts,” “chattel
17 paper,” and “general intangibles.” Secured Party filed a financing statement covering
18 “accounts.” Under the applicable former Article 9, a certain right to payment was chattel
19 paper because it was a lease of specific goods, even though the transaction also covered,
20 and the lessee’s monetary obligation also related to, various other assets and various
21 services. Because the filed financing statement covered only accounts, the security
22 interest in the chattel paper was unperfected. Under revised Article 9, however, the right
23 to payment was an “account,” and not chattel paper, because the lessee’s right to
24 possession and use of the goods was not “the predominant purpose of the transaction.”
25 Section 9-102(a)(11)(B)(ii). Upon the effective date the security interest became
26 perfected by the pre-effective-date filed financing statement covering accounts.
27

28 **5. Enforceability of security interest: unenforceable security interest made**
29 **unenforceable.**
30

31 **Example 3.** Under the facts of Example 1, Section A-303, Comment 2, instead of signing
32 a security agreement Debtor agreed orally to grant to Secured Party a security interest in
33 the happicoins. It follows that under former Article 9 Secured Party’s security interest
34 was unenforceable and did not attach to the happicoins for want of a signed security
35 agreement. Former Section 9-203(b)(3)(A). However, upon the effective date of revised
36 Article 9, Secured Party had control of the happicoins under revised Article 9. Sections
37 12-105. At that time the security interest became enforceable and attached under Sections
38 9-107A and 9-203(b)(3)(D) and also was perfected by control.
39

40 **Section A-305. Priority.**

41 (a) **[Determination of priority.]** Subject to subsections (b) and (c), this act determines
42 the priority of conflicting claims to collateral.

43 (b) **[Established priorities.]** Subject to subsection (c), if the relative priorities of claims

1 to collateral were established before **[the effective date of this act]**, Article 9 as in effect prior to
2 **[the effective date of this act]** determines priority.

3 (c) **[Determination of certain priorities on adjustment date.]** On [the adjustment date],
4 to the extent the relative priorities determined by Article 9 as amended by this act modify the
5 relative priorities established before **[the effective date of this act]**, the relative priorities of
6 claims to Article 12 property and electronic money which were established before **[the effective**
7 **date of this act]** cease to apply.

8 Official Comment

9
10 1. **Source.** This section derives from Section 9-709.

11
12 2. **Law governing priority and established priorities.** Ordinarily, revised Article 9
13 determines the priority of conflicting claims to collateral under subsection (a). However, when
14 the relative priorities of the claims were established before the effective date, former Article 9
15 governs under subsection (b). Subsection (c) provides an exception to subsection (b).

16
17 **Example 1.** In 2021, prior to the effective date, Debtor obtained a loan from Secured
18 Party and signed a security agreement covering “all cryptocurrency and money now
19 owned or hereafter acquired.” The security interest attached to various cryptocurrencies
20 owned by Debtor, including 1,000 happicoins held by Debtor on the happicoins
21 blockchain platform. Secured Party promptly filed a financing statement covering “all
22 general intangibles, including cryptocurrencies, now owned or hereafter acquired by
23 Debtor.” In 2022, also prior to the effective date, Debtor obtained a loan from Lender and
24 signed a security agreement covering “all cryptocurrency now owned or hereafter
25 acquired.” Although the happicoins are general intangibles, Lender failed to file a
26 financing statement. Because the priorities of the claims were established before the
27 effective date, former Article 9 governs. Secured Party’s perfected security interest has
28 priority over Lender’s unperfected security interest under former Section 9-322(a)(2).
29

30 **Example 2.** The facts are the same as in Example 1, except that Debtor transferred
31 control of the 1,000 happicoins to Lender on the blockchain in 2022 *before* the effective
32 date. Because Lender failed to file a financing statement and control was not a method of
33 perfection under former Article 9, Lender’s security interest was unperfected immediately
34 prior to the effective date. However, because under revised Article 9 the happicoins are
35 controllable electronic records and Lender has “control” of the happicoins under Section
36 12-105, Lender’s security interest became perfected on the effective date. Nevertheless,
37 because the priorities of Secured Party’s and Lender’s security interests were established
38 before the effective date, Secured Party’s security interest continues to have priority after
39 the effective date. (However, see Example 4 for the shift of priority on the adjustment

1 date.)

2
3 **Example 3.** The facts are the same as in Example 1, except that in 2023, *after* the
4 effective date, Debtor transferred control of the 1,000 happicoins to Lender on the
5 blockchain. Under revised Article 9, the happicoins were controllable electronic records
6 and the transfer of control of the happicoins gave Lender “control” of the happicoins as
7 provided in Section 12-105. The affirmative step of transferring control established anew
8 the relative priority of the conflicting claims after the effective date. Revised Article 9
9 determines priority and Lender’s security interest has priority under Section 9-326A
10 (without any deferral until the adjustment date). Moreover, Lender also may also have
11 priority over other property claims as a qualifying purchaser under Section 12-104(e).
12

13 One consequence of the rule on established priorities in subsection (b) is that the mere taking
14 effect of this act does not of itself adversely affect the priority of conflicting claims to collateral,
15 as Example 2 illustrates. However, as Example 3 illustrates, relative priorities that are
16 “established” before the effective date do not necessarily remain unchanged following the
17 effective date. Of course, unlike priority contests among security interests, some priorities are
18 established permanently, e.g., the rights of a buyer of property who took free of a security
19 interest under former Article 9.
20

21 3. Modification of established priorities on adjustment date. 22

23 Subsection (c) provides an exception to the respect that subsection (b) affords to pre-
24 effective-date established priorities, but only for security interests in Article 12 property—
25 controllable accounts, controllable electronic records, and controllable payment intangibles—and
26 electronic money.
27

28 **Example 4.** The facts are the same as in Example 2. Lender’s security interest became
29 perfected by control on the effective date, Secured Party’s established priority continued
30 to apply under subsection (b). Under subsection (c), however, on the adjustment date the
31 priorities shifted. Secured Party’s established priority ceased to apply and Lender’s
32 perfection by control gave Lender priority under revised Section 9-326A.
33

34 4. Transfers of collateral after the effective date. 35

36 **Example 5.** The facts are the same as in Example 2. In 2023, *after* the effective date,
37 Debtor acquired an additional 500 happicoins. The security interests of both Secured
38 Party and Lender attached to the happicoins pursuant to the after-acquired property
39 clauses in their respective security agreements. Secured Party’s security interest was
40 perfected by its earlier financing statement filing. Lender then perfected its security
41 interest by Debtor’s transfer of control of the happicoins to Lender. Lender’s security
42 interest in the additional happicoins perfected by control gave Lender priority as to those
43 happicoins under Section 9-326A. Unlike the situation in Example 2, however, as to the
44 newly acquired happicoins the priorities were not established prior to the effective date.
45 Before the effective date neither creditor could have had a “perfected” security interest in
46 happicoins in which Debtor had not yet acquired rights.

Example 6. The facts are the same as in Example 1. In 2023, *after* the effective date, Debtor transferred 750 spitcoins, an electronic money, to Beier. Beier then obtained control of the spitcoins under Section 9-105A. Secured Party’s security interest in the spitcoins, which were either money not capable of being possessed or general intangibles under former Article 9, are assumed to be perfected by filing. See Section A-302, Comment 3, Example 2. Because there was no wrongful collusion with Debtor (indeed, Beier had no knowledge or notice of Secured Party’s security interest), Beier took the spitcoin free of Secured Party’s security interest under Section 9-332(b).

Section A-306. Priority of Claims When Priority Rules of Article 9 Do Not

Apply.

(a) **[Determination of priority.]** Subject to subsections (b) and (c), Article 12 determines the priority of conflicting claims to Article 12 property when the priority rules of Article 9 as amended by this act do not apply.

(b) **[Established priorities.** Subject to subsection (c), when the priority rules of Article 9 as amended by this act do not apply and the relative priorities of claims to Article 12 property were established before **[the effective date of this act]**, law other than Article 12 determines priority.

(c) **[Determination of certain priorities on adjustment date]** When the priority rules of Article 9 as amended by this act do not apply, to the extent the relative priorities determined by this act modify the relative priorities established before **[the effective date of this act]**, the relative priorities of claims to Article 12 property which were established before **[the effective date of this act]** cease to apply on [the adjustment date].

Official Comment

1. **Source.** This section derives from Section 9-709 and, in part, from Section 8-510.

2. **Applicability of this section to Article 12 property.** Although this section 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

1 accounts and payment intangibles (as well as to security interests in that property that secure an
2 obligation). Section 9-109(a)(3). There is a very limited exclusion from the scope of Article 9 for
3 sales of accounts and payment intangibles in connection with sales of the business out of which
4 they arose. Section 9-109(d)(4).

5
6 **3. Law governing priority and established priorities.** Ordinarily, when the
7 priority rules of Article 9 do not apply, Article 12 determines the priority of conflicting claims to
8 Article 12 property under subsection (a). However, when the relative priorities of the claims
9 were established before the effective date, under subsection (b) law other than Article 12
10 governs. Subsection (c) provides an exception to subsection (b).

11
12 **4. Law governing priority and established priorities.**

13
14 **Example 1.** In 2021, prior to the effective date, Aiko owned 500 happicoins (a
15 cryptocurrency consisting of controllable electronic records) over which Aiko had control
16 (within the meaning of Section 12-105, which was not yet effective) on the happicoins
17 blockchain. In December 2021 Aiko sold the 500 happicoins to Barbara for \$10,000 cash.
18 Aiko provided Barbara with a signed memorandum acknowledging the sale and Aiko's
19 receipt of the purchase price and agreeing to hold the happicoins for Barbara pending
20 Barbara's further instructions.

21
22 In January 2022 (also prior to the effective date), Aiko sold the same 500 happicoins to
23 Molly for \$12,000 cash. Aiko provided Molly with a signed memorandum similar to the
24 one Aiko had provided to Barbara. Assume that, under the non-Uniform Commercial
25 Code applicable law, Barbara remained the owner of the happicoins and under that law
26 Molly obtained no interest in the happicoins pursuant to the purported sale because Aiko
27 had retained no interest and had nothing to transfer to Molly. Because the priorities of the
28 claims of Aiko, Barbara, and Molly were established before the effective date, under
29 subsection (a) those priorities remained in effect after the effective date and Barbara
30 remains the owner of the happicoins.

31
32 **Example 2.** The facts are the same as in Example 1, except that *before* the effective date,
33 Aiko transferred control of the happicoins to Molly on the happicoins blockchain. Again,
34 assume that under the non-Uniform Commercial Code applicable law that transfer of
35 control had no legal effect. After the effective date the relative priorities are unchanged
36 from those described in Example 1 because the relative priorities were established before
37 the effective date and subsection (b) applies.

38
39 **Example 3.** The facts are the same as in Example 1, except that *after* the effective date,
40 Aiko transferred control of the happicoins to Molly on the happicoins blockchain. Under
41 Article 12, the happicoins were controllable electronic records and the transfer of control
42 of the happicoins gave Molly "control" of the happicoins as provided in Section 12-105.
43 Because (it is assumed) Molly met the requirements for a "qualifying purchaser" under
44 Section 12-104(e), Molly acquired the happicoins free of Barbara's property claim. The
45 affirmative step of transferring control after the effective date established anew the
46 relative priority of the conflicting claims after the effective date. Under Section A-301(a),

1 Article 12 applies to the pre-effective-date transactions and property interests and
2 subsection (a) of this section applies.
3

4 **5. Modification of established priorities on adjustment date.** Subsection (c)
5 provides an exception to the respect that subsection (b) affords to pre-effective-date established
6 priorities.
7

8 **Example 4.** The facts are the same as in Example 2. However, on the adjustment date the
9 established priorities change. Because (it is assumed) Molly met the requirements for a
10 “qualifying purchaser” under Section 12-104(e), on the adjustment date Molly acquired
11 the happicoins free of Barbara’s property claim. Under Section A-301(a), Article 12
12 applies to the pre-effective-date transactions and property interests and subsection (a) of
13 this section applies.
14

15 **6. Transfers after the effective date.**
16

17 **Example 5.** The facts are the same as in Example 1, except that *after* the effective date
18 Aiko sold the happicoins to Jacob, for value, and also transferred control of the
19 happicoins to Jacob on the happicoins blockchain. Because (it is assumed) Jacob met the
20 requirements for a “qualifying purchaser” under Section 12-104(e), Jacob acquired the
21 happicoins free of both Barbara’s and Molly’s property claims. Note that Jacob took the
22 happicoins free of conflicting claims in the post-effective date acquisition immediately
23 upon acquisition as a qualifying purchaser. Jacob’s priority was established after the
24 effective date and was not deferred until the adjustment date, as was the case for Molly’s
25 rights in Example 4.
26

27 **PART 4**

28 **GENERAL PROVISIONS**

29 **Section A-401. Effective Date.**

30 This act takes effect on **[the effective date of this act]**.

31 **Legislative Note:** *This [part] [section] is not to be codified as a part of [the Uniform*
32 *Commercial Code.*