D R A F T

FOR DISCUSSION ONLY

UNIFORM COMMERCIAL CODE
REVISED ARTICLE 9. PARTS 4 and 5

(With Conforming and Miscellaneous Amendments to
Sections 1-102, 9-105, and 9-318)

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

February 10, 1995, Draft

UNIFORM COMMERCIAL CODE
REVISED ARTICLE 9. PARTS 4 and 5

(With Conforming and Miscellaneous Amendments to
Sections 1-102, 9-105, and 9-318)

With Prefatory Note and Comments

DRAFTING COMMITTEE TO REVISE
UNIFORM COMMERCIAL CODE ARTICLE 9 - SECURED TRANSACTIONS;
SALES OF ACCOUNTS AND CHATTEL PAPER

WILLIAM M. BURKE, Suite 2190, 725 South Figueroa Street, Los Angeles, CA 90017, *Chair*
WILLIAM S. ARNOLD, P.O. Drawer A, Crossett, AR 71635
MARION W. BENFIELD, JR., Loyola Law School, 1441 West Olympic Boulevard, Los Angeles, CA 90015
TRUDI BIRD, 7 Diving Street, Stonington, CT 06378
DALE G. HIGER, Suite 1015, One Capital Center, 999 Main Street, Boise, ID 83702
WILLIAM C. HILLMAN, U.S. Bankruptcy Court, Room 1101, 10 Causeway Street, Boston, MA 02222
RANDAL C. PICKER, University of Chicago Law School, 1111 East 60th Street, Chicago, IL 60637
DONALD J. RAPSON, Room 3320, 650 CIT Drive, Livingston, NJ 07039, *The American Law Institute Representative*
HARRY C. SIGMAN, P.O. Box 67E08, Los Angeles, CA 90067, *The American Law Institute Representative*
BRADLEY Y. SMITH, 20th Floor, 450 Lexington Avenue, New York, NY 10017, *The American Law Institute Representative*
EDWIN E. SMITH, 21st Floor, 150 Federal Street, Boston, MA 02110
SANDRA S. STERN, 949 Post Road, Scarsdale, NY 10583
STEVEN L. HARRIS, University of Illinois, College of Law, 504 East Pennsylvania Avenue, Champaign, IL 61820, *Co-Reporter*
CHARLES W. MOONEY, JR., University of Pennsylvania, School of Law, 3400 Chestnut Street, Philadelphia, PA 19104, *Co-Reporter*

EX OFFICIO

RICHARD C. HITE, Suite 630, 200 West Douglas Avenue, Wichita, KS 67202, *President, National Conference*
JOHN P. BURTON, P.O. Box 1357, Suite 101, 123 East Marcy Street, Santa Fe, NM 87501, *Chair, Division E, National Conference*

EXECUTIVE DIRECTOR

FRED H. MILLER, William Mitchell College of Law, 875 Summit Avenue, St. Paul, MN 55105, *Executive Director, National Conference*
WILLIAM J. PIERCE, 1505 Roxbury Road, Ann Arbor, MI 48104, *Executive Director Emeritus, National Conference*

Copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
676 North St. Clair Street, Suite 1700
Chicago, Illinois 60611
312/915-0195

Reporters' Introductory Note to February 10, 1995, Draft

This draft consists of two parts. The first part contains revisions concerning filing. It consists of a revised Part 4, accompanied by one revised and several new definitions in § 9-105. The second part of this draft consists of Part 5 (Default), together with § 1-102(c), certain definitions in § 9-105, and a draft of § 9-318. A Prefatory Note precedes each part of the draft and provides an overview of that part.

Reporters' Prefatory Note to Revisions Concerning Filing

Following a revised Part 4 and related definitions. The draft is marked (additional material is underlined and deletions are indicated by ~~strikeout~~) to reflect changes from the current official text.

The proposed revisions stem largely from two concepts. These concepts are drawn from recommendations of the Study Committee (see Section 11 of the Report), from suggestions made by participants in the Article 9 Filing Project and the Drafting Committee (including members, advisors, and observers), and from preliminary deliberations of the Drafting Committee. First, the draft is "media neutral." It recognizes that one can "communicate" (defined in draft § 9-105(o)) a "record" (defined in draft § 9-105(r)) by means other than writing or other tangible media. Second, draft § 9-412 provides for administrative rules to address details that are better left outside of the statute. By leaving many matters of detail to the rules, the statute has become somewhat cleaner and more general.

The Drafting Committee reviewed a preliminary (November 10, 1994) draft of Part 4 at its December, 1994, meeting. Time did not suffice to permit discussion of every provision. This draft reflects the December discussions where applicable. In particular, we have adjusted the way in which the draft allocates legal rules between the statute and administrative rules, in light of the December discussion. The Drafting Committee may wish to consider whether the current allocation is satisfactory. In accordance with the discussion, we also have taken greater liberties with the organization of each section and, except as instructed otherwise by the Drafting Committee, have not moved material from one section to another. This draft also reflects several changes requested by the NCCUSL Style Committee.

SECTION 9-105. DEFINITIONS AND INDEX OF DEFINITIONS.

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

* * *

(o) "Communicate" means to (i) send a written or other tangible record, (ii) transmit a record by any means agreed upon by the persons sending and receiving the record; or (iii) in the case of transmissions of records to and by a filing office, transmit a record by any means prescribed in the rules;

* * *

(p) "Filing office" means the office[s] designated in Section 9-401 as the proper place to file a financing statement;

* * *

(q) "Jurisdiction of organization" of a debtor means [e.g., for a corporation, its state of incorporation; more complete definition to come, if necessary];

* * *

(r) "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, including a financing statement, [an amendment,] an amended financing statement, a statement of assignment, a continuation statement, and a termination statement;

[(s) "Registered agent" means a registered agent of a debtor designated under Section 9-409;]

(t) "Rules" means the administrative rules issued by [] pursuant to Section 9-412;

* * *

(~~m~~u) "Secured party" means a lender, seller, or other person in whose favor there is a security interest, including a person to whom

accounts, ~~or~~ chattel paper, or general intangibles have been sold. ~~When~~ If ~~the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by~~ a security interest is created in favor of a trustee, indenture trustee, agent, collateral agent, or other ~~person~~ representative, the representative is the secured party;

* * *

[(v) "Tax identification number" of a debtor means a debtor's social security number if the debtor is an individual and in other cases a number, if any, determined by a method prescribed in the rules;]

* * *

Reporters' Explanatory Notes

1. These definitions are largely self-explanatory. Note that a "record" includes information that is in intangible form (e.g., electronically stored) as well as tangible form (e.g., written). Whatever is filed in the Article 9 filing system, including financing statements, termination statements, and amendments, whether transmitted in tangible or intangible form, would fall within the definition. The definition of "communicate" derives in part from Revised § 8-102(a)(5) (1994); it includes the act of transmitting both tangible and intangible records.

2. We understand that the definition of "record" is the current working definition approved by the NCCUSL Committee on Style for revised UCC Article 5 and the Uniform Limited Liability Company Act. We wish to thank Commissioner Patricia Brumfield Fry (North Dakota) for bringing us up to date. Professor Fry has passed on to us the following language (which we have "lightly" edited) that might be suitable for the official comment:

> This definition is designed to embrace all means of communicating or storing information except human memory. Given the rapid development and commercial adoption of modern communication and storage technologies, requirements that documents or communications be "written" or "in writing" do not necessarily reflect or aid commercial practices. Examples of current technologies commercially used to communicate or store information

include, but are not limited to, magnetic media, optical discs, digital voice messaging systems, electronic mail, audio tapes, and photographic media, as well as paper. "Record" is an inclusive term that includes all of these methods of storing or communicating information. Any "writing" is a record.

A "record" need not be permanent or indestructible, but the term does not include any oral or other communication that is not stored or preserved by any means. The information must be stored on paper or in some other medium. Information that has not been retained other than through human memory does not qualify as a record. A record may be signed. See § 1-201(39). A record may be created without the knowledge or intent of a particular party.

Like the terms "written" or "in writing," the term "record" does not establish the purposes, permitted uses or legal effect that a record may have under any particular provision of law. A record may or may not be admissible in evidence, satisfy Statutes of Frauds, or be in appropriate form for filing with a filing office. Other provisions of this [Article] [Act] must be consulted to determine the admissibility, etc. of any particular record.

* * *

A specification that a document or communication must be in writing excludes the use of any other form of record. In some instances, statutes or the rules of filing offices may require that a writing be filed or that a particular form of signature be employed. In such cases, whether or not a record is permitted under this [Article] [Act], compliance with those statutes or rules is necessary. When a filing office adopts modern technologies, any record satisfying modified statutes or rules as may be adopted would be sufficient under this [Article] [Act].

3. The definition of "secured party" in revised subsection (u) clarifies the status of representatives other than indenture trustees. Under the draft, the secured party is the person in whose favor the security interest has been created, as determined by reference to the security agreement. With this approach, the parties can determine which person has the duties and potential liability that Part 5 imposes upon the secured party. Consider, for example, a multi-bank facility, under which Bank A, Bank B, and Bank C are lenders and Bank A serves as the collateral agent. If the security interest is granted to the banks, then they are the secured parties. If the security interest is granted to Bank A as

collateral agent, then Bank A is the secured party.

PART 4

FILING

SECTION 9-401. PLACE OF FILING; Erroneous Filing; Removal of Collateral.

First Alternative Subsection (1)

(1a) If the law of this State governs perfection of a security interest (Section 9-103), the The proper place to file a financing statement in order to perfect a the security interest is as follows:

(a1) when If the collateral is timber to be cut or is minerals or the like, (including oil and gas,) or accounts subject to subsection (5) of Section 9-103([5]), or when if the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which that are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

[(2) if the debtor has designated a registered agent under Section 9-409, then in the office of the debtor's registered agent;]

(b3) in all other cases, in the office of the [Secretary of State] [].

Second Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the _____ in the county of the debtor's

residence or if the debtor is not a resident of this state then in the office of the _____ in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the _____ in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State].

Third Alternative Subsection (1)

(1) The proper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm products, or accounts or general intangibles arising from or relating to the sale of farm products by a farmer, or consumer goods, then in the office of the _____ in the county of the debtor's residence or if the debtor is not a resident of this state then in the office of the _____ in the county where the goods are kept, and in addition when the collateral is crops growing or to be grown in the office of the _____

in the county where the land is located;

(b) when the collateral is timber to be cut or is minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or when the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods which are or are to become fixtures, then in the office where a mortgage on the real estate would be filed or recorded;

(c) in all other cases, in the office of the [Secretary of State] and in addition, if the debtor has a place of business in only one county of this state, also in the office of _____ of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of _____ of the county in which he resides.

Note: One of the three alternatives should be selected as subsection (1).

(2) A filing which is made in good faith in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this Article and is also effective with regard to collateral covered by the financing statement against any person who has knowledge of the contents of such financing statement.

(3) A filing which is made in the proper place in this state continues effective even though the debtor's residence or place of

~~business or the location of the collateral or its use, whichever controlled the original filing, is thereafter changed.~~

~~Alternative Subsection (3)~~

~~[(3) A filing which is made in the proper county continues effective for four months after a change to another county of the debtor's residence or place of business or the location of the collateral, whichever controlled the original filing. It becomes ineffective thereafter unless a copy of the financing statement signed by the secured party is filed in the new county within said period. The security interest may also be perfected in the new county after the expiration of the four-month period; in such case perfection dates from the time of perfection in the new county. A change in the use of the collateral does not impair the effectiveness of the original filing.]~~

~~(4) The rules stated in Section 9-103 determine whether filing is necessary in this state.~~

(~~5~~b) Notwithstanding the preceding subsection~~s~~, and subject to ~~subsection (3) of~~ Section 9-302([3]), the proper place to file a financing statement in order to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of the ~~[Secretary of State]~~ []. This ~~filing~~ financing statement constitutes a fixture filing (Section 9-313) as to the collateral described therein ~~which~~ that is or is to become fixtures.

~~(6) For the purposes of this section, the residence of an organization is its place of business if it has one or its chief executive office if it has more than one place of business.~~

~~**Note:** Subsection (6) should be used only if the state chooses the Second or Third Alternative Subsection (1).~~

Note: The state should designate the filing office where the brackets appear. The filing office may be that of a governmental official (e.g., the Secretary of State) or a private party with which the state has made arrangements for maintaining the state's filing system (see § 9-410).

Reporters' Explanatory Notes

1. Draft § 9-401(a) indicates where in a given state a financing statement is to be filed. The draft removes the Second and Third Alternatives of current § 9-401(1). These alternatives provide for local filing under certain circumstances. Draft subsection (a) dictates central filing for most situations, while retaining local filing for real-estate-related collateral and special filing provisions for transmitting utilities. (Whether the current definition of "transmitting utility" is adequate will be on the agenda for a future meeting.) The elimination of alternatives for local filing for collateral such as farm products and consumer goods, and for dual (central and local) filing for businesses that have a place of business in only one county, makes current subsections (2), (3), and (6) unnecessary. Accordingly, the draft deletes those subsections.

2. At the December, 1994, meeting, the Drafting Committee instructed the Reporters either to expand or to delete existing subsection (4), which refers to the choice-of-law rules of § 9-103. We think a statutory reminder to consult choice-of-law rules may be useful. We have put such a reminder in subsection (a), where it is more likely to be seen, and deleted the existing subsection.

3. At the October, 1994, Drafting Committee meeting, the Reporters distributed a proposal under which a state would permit each debtor to select a "registered agent" to maintain financing statements and other Article 9 records pertaining to the debtor. Draft subsection (a)(2) provides for filing with such a registered agent, should the Drafting Committee elect to pursue this proposal.

SECTION 9-402. ~~Formal Requisites~~ CONTENTS OF FINANCING STATEMENT; ~~Amendments;~~ MORTGAGE AS FINANCING STATEMENT; EFFECTIVENESS OF FINANCING STATEMENT AFTER CERTAIN CHANGES; AMENDMENTS.

(~~1~~a) A financing statement is sufficient only if it gives the

names and mailing addresses of the debtor and the secured party or a representative of the secured party~~, is signed by the debtor, gives an address of the secured party from which information concerning the security interest may be obtained, gives a mailing address of the debtor~~ and contains a statement indicating the types of collateral~~, or~~ describing the ~~items, of~~ collateral, or otherwise indicating the collateral covered by the financing statement. A statement to the effect that the financing statement covers all assets or all personal property sufficiently indicates the collateral covered by the financing statement. ~~A financing statement may be filed before a security agreement is made or a security interest otherwise attaches. When the financing statement covers crops growing or to be grown, the statement must also contain a description of the real estate concerned.~~ ~~When~~ If the financing statement covers timber to be cut or covers minerals or the like, ~~(~~including oil and gas~~,)~~ or accounts subject to ~~subsection (5) of~~ Section 9-103([5]), or ~~when~~ if the financing statement is filed as a fixture filing (Section 9-313) and the collateral is goods ~~which~~ that are or are to become fixtures, the financing statement also must ~~also comply with subsection (5)~~ show that it covers this type of collateral, must recite that it is to be filed [for record] in the real estate records, must contain a description of the real estate [sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this State], and, if the debtor does not have an interest of record in the real estate, must show the name of a record owner. ~~A copy of~~

~~the security agreement is sufficient as a financing statement if it contains the above information and is signed by the debtor. A carbon, photographic or other reproduction of a security agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state.~~

Note: Language in brackets is optional.

~~(2) A financing statement which otherwise complies with subsection (1) is sufficient when it is signed by the secured party instead of the debtor if it is filed to perfect a security interest in~~

~~(a) collateral already subject to a security interest in another jurisdiction when it is brought into this state, or when the debtor's location is changed to this state. Such a financing statement must state that the collateral was brought into this state or that the debtor's location was changed to this state under such circumstances; or~~

~~(b) proceeds under Section 9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral; or~~

~~(c) collateral as to which the filing has lapsed;~~

~~(d) collateral acquired after a change of name, identity or corporate structure of the debtor (subsection (7)).~~

~~(3) A form substantially as follows is sufficient to comply with subsection (1):~~

~~Name of debtor (or assignor) _____~~

~~Address _____~~

~~Name of secured party (or assignee) _____~~

~~Address _____~~

~~1. This financing statement covers the following types (or items) of property:~~

~~(Describe) _____~~

~~2. (If collateral is crops) The above described crops are growing or are to be grown on:~~

~~(Describe Real Estate) _____~~

~~3. (If applicable) The above goods are to become fixtures on]*~~

~~* Where appropriate substitute either "The above timber is standing on ...." or "The above minerals or the like (including oil and gas) or accounts will be financed at the wellhead or minehead of the well or mine located on ...."~~

~~(Describe Real Estate) _____ and this financing statement is to be filed [for record] in the real estate records. (If the debtor does not have an interest of record) The name of a record owner is _____~~

~~4. (If products of collateral are claimed) Products of the collateral are also covered.~~

~~(use whichever is applicable) (. . . . . (Signature of Debtor (or Assignor) (((. . . . . (Signature of Secured Party (or Assignee)~~

(~~6~~b) A mortgage is effective as a financing statement filed as

a fixture filing from the date of its recording if:

(~~a~~1) ~~the goods are described in the mortgage by item or type~~ the mortgage contains a statement indicating the goods that it covers; ~~and~~

(~~b~~2) the goods are or are to become fixtures related to the real estate described in the mortgage; ~~and~~

(~~c~~3) the mortgage complies with the requirements for a financing statement in this section other than a recital that it is to be filed in the real estate records; and

(~~d~~4) the mortgage is duly recorded.

~~No fee with reference to the financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.~~

(c) The failure to indicate the representative capacity of a secured party or a representative of a secured party does not affect the sufficiency of the financing statement.

~~(5) A financing statement covering timber to be cut or covering minerals or the like (including oil and gas) or accounts subject to subsection (5) of Section 9-103, or a financing statement filed as a fixture filing (Section 9-313) where the debtor is not a transmitting utility, must show that it covers this type of collateral, must recite that it is to be filed [for record] in the real estate records, and the financing statement must contain a description of the real estate [sufficient if it were contained in a mortgage of the real estate to give constructive notice of the mortgage under the law of this state]. If the debtor does not have~~

~~an interest of record in the real estate, the financing statement must show the name of a record owner.~~

(~~7~~d) A financing statement sufficiently gives ~~shows~~ the name of the debtor only if it gives the individual, partnership, limited liability company, or corporate name of the debtor~~, whether or not it adds other trade names or names of partners~~. A financing statement that sufficiently gives the name of the debtor is not rendered ineffective by the addition or absence of trade or other names or names of partners.

(~~8~~e) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors ~~which~~ that are not seriously misleading. A financing statement that does not sufficiently give the name of the debtor is seriously misleading unless the filing office would discover the financing statement in a search of its records conducted [in accordance with the rules issued pursuant to Section 9-412(5)] in response to a request using the debtor's correct name, in which case the insufficiency of the debtor's name does not render the financing statement seriously misleading.

(f) ~~Where the~~ If a debtor so changes ~~his~~ its name ~~or in the case of an organization its name, identity or corporate structure~~ that a filed financing statement becomes seriously misleading~~,~~:

(1) the financing statement remains effective to perfect a security interest in collateral acquired by the debtor within four months after the change, and

(2) the ~~filing~~ financing statement is not effective to

perfect a security interest in collateral acquired by the debtor more than four months after the change, unless ~~a new appropriate financing statement~~ an amendment to the financing statement that renders the financing statement not seriously misleading is filed before the expiration of that time.

(g) A filed financing statement remains effective with respect to collateral ~~transferred by the debtor~~ that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest continues under Section 9-306[(2)], even though the secured party knows of or consents to the ~~transfer~~ disposition.

(h) Except as provided in subsection (f) and Section 9-402(A), a financing statement is not rendered ineffective if, after the financing statement is filed, the information contained in the financing statement becomes inaccurate and seriously misleading.

Subsection (i)--Alternative A

(~~4~~i) ~~A~~ The secured party of record may add or release collateral covered by a financing statement or otherwise amend the information contained in a financing statement ~~may be amended~~ by filing ~~a writing signed by both the debtor and the secured party~~ an amendment that identifies the original financing statement by the date of filing and the file number assigned under Section 9-403(h) or by another method specified in the rules. An amendment does not extend the period of effectiveness of a financing statement. If ~~any~~ an amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment.

Subsection (i)--Alternative B

(~~4~~i) ~~A~~ The secured party of record may add or release collateral covered by a financing statement or otherwise amend the information contained in a financing statement ~~may be amended~~ by filing ~~a writing signed by both the debtor and the secured party~~ an amended financing statement. An amended financing statement is sufficient only if it complies with subsection (a) and, in addition, identifies the original financing statement by the date of filing and the file number assigned under Section 9-403(h) or by another method specified in the rules. The filing of an amended financing statement ~~An amendment~~ does not extend the period of effectiveness of ~~a~~ the original financing statement. If ~~any amendment~~ an amended financing statement adds collateral, it is effective as to the added collateral only from its ~~the~~ filing date ~~of the amendment~~.

(j) In this Article, unless the context otherwise requires, the term "financing statement" means the original financing statement and any [amendments] [amended financing statements], statements of assignment (Section 9-405(b)), and continuation statements (Section 9-404(a)) relating to the original financing statement.

[(k) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.]

(l) The secured party may file an original financing statement or an [amendment] [amended financing statement] that adds collateral covered by a financing statement only if authorized [in writing] by the debtor. [A secured party who files a financing statement or such an [amendment] [amended financing statement] without the

debtor's [written] authorization is liable to the debtor for [[insert amount] dollars] [an amount specified in the rules] [and in addition] [for any loss caused to the debtor by the filing].]

~~**Note:** Language in brackets is optional.~~

Note: Where the state has any special recording system for real estate other than the usual grantor-grantee index (as, for instance, a tract system or a title registration or Torrens system) local adaptations of subsection (~~5~~a) and Section 9-403(~~7~~j) may be necessary. See Mass.Gen.Laws Chapter 106, Section 9-409.

Reporters' Explanatory Notes

1. This section has been substantially reorganized. Subsections (a) through (e) deal with the contents of a financing statement, including the special rules governing the names of the secured party and debtor and the "not seriously misleading" principle. Subsections (f), (g), and (h) address post-filing changes. Subsection (i) governs amendments. Subsection (j) explains that "financing statement" includes not only the original financing statement but also any amendments, etc., that affect it. Subsections (k) and (l) deal with when a financing statement can be filed and the need for the debtor's authorization.

2. Revised subsection (a) omits the requirement (in current subsection (1)) that the debtor sign a financing statement It thereby eases the way for electronic, paperless filing initiated by a secured party. See draft § 9-403(a). Subsection (l) contains substitute protection for the debtor. It permits the secured party to file an original financing statement or an amendment that adds collateral only if the debtor has authorized the filing and provides a remedy for unauthorized filings. See Explanatory Note 11 below.

Subsection (a) also expands the class of sufficient collateral references to embrace "a statement . . . otherwise indicating the collateral covered by the financing statement." A separate sentence makes clear that the quoted language is broad enough to uphold references such as "all personal property." If the property in question belongs to the debtor and is personal property, any searcher will know that the property is covered by the financing statement. We have deleted other currently-required information from this subsection because it seems unwise (real estate

description for financing statements covering crops), unnecessary (adequacy of copies of financing statements), or both (copy of security agreement as financing statement). Inasmuch as a secured party owes no obligation to disclose information concerning the security interest to third parties, the draft changes the address requirement to refer to "a mailing address" for the secured party as well as for the debtor.

We have added to subsection (a) the substance of existing subsection (5), which contains the requirements for fixture filings and financing statements covering timber, minerals, and certain accounts.

3. Draft subsections (a) and (b) (current subsections (5) and (6)) contain the following terms: "for record," "real estate records," "interest of record," and "record owner." The official comments should be revised to explain that these are terms traditionally used in real estate law and that this context "otherwise requires" that the proposed definition of "record" in draft § 9-105(r) is not applicable. These two subsections also contain minor revisions in style. Subsection (b) conforms to draft subsection (a) the requisite description of goods in a mortgage filed as a fixture filing. The subject of fees applicable to a mortgage filed as a fixture-filing financing statement is addressed with other fees in draft § 9-411. The Drafting Committee may wish to consider whether the phrase "must show that it covers this type of collateral" in subsection (b) should be clarified.

4. Draft subsection (c) is new. It makes clear that when the secured party is a representative, the financing statement is sufficient if it names the secured party, whether or not it indicates any representative capacity. Similarly, a financing statement that names a representative of the secured party need not indicate the representative capacity. For example, consider a transaction in which a security interest is granted to a group of secured parties, but not to their representative. The representative of the secured parties would not itself be a secured party. See draft § 9-105(u) & Explanatory Note 3. Under subsection (a) and (c), however, a financing statement would not be insufficient because it names the collateral agent instead of the actual secured parties even if it omitted the collateral agent's representative capacity.

5. Current subsection (2) has been deleted in the draft; elimination of the debtor's signature requirement makes the exceptions provided by that subsection unnecessary. Current subsection (3), which contains a form of financing statement, also has been deleted.

6. Draft subsections (d), (f), and (g) have been discussed by the Drafting Committee in connection with its consideration of "post-closing events." This draft makes a few minor changes in

style and phraseology. The proposed changes in subsection (d) respond to Study Committee Recommendation 17.A (Report, at 39-40). They reflect the prevailing view that the "individual, partnership or corporate name of the debtor" on a financing statement is both necessary and sufficient, whether or not trade or other names are included. Recommendation 17.A also calls for expanded official comments that address the names of individuals and entities other than corporations or partnerships. Inasmuch as the name of a "limited liability company" is a matter of public record, we have treated the limited liability company in the statute itself.

Draft subsection (f) responds to Study Committee Recommendations 17.B and 17.C (Report, at 140-42) and addresses a "pure" change of name that does not implicate a new debtor. It clarifies the effectiveness of a seriously misleading financing statement for the four months following a name change and provides that the record can be corrected by an amendment to the financing statement that specifies the debtor's new correct name.

Subsection (g) clarifies the third sentence of current § 9-402(7), as proposed in Recommendation 17.G (Report, at 149), by providing that a financing statement remains effective following the transfer of collateral only when the security interest continues in that collateral. This result is consistent with the conclusion of PEB Commentary No. 3.

7. Draft subsection (e) derives from current subsection (8). It adds two per se rules concerning the effectiveness of financing statements in which the debtor's name is incorrect. If the financing statement nevertheless would be discovered in a search under the debtor's correct name, as a matter of law the incorrect name does not make the financing statement seriously misleading. If the financing statement would not be discovered in a search under the debtor's correct name, as a matter of law the financing statement is seriously misleading.

Subsection (h) provides that, except for the four-month rules in subsection (f) ("pure" name change) and Section 9-402A (new debtor that becomes bound), post-filing changes that render a financing statement inaccurate and seriously misleading have no effect on a financing statement. The financing statement remains effective.

8. Subsection (i) addresses changes to financing statements, including addition and release of collateral. Alternative A contemplates that changes would be made by filing an amendment. Alternative B contemplates that changes would be accomplished by filing an amended (restated) financing statement, rather than an amendment. Under Alternative B, an inspection of the amended financing statement would reveal the current status of the financing statement, without the need to review the original. If the Drafting Committee adopts this approach, some conforming changes to other

provisions may be necessary.

The draft continues to treat assignments separately, in § 9-405. We found that the statute could accommodate partial assignments more easily with amended financing statements than with separate assignments. See the Explanatory Note to Draft § 9-405.

Both alternatives revise current subsection (4) to permit secured parties to make changes in the public record without the need to obtain the debtor's signature. However, the filing of an amendment or amended financing statement that adds collateral must be authorized by the debtor. See subsection (l).

9. Subsection (j) derives from existing subsection (1) and provides that references to "the term 'financing statement'" include not only the original financing statement and amendments (or amended financing statements) but also the remaining parts of the package that constitute the complete financing statement of record--assignments and continuation statements. The Drafting Committee may wish to consider whether this construct remains useful and, if so, whether it should be relocated to § 9-105.

10. We have bracketed subsection (k), which appears as part of existing § 9-402(1), because we see no need for it. The official comments could make clear that no change in substance was intended. See also § 9-303(1) (contemplating situations in which the financing statement is filed before a security interest attaches).

11. Subsection (l) substitutes for the debtor's signature a requirement that the debtor authorize the filing of a financing statement or an amendment that adds collateral. We suggest that the Drafting Committee consider whether the authorization needs to be in writing (or in a "record" of some kind). We have set forth a short menu of possible remedies for unauthorized filing. One approach would be to require the debtor to prove damages. Another would be to fix a statutory damage amount. A third would be to set statutory minimum but allow the debtor to recover greater damages, if proved. Yet another would be to leave the fixing of damages to the administrative rules.

SECTION 9-402A. EFFECTIVENESS OF FINANCING STATEMENT IF NEW DEBTOR BECOMES BOUND BY SECURITY AGREEMENT.

(a) In this section:

(1) "new debtor" means a person who becomes bound by a security agreement [signed] [entered into] by another person [if the person becomes bound in connection with a transaction or series of

transactions pursuant to which the person who becomes bound continues to operate the business or a portion of the business previously operated by the other person]; and

(2) "original debtor" means the person who [signed] [entered into] the security agreement to which the new debtor has become bound.

(b) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under Section 9-402(g).

(c) [At the time when the new debtor becomes bound by the security agreement, a] [A] filed financing statement naming the original debtor [becomes] [is] effective to perfect a security interest in collateral that is described in the security agreement and covered by the financing statement and in which the new debtor has or acquires rights.

(d) If a filed financing statement that [becomes] [is] effective under subsection (c) is seriously misleading with respect to the name of the new debtor:

(1) the financing statement [remains] [is] effective to perfect a security interest in collateral acquired by the new debtor before, and within four months after, the new debtor becomes bound, and

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the new debtor more than four months after the new debtor becomes bound unless an amendment to the financing statement that renders the financing

statement not seriously misleading is filed before the expiration of that time.

Reporters' Explanatory Note

Draft § 9-402A has been discussed by the Drafting Committee in connection with its consideration of "post-closing events." It reflects Study Committee Recommendations 17.E and F. It deals with the situation where one party (B) becomes bound by another party's (A's) security agreement (including any after-acquired property clause) in favor of SP-A.

SECTION 9-403. WHAT CONSTITUTES FILING A RECORD; REJECTION OF RECORDS; DURATION OF ~~Filing~~ FINANCING STATEMENT; EFFECT OF LAPSED ~~Filing~~ FINANCING STATEMENT; DUTIES OF FILING ~~Officer~~ OFFICE.

Subsection (a)--Alternative A

(~~1~~a) ~~Presentation of a financing statement and tender of the filing fee or acceptance~~ Acceptance of ~~the statement~~ a record by ~~the~~ a filing ~~officer~~ office constitutes filing under this Article.

Subsection (a)--Alternative B

(~~1~~a) ~~Presentation of a financing statement and tender of the filing fee or acceptance~~ Proper indexing of ~~the statement~~ a record by ~~the~~ a filing ~~officer~~ office (subsections (h) and (j)) constitutes filing under this Article.

(b) A filing office may refuse to accept a record for filing only for one or more of the following reasons:

(1) the record is not communicated by an authorized medium of communication;

(2) the filing office is unable to index the record because of its form or content or the method or medium by which it is communicated;

(3) the failure to tender the applicable filing fee;

(4) in the case of an original financing statement, the statement fails:

(i) to give a name and address for the debtor,

(ii) to give a name and address for the secured party,

(iii) to contain a statement indicating the collateral,

[(iv) to give a jurisdiction of organization for the debtor or indicate that the debtor has none,

(v) to give a tax identification number for the debtor or indicate that the debtor has none,

(vi) to indicate whether the debtor is an individual or an organization,

(vii) if the financing statement indicates that the debtor is an organization, to indicate the type of organization, or

(viii) if the financing statement indicates that the debtor is an individual, to indicate the sex of the individual and the month and day of the individual's birth;]

(5) in the case of an [amendment] [amended financing statement], continuation statement, or termination statement, the record fails to identify the original financing statement as required by subsection (g), Section 9-403(g), or Section 9-404(a); or

(6) in the case of a statement of assignment (Section 9-405(b)), the statement fails to identify the original financing

statement as required by that Section, fails to give an address for the assignee, or fails to give a name for the secured party of record, the debtor, or the assignee.

[(c) A filed financing statement that complies with the requirements of Section 9-402(a) is effective even if some or all of the information described in subsections (b)(iv) through (b)(viii) is incorrect or is not given.]

[(d) If the filing office refuses to accept a record for filing for a reason other than one set forth in subsection (b), then the filing office is liable to [the secured party] [any person damaged by the refusal] [for [insert amount] dollars] [and in addition] [for any loss caused [to the debtor] [to the person] by the filing].]

(e) If the filing office refuses to accept a record for filing it shall communicate its refusal and the reason for its refusal to the secured party at the time and in the manner prescribed in the rules, but in no event less than [7] [business] days after the filing office receives the record. [If the filing office fails to communicate its refusal and the reason therefor within the time set forth in the preceding sentence, it is liable to [the secured party] [any person damaged by the failure] [for [insert amount] dollars] [and in addition] [for any loss caused by the filing]].

(~~2~~f) Except as otherwise provided in subsection (~~6~~i), a filed financing statement is effective for a period of five years from the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed ~~prior to~~ before the lapse[,

notwithstanding the commencement of insolvency proceedings by or against the debtor]. ~~If a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of sixty days or until expiration of the five year period, whichever occurs later.~~ Upon lapse a financing statement becomes ineffective and any ~~the~~ security interest that was perfected by the financing statement becomes unperfected, unless it is perfected without filing. If the security interest becomes unperfected upon lapse, it is deemed to have been unperfected [as against a person who became a purchaser or lien creditor before lapse] [at all times prior thereto].

(~~3~~g) A continuation statement may be filed by ~~the~~ a secured party of record for a financing statement only within [six months] [one year] ~~prior to~~ before the expiration of the five year period specified in subsection (~~2~~f). A ~~Any such~~ continuation statement must ~~be signed by the secured party,~~ identify the original financing statement by file number and the date of filing or by another method specified in the rules and state that ~~the original statement is still effective~~ it is a continuation statement or that it is filed to continue the effectiveness of the financing statement. ~~A continuation statement signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of Section 9-405, including payment of the~~

~~required fee.~~ Upon timely filing of ~~the~~ a continuation statement, the effectiveness of the original financing statement is continued for five years after the last date to which the ~~filing~~ financing statement was effective, whereupon ~~it~~ the financing statement lapses in the same manner as provided in subsection (~~2~~f) unless another continuation statement is filed under this subsection ~~prior to such~~ before the lapse. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the original financing statement. Unless a statute on disposition of public records provides otherwise, the filing ~~officer~~ office may ~~remove a lapsed~~ cause the files to reflect the fact that a financing statement has lapsed under this Section or has become ineffective under Section 9-404 ~~from the files~~ and may destroy ~~it~~ any written record evidencing the financing statement immediately if ~~he~~ the filing office has retained a ~~microfilm or other photographic~~ record of the financing statement~~, or in other cases after one year after the lapse~~. ~~The filing officer shall so arrange matters by physical annexation of financing statements to continuation statements or other related filings, or by other means, that if he physically destroys the financing statements of a period more than five years past, those which have been continued by a continuation statement or which are still effective under subsection (6) shall be retained.~~

(~~4~~h) Except as otherwise provided in subsection (~~7~~j), ~~a~~ the filing ~~officer~~ office shall ~~mark each statement with~~ assign a file number to each record filed with the filing office, ~~and with~~ create a record that reflects the file number and the date and ~~hour~~ time of

filing, and ~~shall hold the statement or a microfilm or other photographic copy thereof for~~ maintain the record for public inspection. In addition, the filing ~~officer~~ office shall index ~~the statement~~ filed records according to the name of the debtor and shall note in the index the file number and the ~~address of the debtor given in the statement~~ date and time of filing.

~~(5) The uniform fee for filing and indexing and for stamping a copy furnished by the secured party to show the date and place of filing for an original financing statement or for a continuation statement shall be $_____ if the statement is in the standard form prescribed by the [Secretary of State] and otherwise shall be $_____, plus in each case, if the financing statement is subject to subsection (5) of Section 9-402, $_____. The uniform fee for each name more than one required to be indexed shall be $_____. The secured party may at his option show a trade name for any person and an extra uniform indexing fee of $_____ shall be paid with respect thereto.~~

(~~6~~i) If ~~the~~ a debtor is a transmitting utility (~~subsection (5) of~~ Section 9-401(b)) and a filed financing statement so states, ~~it~~ the financing statement is effective until a termination statement is filed. A real estate mortgage ~~which~~ that is effective as a fixture filing under ~~subsection (6) of~~ Section 9-402(b) remains effective as a fixture filing until the mortgage is released or satisfied of record or its effectiveness otherwise terminates as to the real estate.

(~~7~~j) ~~When~~ If a financing statement covers timber to be cut or

covers minerals or the like, ~~(~~including oil and gas,~~)~~ or accounts subject to ~~subsection (5) of~~ Section 9-103([5]), or is filed as a fixture filing, [it shall be filed for record and] the filing ~~officer~~ office shall index it under the names of the debtor and any owner of record shown on the financing statement ~~in the same fashion~~ as if they were the mortgagors in a mortgage of the real estate described, and, to the extent that the law of this State provides for indexing of mortgages under the name of the mortgagee, under the name of the secured party as if ~~he~~ the secured party were the mortgagee thereunder, or where indexing is by description ~~in the same fashion~~ as if the financing statement were a mortgage of the real estate described.

Note: In states in which writings will not appear in the real estate records and indices unless actually recorded the bracketed language in subsection (~~7~~j) should be used.

Reporters' Explanatory Notes

1. Current subsection (1) deals solely with what constitutes filing of a financing statement. Draft subsection (a) deals generically with what constitutes filing of a record, including an original financing statement, an amendment, an amended financing statement, a statement of assignment, a termination statement, and a continuation statement. The draft presents two alternatives for changing the current rule, under which a rejected filing, or a filing that the filing office receives but completely ignores, nevertheless may be effective. Under Alternative A, filing does not occur until the filing office accepts a record. Under Alternative B, filing does not occur until the filing office properly indexes the record.

A financing statement that the filing office rejects provides no public notice. For this reason, a financing statement that the filing office refuses to accept would not be effective to perfect a security interest under either alternative, even if the refusal was unjustified. Either alternative would place upon the filer--who may be the only one who knows that the record was submitted--the risk

that the financing statement failed to make its way into the public record.

Likewise, a record that has been accepted but mis-indexed by the filing office provides no public notice. Accordingly, Alternative B places upon the filer (who knows how the record should have been indexed and can verify whether in fact it was indexed properly) the risk of mis-indexing. If the Drafting Committee favors Alternative B, certain conforming changes to other provisions would be necessary.

Note that Alternative B could be problematic in some transactions, such as purchase money transactions in which priority depends on making a filing within 20 days under draft § 9-312(4). A secured party whose financing statement is accepted within the time period would have no assurance that the financing statement ultimately is properly indexed. A middle ground might be to provide that acceptance constitutes filing if the record is properly indexed within a specified period, such as 30 days, and filing occurs upon proper indexing if that occurs later. Cf. Bankruptcy Code § 547(e)(2)(A) (". . . a transfer is made . . . at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time").

2. Draft subsection (b) is new. It limits the bases for the filing office to reject records and requires the filing office to notify the secured party of a rejection. For purposes of discussion, we have included among the reasons for rejection of an original financing statement the failure to give various types of information that would assist a searcher in weeding out "false positives," i.e., records that a search reveals but which do not pertain to the debtor in question.

Subsection (c) attempts to make clear that refusal to accept the financing statement is the only consequence of leaving one of the "boxes" empty, and that (i) a filed financing statement that complies with § 9-402(a) will not be rendered ineffective because the information provided is incorrect and (ii) a noncomplying financing statement that is filed is effective, even if a "box" is empty. Some members of the Drafting Committee seemed inclined to subordinate filings containing inaccurate information under certain circumstances (e.g., if a competing claimant actually searched and was misled by the misinformation). We think any benefits of a rule of this kind do not justify the costs and favor instead the simple, bright-line rule in the draft.

3. Draft subsection (d) sets forth the consequences of the filing office's wrongful refusal to accept a record. We have put this subsection in brackets, recognizing that the potential for incurring liability may prompt filing officers to oppose revised Article 9 and that the benefits of this rule may not justify the costs. If the Drafting Committee favors imposing liability for

wrongful rejection, it should decide how to measure that liability. The draft suggests three possibilities: (i) actual loss, (ii) a statutory damage amount, and (iii) actual loss, with a statutory minimum recovery. In addition, the Drafting Committee should consider whether the statute should identify the plaintiff. The proper plaintiff may not always be the secured party. For example, the debtor might be a more appropriate plaintiff if a termination statement is wrongfully rejected; an assignee might be an appropriate plaintiff if an assignment is wrongfully rejected. The Drafting Committee might also consider whether the administrative rules should fix a damage amount.

4. Draft subsection (e) requires the filing office to communicate the fact of rejection and the reason therefor within a fixed period of time. Again, we have bracketed a sentence that would confer a remedy on an aggrieved party and have provided several possible damage formulas.

5. Subsection (f) makes some changes to existing subsection (2), concerning lapse. Section 204 of the Bankruptcy Reform Act of 1994 permits a secured party to continue or maintain the perfected status of its security interest without first obtaining relief from the automatic stay. Accordingly, the draft deletes the existing tolling provision. It also contains bracketed language for the Drafting Committee's consideration, to the effect that lapse occurs notwithstanding the debtor's entry into insolvency proceedings. With or without the bracketed language, the draft would impose a new burden on the secured party, to be sure that a financing statement does not lapse during the debtor's bankruptcy. The last sentence of the subsection leaves for Drafting Committee resolution the question of the effect of lapse. Of course, to the extent that federal bankruptcy law dictates the consequences of lapse, the provisions of the draft would be of no effect.

6. Draft subsection (g) deals with the details of filing continuation statements. Current subsection (3) provides a six-month window before expiration during which a continuation statement may be filed. The draft offers an additional alternative--a one-year window. Consistent with the media neutral approach of draft Part 4 as a whole, the secured party's signature is not required under the draft. The other suggested changes give effect to the media neutral approach or are for clarification. The revisions proposed in draft subsection (h) (current subsection (4)) also reflect media neutral drafting.

7. Current subsection (5), which deals with fees for filing, has been consolidated with the other, similar provisions elsewhere in Part 4. See draft § 9-411.

8. Concerning the references to "of record" and "for record" in draft subsections (i) and (j), see Explanatory Note 4 to draft § 9-402.

SECTION 9-404. TERMINATION STATEMENT.

(a) A termination statement for a financing statement is a record that identifies the financing statement by file number and the date of filing or by another method specified in the rules and states that the secured party does not claim a security interest or other interest perfected by the financing statement.

(~~1~~b) A secured party of record for a financing statement may file a termination statement for the financing statement.

(c) If a financing statement ~~covering~~ covers [consumer goods] ~~is filed on or after _____~~, then within one month or within ~~ten~~ 10 days following written demand by the debtor after there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party of record must file with ~~each~~ the filing ~~officer with whom the financing statement was filed,~~ office a termination statement ~~to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number~~ for the financing statement. In other cases whenever there is no outstanding secured obligation and no commitment to make advances, incur obligations or otherwise give value, the secured party of record for a financing statement must on written demand by the debtor send the debtor~~, for each filing officer with whom the financing statement was filed,~~ a termination statement ~~to the effect that he no longer claims a security interest under the financing statement, which shall be identified by file number~~ for the financing statement. ~~A termination statement signed by a person~~

~~other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record complying with subsection (2) of Section 9-405, including payment of the required fee.~~ If the ~~affected~~ secured party of record fails to file ~~such~~ or send a termination statement as required by this subsection, ~~or to send such a termination statement within ten days after proper demand therefor, he~~ the secured party of record is ~~shall be~~ liable to the debtor for [~~one hundred~~ [insert amount] dollars] [an amount specified in the rules], and in addition for any loss caused to the debtor by ~~such~~ the failure.

(~~2~~d) On ~~presentation to the filing officer of such a termination statement he must note it in the index~~ filing a termination statement with the filing office under subsection (b) the financing statement to which the termination statement relates becomes ineffective. ~~If he has received the termination statement in duplicate, he shall return one copy of the termination statement to the secured party stamped to show the time of receipt thereof. If the filing officer has a microfilm or other photographic record of the financing statement, and of any related continuation statement, statement of assignment and statement of release, he may remove the originals from the files at any time after receipt of the termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement.~~

~~(3) If the termination statement is in the standard form prescribed by the [Secretary of State], the uniform fee for filing~~

~~and indexing the termination statement shall be $_____, and otherwise shall be $_____, plus in each case an additional fee of $_____ for each name more than one against which the termination statement is required to be indexed.~~

~~**Note:** The date to be inserted should be the effective date of the revised Article 9.~~

Reporters' Explanatory Notes

1. Subsection (a) establishes the requirements for a termination statement, thereby eliminating some redundancies in the remainder of draft § 9-404. Most of the other changes in the section are for clarification or to embrace media neutral drafting.

2. Draft subsection (b) provides that a secured party of record may file a termination statement. Draft subsection (c) specifies when a secured party of record must file a termination statement. After elimination of the requirement of a debtor's signature, subsection (c) will be the debtor's principal protection against a secured party's filing an unauthorized financing statement or amendment, unless the Drafting Committee creates a statutory damage remedy.

SECTION 9-405. ASSIGNMENT OF SECURITY INTEREST; DUTIES OF FILING ~~Officer~~ OFFICE~~; Fees~~.

(~~1~~a) ~~A~~ An original financing statement may ~~disclose an~~ contain a statement of assignment of ~~a security interest in the collateral described in~~ the secured party's rights under the financing statement by ~~indication~~ indicating in the financing statement ~~of~~ the name and mailing address of the assignee ~~or by an assignment itself or a copy thereof on the face or back of the statement~~. Upon filing the assignee named in a statement of assignment filed under this subsection is the secured party of record for the financing statement. A statement of assignment may state that the rights under the financing statement are being assigned only with respect

to the portion of the collateral covered by the financing statement that is indicated in the statement of assignment; otherwise, the rights under the financing statement are assigned of record with respect to all of the collateral covered by the financing statement.

(~~2~~b) A secured party of record may assign of record all or part of ~~his~~ that secured party's rights under a financing statement by ~~the~~ filing in the ~~place where the original financing statement was filed of~~ filing office ~~a separate written statement of assignment signed by the secured party of record and setting forth~~ an amended financing statement that complies with Section 9-402(a), identifies the original financing statement by file number and the date of filing or by another method specified in the rules, and gives the ~~name~~ names of the secured party of record and the debtor~~, the file number and the date of filing of the financing statement~~ and the name and mailing address of the assignee ~~and containing a description of the collateral assigned~~. ~~A copy of the assignment is sufficient as a separate statement if it complies with the preceding sentence. On presentation to the filing officer of such a separate statement, the filing officer shall mark such separate statement with the date and hour of the filing. He shall note the assignment on the index of the financing statement, or in~~ The uniform fee for filing, indexing and furnishing filing data about ~~such a separate statement of assignment shall be $_____ if the statement is in the standard form prescribed by the [Secretary of State] and otherwise shall be $_____, plus in each case an additional fee of $_____ for each name more than one against which the statement of~~

~~assignment is required to be indexed.~~ Upon filing the assignee named in an amended financing statement filed under this subsection is the secured party of record for the financing statement.

~~(3) After the disclosure or filing of an assignment under this section, the assignee is the secured party of record.~~

(c)[1] In the case of a fixture filing, or a ~~filing~~ financing statement covering timber to be cut, or covering minerals or the like~~,~~ ~~(~~including oil and gas~~,)~~ or accounts subject to ~~subsection (5) of~~ Section 9-103([5]), ~~he~~ the filing office shall index ~~the~~ a statement of assignment filed under subsection (a) or an amended financing statement filed under subsection (b) under the name of the assignor as grantor and, to the extent that the law of this State provides for indexing the assignment of a mortgage under the name of the assignee, ~~he~~ the filing office shall index the statement of assignment ~~of the financing statement~~ or the amended financing statement under the name of the assignee. Notwithstanding ~~the provisions of~~ this ~~subsection~~ Section, an assignment of record of a security interest in a fixture ~~contained in~~ covered by a mortgage effective as a fixture filing (~~subsection (6) of~~ Section 9-402(b)) may be made only by an assignment of record of the mortgage in the manner provided by the law of this State other than this Act.

Reporters' Explanatory Note

The draft preserves the opportunity given by existing § 9-405 to assign a security interest of record in one of two different ways: by notation on the original filing or by making a subsequent

---

[1] The provisions in subsection (c) are found in the current § 9-405(2) and are marked to reflect changes therefrom.

filing. Unlike the current section, the draft contemplates that the subsequent filing will be an amended (restated) financing statement. This approach seems particularly useful for partial assignments of a security interest in all the collateral (in which case the amended financing statement would give the names of both the assignor and the assignee as secured parties) and for assignments of a security interest in some but not all the collateral (which would require the filing of an amended financing statement for each assignee). In such cases, a searcher could identify the secured parties of record and the collateral claimed by each by looking at the amended financing statement. There would be no need to reconstruct the transactions by reference to several records.

Draft § 9-402(i), Alternative B, contemplates that amendments, including those that add or release collateral, would be accomplished by filing an amended financing statement. See generally Explanatory Note 8 to draft § 9-402. If the Drafting Committee adopts the amended-financing-statement approach for both amendments and assignments, further coordination between the two sections will be necessary, leading (we hope) to a less cumbersome statute.

Most of the other proposed changes in draft § 9-405 are for clarification or to embrace media neutral drafting.

SECTION 9-406. ~~Release of Collateral; Duties of Filing Officer; Fees~~ MULTIPLE SECURED PARTIES OF RECORD.

(a) If there is more than one secured party of record for a financing statement, each secured party of record may file an amendment, [continuation statement,] termination statement, or statement of assignment under this Part concerning its rights under the financing statement[, and any secured party of record may file a continuation statement concerning the financing statement.]

(b) A filing by one secured party of record does not affect the rights under the financing statement of another secured party of record[, except that the filing of a continuation statement by one secured party of record is effective with respect to all secured parties of record.]

~~A secured party of record may by his signed statement release all or a part of any collateral described in a filed financing statement. The statement of release is sufficient if it contains a description of the collateral being released, the name and address of the debtor, the name and address of the secured party, and the file number of the financing statement. A statement of release signed by a person other than the secured party of record must be accompanied by a separate written statement of assignment signed by the secured party of record and complying with subsection (2) of Section 9-405, including payment of the required fee. Upon presentation of such a statement of release to the filing officer he shall mark the statement with the hour and date of filing and shall note the same upon the margin of the index of the filing of the financing statement. The uniform fee for filing and noting such a~~

~~statement of release shall be $_____ if the statement is in the standard form prescribed by the [Secretary of State] and otherwise shall be $_____, plus in each case an additional fee of $_____ for each name more than one against which the statement of release is required to be indexed.~~

Reporters' Explanatory Notes

1. The draft deletes the entire statutory text of current § 9-406, which deals with releases of collateral. Under draft § 9-402(i), releases of collateral are dealt with as a form of amendment that modifies the collateral covered by a financing statement.

2. Draft § 9-406 deals with multiple secured parties. In general, it permits a secured party of record to make filings concerning its own rights under a financing statement, but protects the secured party's rights from the effects of filings made by another secured party of record. For example, assume that a financing statement names A and B as the secured parties. If B files an amendment that limits the collateral covered by the financing statement or files a termination statement, A's rights would not be affected. The financing statement would continue to name A as a secured party and, as to A, the collateral description would remain unaffected by B's amendment.

One possible exception to this principle concerns continuation statements. Some have suggested that a continuation statement filed by any one secured party of record should be effective with respect to all secured parties of record. The bracketed language at the end of each subsection is intended to accomplish this result.

SECTION 9-407. INFORMATION FROM FILING ~~Officer~~ OFFICE; SALE OR LICENSE OF RECORDS.

[(~~1~~a) If ~~the~~ a person filing ~~any financing statement, termination statement, statement of assignment, or statement of release,~~ a written record furnishes the filing ~~officer~~ office a copy thereof, the filing ~~officer~~ office shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to ~~such~~ the person.]

[(~~2~~b) Upon request of any person, the filing ~~officer~~ office shall [issue ~~his~~ its certificate showing] [communicate to the requesting person] whether there is on file on a date and hour ~~stated therein~~ specified by the filing office, any ~~presently effective~~ financing statement ~~naming a particular debtor~~ that names a particular debtor and has neither lapsed under Section 9-403 nor become ineffective under Section 9-404 ~~and any statement of assignment thereof~~ and if there is, giving the date and hour of filing of each such financing statement and the ~~names and addresses of each secured party~~ information contained therein. ~~The uniform fee for such a certificate shall be $_____ if the request for the certificate is in the standard form prescribed by the [Secretary of State] and otherwise shall be $_____. Upon request the filing officer shall furnish a copy of any filed financing statement or statement of assignment for a uniform fee of $_____ per page.~~]

(c) The [insert appropriate official or governmental agency] [filing office] shall sell or license to the public records filed with it under this Part in the manner and on the terms prescribed in the rules.

Note: ~~This section is~~ Subsections (a) and (b) are proposed as ~~an~~ optional ~~provision~~ provisions to require filing officers to [furnish certificates] [respond to certain requests]. Local law and practices should be consulted with regard to the advisability of adoption.

Reporters' Explanatory Notes

1. Most of the proposed changes in draft § 9-407 are for

clarification or to embrace media neutral drafting.

2. Existing law provides that the filing office respond to a request for information by providing a certificate. The principle of media neutrality would suggest that the statute not require a written certificate. However, official written certificates usually can be introduced into evidence, whereas official communications by another medium might not be. We have included bracketed alternative formulations in subsection (b). The first would follow existing law; the second would permit the response to be communicated by any medium authorized in the administrative rules. The Drafting Committee may favor one over the other, may wish to leave the option open in the statute, or may wish to keep the brackets and suggest that each state make its own decision.

3. Draft subsection (c) mandates that the appropriate official or the filing office sell or license the filing records, although it leaves to the administrative rules the details of implementation.

Section 9-408. Filing and Compliance with Other Statutes and Treaties for Consignments, Leases, Bailments and Other Transactions ~~Financing Statements Covering Consigned or Leased Goods~~.

A consignor, ~~or~~ lessor, bailor [or buyer] of property ~~goods~~ may file a financing statement or may comply with a statute or treaty described in Section 9-302(3) using the terms "consignor," "consignee," "lessor," "lessee," "bailor," "bailee," "owner," "registered owner"[, "buyer," "seller"] or the like instead of the terms "debtor" and "secured party." ~~the terms specified in Section 9-402.~~ ~~The provisions of this~~ This Part ~~shall apply~~ applies as appropriate to such a financing statement and to such compliance, which is equivalent to filing a financing statement under § 9-302(4), but neither the ~~its~~ filing nor compliance ~~shall not~~ is of itself ~~be~~ a factor in determining whether or not the consignment, ~~or~~ lease, bailment[, sale] or other transaction creates a security interest ~~is intended as security~~ (Section 1-201(37)). However, if it is determined for other reasons that the consignment, ~~or~~ lease,

bailment, [sale,] or other transaction creates a security interest ~~is so intended~~, a security interest held by ~~of~~ the consignor, ~~or~~ lessor, bailor, owner[, or buyer] that ~~which~~ attaches to the collateral ~~consigned or leased goods~~ is perfected by the ~~such~~ filing or compliance.

Reporters' Explanatory Notes

1. The foregoing revised § 9-408 is identical to that contained in the October 26, 1994, Draft (concerning goods covered by a certificate of title), except that the terms "buyer" and "seller" have been reversed, and except for a few changes suggested by the Style Committee. The proposed revision provides the same benefits for compliance with a statute or treaty described in § 9-302(3) that existing § 9-408 provides for filing in connection with the use of terms such as "lessor," consignor," etc. It also expands the rule to embrace more generally other bailments and transactions. We intend the references to "owner" and "registered owner" to address, for example, the situation where a putative lessor is the registered owner of an automobile covered by a certificate of title and the transaction is determined to create a security interest. Although the draft provides that the security interest is perfected, it may be advisable or necessary to amend the relevant certificate of title act in order to ensure that this result will be achieved. The bracketed language would encompass sales transactions, primarily sales of general intangibles. Whether the bracketed language is appropriate will depend on the Drafting Committee's ultimate decisions about the scope of Article 9.

2. The last two sentences of the section substitute the concept of "creation" of a security interest for the existing "intention" standard. We also expect to revise the definition of "security interest" in § 1-201(37) by deleting all references to the "intention" standard.

[SECTION 9-409. REGISTERED AGENT.

Intentionally omitted]

Reporters' Explanatory Note

At the October, 1994, Drafting Committee meeting, the Reporters distributed a proposal under which a state would permit each debtor to select a "registered agent" to maintain financing statements and other Article 9 records pertaining to the debtor. Pending the Drafting Committee's determination whether it wishes to pursue that proposal, we have not prepared the draft statutory text that would

be needed to give effect to that proposal.

SECTION 9-410. DELEGATION OF DUTIES TO PRIVATE CONTRACTOR.

The [insert appropriate official or governmental agency] [filing office] may by contract delegate to a private contractor some or all of its powers, rights, and duties under this Part, other than the power to issue rules under Section 9-412. Contracts under this Section are subject to [insert reference to any applicable statute that regulates government contracting and procurement].

Reporters' Explanatory Notes

Draft § 9-410 explicitly confers on the filing office or the appropriate government agency the power to make arrangements with a private contractor for the operation of the duties of the filing office.

SECTION 9-411. FEES.

(a) The fee for filing and indexing a [record under this Part] [financing statement, amendment, continuation statement, statement of assignment, or termination statement] [and for marking a written copy furnished by the secured party to show the time and place of filing] shall be $_____ if the record is communicated in writing and $_____ if the record is communicated by any other means authorized in the rules, [plus in each case, if the financing statement is subject to the last sentence of Section 9-402(a), $_____]. The fee for each name more than one required to be indexed shall be $_____. [No fee with reference to a mortgage filed as a financing statement is required other than the regular recording and satisfaction fees with respect to the mortgage.]

[(b) The fee for responding to any request for information from the filing office, including for [issuing a certificate showing] [communicating] whether there is on file any effective financing statement naming a particular debtor, shall be $ ____ if the request is communicated in writing and $ ____ if the request is communicated by any other means authorized in the rules.]

Reporters' Explanatory Note

Section 9-411 collects in a single section all fee requirements for filing and for responding to requests for information. It derives from various sections of existing Part 4.

SECTION 9-412. ADMINISTRATIVE RULES.

The [insert appropriate official or governmental agency] [filing office] may issue rules not inconsistent with the provisions of this [Act] [Article] [and in accordance with the [insert any applicable state administrative procedure act]]:

(1) prescribing the method and medium for communicating records to a filing office for filing and for communicating with the filing office;

(2) prescribing the form and content of requests for information from the filing office[, [and] notices of [insert other liens, if any, to be "perfected" by filing in the financing statement records, such as statutory agricultural liens, judicial liens, and state tax liens; also insert statutory cross references] [, and designations of registered agents];

(3) prescribing the duties of the filing office in addition to those created by this Part;

(4) prescribing the business hours of the filing office;

(5) prescribing the manner in which the filing office maintains, preserves, indexes, searches, and makes available records;

(6) concerning the filing office, including the transition from the prior filing system to the system established under this Part;

(7) prescribing the manner of payment of fees to the filing office and the amount of fees payable for services other than those described in Section 9-411;

[(8) prescribing the amount of compensation payable under [Section 9-402 and] Section 9-404 and the amount of any charge to which a secured party is entitled under Section 9-208;]

(9) prescribing the basis for determining the time when the filing office [has accepted for filing or received a record] [has indexed a record] and requiring or permitting the use of a record to confirm that the filing office [has accepted for filing or received] [has indexed] a record;

(10) requiring or permitting the amendment or remedy of an error made by the filing office, including errors in filing, failing or refusing to accept records for filing, indexing records, and searching records, and prescribing the limits and effects of those amendments or remedies;

(11) prescribing the terms and manner of selling or licensing to the public records filed with the filing office under this Part, including the price to be charged for the records;

[(12) prescribing remedies for a person aggrieved by a secured

party's noncompliance with this Part or the rules;]

(13) establishing performance standards for the filing office, including standards concerning the timeliness and quality of performance by the filing office of its duties;

(14) prescribing protocols, abbreviations, symbols, expansions of definitions of terms, and definitions of terms that may be used to communicate with the filing office and in the preservation and organization of records by the filing office;

[(15) prescribing a method for determining tax identification numbers for debtors [other than individuals];]

(16) prescribing procedures for filing a termination statement or otherwise terminating the effectiveness of a financing statement if the secured party cannot be found, has ceased to exist, or otherwise is unavailable;

(17) prescribing criteria for determining questions of authenticity and authority concerning records;

(18) governing the delegation of powers, rights, and duties to a private contractor under Section 9-410;

(19) governing the rulemaking procedures for rules issued under this Section; and

[(20) governing other matters if the [] determines that the rules will further the purposes and policies of this [Article] [Act].]

Reporters' Explanatory Notes

1. Draft § 9-412 authorizes the issuance of administrative rules. It derives in part from provisions in the Personal Property Security Acts of British Columbia and Saskatchewan.

2. As drafted, § 9-412 is permissive; no rules need be promulgated. The Drafting Committee should consider whether certain aspects of the rules should be mandatory. For example, should the filing office be required formally to prescribe the manner in which it maintains, preserves, and indexes, searches, and otherwise makes available records? The draft also does not address related issues, such as the process by which rules are considered, promulgated, and made available to the public. The Drafting Committee may wish to consider whether further amplification is desirable.

Reporters' Prefatory Notes to Revisions Concerning Default

1. This part of the draft consists of Part 5, together with § 1-102(c), certain definitions in § 9-105, and a draft of § 9-318. Except as otherwise noted, the statutory text has been marked (additional material is underlined and deletions are indicated by ~~strikeout~~) to reflect changes to the July 1, 1994, draft (the "July 1994 Draft"). The July 1994 draft was considered by the Drafting Committee during its third (September 30-October 2, 1994) and fourth (December 2-4, 1994) meetings.

We have omitted the Reporters' Explanatory Notes from this part of the draft. Instead, we have added brief notes summarizing the changes that this draft makes. Before transmitting a draft of Article 9 to NCCUSL this spring we will revise the Reporters' Explanatory Notes to reflect the Drafting Committee's deliberations through the March, 1995, meeting.

2. **Most of the changes in this draft address issues of consumer protection. Although we drew on and benefited substantially from correspondence and conversations with members of the Consumer Financing Task Force,** we made the decisions concerning the issues to address in the draft as well as the substance of the draft provisions. **We wish to reiterate that the Drafting Committee has not yet considered this draft and no decision--even a preliminary decision--has been made concerning whether to address these issues in the statute or, if they are addressed, the substance of the statutory treatment. The Drafting Committee merely instructed us to prepare sample consumer protection provisions that would assist the Drafting Committee in its ongoing deliberations. In effect, readers may assume that all of the draft consumer provisions are in square brackets at this time.**

The draft also reflects certain changes suggested the NCCUSL

Style Committee. We have received many written comments from members of the Drafting Committee, observers, advisors, and others interested in the project. The draft addresses some of these; others will be addressed in the coming Explanatory Notes.

3.a. The draft includes the following new consumer protection provisions. Although many of the areas addressed were suggested by members of the Consumer Financing Task Force, the substance of the draft differs materially from those suggestions in several instances.

§ 9-105 -The draft adds definitions of "consumer debtor," "consumer [secured] transaction," and "default."

§ 9-318(d) - The draft adds two alternatives that address the problem of notifications to account debtors by multiple assignees of receivables.

§ 9-501 - The draft expands the nonwaivable provisions to include various new consumer-protection rules. It also substitutes a "reasonable" test for the "manifestly unreasonable" test for agreed standards of compliance in the case of consumer [secured] transactions.

§ 9-504 - For consumer [secured] transactions the draft changes the safe harbor for timely notification of a disposition from 10 to 21 days, and it adds a new plain English safe harbor form for notifications. It also adds a requirement that a secured party notify consumer debtors and consumer obligors of the method of calculating a surplus or deficiency.

§ 9-504A - This section is new. In a consumer [secured] transaction this section requires a secured party that buys collateral or sells collateral to a related person (to be defined) in a § 9-504 disposition to give the debtor or obligor a credit if the secured party-buyer or related person resells the collateral within XX days (to be determined). The rule applies only if the net subsequent resale price exceeds the initial sale price by XX% (to be determined) or more. The credit is in the amount of the excess. This section also provides for the elimination of any deficiency claim when a secured party takes possession of consumer goods and the debt at the time of default does not exceed $XX (to be a fairly small amount).

§ 9-505 - The draft adds as an alternative, in square brackets, a prohibition of partial strict foreclosure in consumer [secured] transactions. It also adds a new provision for standardized collateral (such as cars) covered by qualified reports (such as "bluebooks"). The new rule would permit partial strict foreclosure for standardized collateral only if the debt satisfied were not less than the average of retail and wholesale values as reported in the qualified report. An exception would be made when the parties agree

in good faith that the collateral is worth less because of damage, misuse, etc.

§ 9-506 - The draft adds a right of reinstatement for consumer debtors and obligors. The debtor could reinstate the debt and cure a payment default (but not other defaults) by tendering all past due amounts (including late charges) without acceleration plus a performance deposit in the amount of the lesser of XX (to be determined) scheduled payments or XX (to be determined) percent of the secured obligation. The tender must be made within 21 days following a notice of disposition or before disposition (or contract for disposition) or retention under § 9-505, whichever is latest. A debtor or obligor could use this reinstatement right only one time during a XX-month (to be determined) period.

§ 9-507 - The draft now makes it clear that a person whose deficiency is eliminated can pursue a claim for a surplus and that a consumer whose deficiency is reduced or eliminated can recover any excess of the statutory liquidated damages over the amount of such reduction or elimination. The draft also adds square brackets to flag the issue of whether a noncomplying secured party could, nevertheless, pursue additional collateral on a nonrecourse basis. The draft also provides that a prevailing consumer will receive attorneys' fees, leaving the secured party's fees to the agreement and other law.

b. We elected not to incorporate in the draft several suggestions made by consumer protection advocates who are participating in the Consumer Financing Task Force. These include proposals to prohibit a deficiency claim in a consumer transaction if the secured party employs a nonstandard or unconventional method of disposition, to add to the statute a list of "factors" that bear on commercial reasonableness, and to add an Article 9 unconscionability provision. Concerning unconscionability, we have attached a copy of UCCC § 5.108 as an appendix to the draft. Please note also that the ABA Article 1 Task Force is considering whether to include an unconscionability provision in Article 1.

SECTION 1-102. PURPOSES; RULES OF CONSTRUCTION; VARIATION BY AGREEMENT.

* * *

(c~~3~~) The effect of provisions of this [Act] may be varied by agreement, except as otherwise provided in this [Act] and except that the obligations of good faith, diligence, reasonableness, and care prescribed by this Act may not be disclaimed by agreement but

the parties may by agreement determine the standards by which the performance of ~~such~~ these obligations is to be measured if ~~such~~ the standards are not manifestly unreasonable. ~~Notwithstanding the preceding sentence, the obligations of good faith, diligence, reasonableness and care prescribed by Part 5 of Article 9 may be disclaimed by agreement as provided in subsection (c) of Section 9-501.~~

* * *

Summary of Changes from July 1994 Draft

The deleted sentence, which was added in the July 1994 Draft, was overbroad. Any inconsistency between subsection (3) (now (c)) of § 1-102 and draft § 9-501(c) is addressed by a new proviso in the latter subsection. The proviso makes it clear that the waiver provisions of Part 5 override the general prohibition against waivers of diligence, reasonableness, and care found in § 1-102.

SECTION 9-105. DEFINITIONS AND INDEX OF DEFINITIONS.

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

(1~~a~~) "Account debtor" means the person ~~who is~~ obligated on an account, chattel paper, instrument[, letter of credit] or general intangible;

(2) "Affected obligor" means an obligor against which or against whose property a debtor has no recourse with respect to the obligation secured by the collateral [and concerning which the secured party knows that the debtor does not have recourse];

* * *

(5) "Consumer debtor" means a debtor in a consumer secured transaction.

(6~~cc~~) "Consumer obligor" means an obligor who is an

individual and who incurred his or her obligation as part of a transaction entered into primarily for personal, family, or household purposes;

(7) "Consumer [secured] transaction" means a transaction in which an obligation is incurred primarily for personal, family, or household purposes and a security interest secures the obligation[, if

(i) the obligation arises out of the sale of goods, services, or another product and the portion of the obligation attributable to the cash price does not exceed $XX,

(ii) in the case of any other obligation, the principal amount of the obligation does not exceed $XX at any time and there is no agreement to extend credit in an amount that exceeds $XX outstanding at any time, or

(iii) the collateral includes [a motor vehicle or] personal property or fixtures used or expected to be used as the debtor's principal dwelling.]

A transaction is not a consumer [secured] transaction to the extent that the collateral consists of investment property and the secured party is a commodity intermediary or a securities intermediary.

(8d) "Debtor" means

[(i)] a person

(x) that created a security interest in the collateral, or

(y) to which a debtor has transferred collateral, if a secured party knows that the debtor has transferred the collateral

and knows the identity of the transferee ~~who created a security interest in the collateral~~,

whether or not the person ~~[~~owes payment or performance of~~] [is obligated on]~~ the obligation secured by the collateral~~.~~; [and

(ii) ~~[The term includes~~ the seller of accounts, chattel paper, or general intangibles];

(9) "Default" has the meaning provided in an agreement between a debtor and a secured party, but in a consumer [secured] transaction an agreement with respect to default on the part of a consumer debtor or consumer obligor is enforceable only to the extent that

(x) a consumer debtor or consumer obligor fails to make a payment as agreed, or

(y) the prospect of payment, performance, or realization of collateral is significantly impaired.

The burden of establishing the prospect of significant impairment is on a secured party. In the absence of agreement, default [means] [includes] a breach in connection with a secured obligation, a security interest, or a security agreement if the prospect of payment, performance, or realization of collateral is significantly impaired.

* * *

(16~~jj~~) "Obligor" means a person [other than the debtor] that ~~who~~, [with the consent or acquiescence] [to the knowledge] of the secured party:

(i) owes,

(ii) has provided property (other than the collateral) to secure, or

(iii) is otherwise [accountable] [liable] in whole or in part for

payment or other performance of an obligation secured by a security interest in the collateral;

* * *

Summary of Changes from July 1994 Draft

1. As in the July 1994 Draft, this draft distinguishes between the "debtor" and the "obligor." It continues to address concerns about a broad construction of the term "debtor" that could affect the secured party's duties under Part 5, especially the duty to send notification under § 9-504. This draft redefines "debtor" and adds a new defined term, "affected obligor."

The July 1994 Draft sought to capture a significant difference between two classes of persons: (1) those persons who have created the security interest at issue and (2) those persons who may have a stake in the proper enforcement of the security interest but who have not created a security interest in the collateral. The definition of "affected obligor" seeks, in turn, to distinguish among obligors who have a stake in the proper enforcement and those who do not. In the July 1994 Draft, we described an obligor with such as stake as "an obligor who has a right of recourse against the debtor with respect to the obligation secured by the collateral." We wish to thank Professor Neil Cohen for his suggestions on this issue. As professor Cohen wrote to us:

> [T]he key is not whether the obligor has a right of recourse against the debtor but, rather, the opposite -- whether the debtor has a right of recourse against the obligor. If the debtor has a right of recourse against the obligor (as is the case when the debtor is a secondary obligor and the obligor is the principal obligor), then the obligor has no interest in the disposition of the collateral because its total liability (to the secured party and the debtor) will always be the same. If, on the other hand, the debtor has no recourse against the obligor (regardless of whether this is because the obligor is the secondary obligor and the debtor is the principal obligor or because the debtor is a secondary obligor who has waived its recourse against the principal obligor), the obligor has an interest in the disposition of the collateral because that will determine the debtor's

liability to the secured party. Only the latter type of obligor should be entitled to Part 5 protections.

The definition of "affected obligor" reflects this approach. The Drafting Committee may wish to consider whether the bracketed language at the end of the definition is desirable. A person cannot become an obligor without the secured party's consent or acquiescence. If the bracketed language is deleted, a secured party would owe obligations to an obligor who does not have recourse against the debtor, even if the secured party is unaware of the details of the relationship between the debtor and the obligor. This result may be preferable to litigation over what the secured party did and did not know.

2. The definition of "debtor" has been expanded to include transferees of collateral when the secured party knows of the transfer and the transferee's identity. The Drafting Committee should give serious consideration to the wisdom of this change. Although we acknowledge that a transferee has a stake in the enforcement process, we also are concerned about interjecting a secured party's subjective knowledge into the enforcement process. An alternative would be to include in the definition only transferees who take with the "consent or acquiescence" of the secured party.

3. The definitions of "consumer debtor" and "consumer [secured] transaction" have been added in connection with various new (and old) consumer protection rules. Note that the bracketed clauses (i) - (iii) in the latter definition require specified dollar amounts and necessarily impose substantial complexity.

4. A definition of "default" has been added. This definition is significant primarily in limiting defaults in consumer transactions to those that are material. The draft language is taken in large part from § 5.109 of the Uniform Consumer Credit Code ("UCCC").

5. Under the July 1994 Draft, "debtor" and "obligor" were mutually exclusive. But the substantive rules did not impose any duties upon or create any rights for obligors that were not imposed upon or created for debtors. As a result, the deletion of the bracketed language would have no substantive effect. However, maintaining mutually exclusive categories may make the statute easier to understand and apply.

Reporters' Prefatory Note to Draft § 9-318

This section has been marked to show changes from the official text.

SECTION 9-318. DEFENSES AGAINST ASSIGNEE; MODIFICATION OF CONTRACT AFTER NOTIFICATION OF ASSIGNMENT; TERM PROHIBITING ASSIGNMENT INEFFECTIVE; IDENTIFICATION AND PROOF OF ASSIGNMENT.

(a~~1~~) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in Section 9-206 the rights of an assignee are subject to

(1~~a~~) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and

(2~~b~~) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.

(b~~2~~) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.

(c~~3~~) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. A notification that ~~which~~ does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account

debtor may pay the assignor.

Subsection (d)--Alternative A

(d) An account debtor [who is a consumer debtor or a consumer obligor] is authorized to make all payments to the first assignee from whom the account debtor receives notification that the amount due or to become due has been assigned and that payment is to be made to the assignee, whether or not (1) only a portion of an account, chattel paper, or general intangible has been assigned to that assignee, (2) a portion has been assigned to another assignee, or (3) the account debtor knows that the assignment to that assignee is limited.

Subsection (d)--Alternative B

(d) An assignee shall not notify an account debtor [who is a consumer debtor or a consumer obligor] to make less than the full amount of any installment payment to the assignee, whether or not (1) only a portion of the account, chattel paper, or general intangible has been assigned to that assignee, (2) a portion has been assigned to another assignee, and (3) the account debtor knows that the assignment to that assignee is limited. An account debtor is under no obligation to comply with a notification that does not comply with this subsection.

(e~~4~~) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

Summary of Changes

The draft offers two alternative approaches for protecting [consumer] account debtors from multiple notifications and claims when a right to payment has been split into two or more portions. Alternative A permits an account debtor to treat the first assignee to give notification as an assignee of the whole right to payment, even if the assignment is partial and the assignee knows that fact. Alternative B prohibits a partial assignee from demanding payment of less than the entire amount of an installment and permits the assignee to ignore any notification that violates this prohibition.

Although the draft needs refinement, we believe that it provides a sufficient basis for the Drafting Committee's discussions.

PART 5

DEFAULT

SECTION 9-501. DEFAULT; JUDICIAL ENFORCEMENT; WAIVER AND VARIANCE OF RIGHTS AND DUTIES; PROCEDURE WHEN SECURITY AGREEMENT COVERS BOTH REAL AND PERSONAL PROPERTY.

(a) After ~~Upon~~ default ~~under a security agreement~~, a secured party has the rights and remedies provided in this Part and, except as limited by subsection (c), those provided in the security agreement. ~~The~~ A secured party may reduce the claim to judgment, foreclose or otherwise enforce the claim or security interest by any available judicial procedure. If the collateral is documents, ~~the~~ a secured party may proceed either as to the documents or as to the goods covered thereby. A secured party in possession has the rights, remedies and duties provided in Section 9-207. The rights and remedies referred to in this subsection are cumulative and may be exercised simultaneously.

(b) After default, ~~the~~ a debtor and ~~the~~ an obligor have ~~has~~ the rights and remedies provided in this Part, those provided in the security agreement and those provided in Section 9-207.

(c) To the extent that they give rights to ~~the~~ a debtor or ~~the~~ an obligor and impose duties on ~~the~~ a secured party, the rules stated in the Sections ~~subsections~~ referred to below may not be waived or varied by a debtor that ~~who~~ has a property interest, other than a security interest, in the collateral or by a consumer obligor except as specifically provided in this Part:

(1) Section 9-502 ~~subsection~~ (b) ~~of Section 9-502~~, which deals with collection and enforcement of collateral;

(2) Section 9-504 ~~subsections~~ (d), ~~and~~ (e), (f), (i), and (j) ~~of Section 9-504~~, which deal with disposition of collateral;

(3) Section 9-503 insofar as it imposes upon a secured party who takes possession of collateral without judicial process the duty to do so without breach of the peace;

(4) Section 9-502 ~~subsection~~ (c) ~~of Section 9-502~~ and Section ~~subsection~~ (b) ~~of Section 9-504~~ insofar as they deal with application or payment of non-cash proceeds of collection, enforcement or disposition;

(5) Section 9-502 ~~subsections~~ (c) and (e) ~~of Section 9-502~~ and Section 9-504 ~~subsection~~ (b) ~~of Section 9-504~~ insofar as they require accounting for or payment of surplus proceeds of collateral;

(6) Section 9-505, which deals with acceptance of collateral in satisfaction of obligation;

(7) Section 9-506, which deals with redemption of collateral and reinstatement of obligations;

(8) Section 9-507 ~~subsections~~ (a), (b), (c) ~~(1), (c)(2)~~,

(d) and (hg) ~~of Section 9-507~~, which deal with the secured party's liability for failure to comply with this Part; ~~and~~

(9) Section 9-318(d), which deals with notification to an account debtor [who is a consumer debtor or consumer obligor]; and

(10) Section 9-504A(a) and (c), which deal with adjustment and limitation of deficiency claims. ~~[any consumer-protection provisions.]~~

(d) Notwithstanding Section 1-102(c), the ~~The~~ rules in subsection (c) may be waived or varied by any other debtor or obligor to the extent and in the manner provided by other law. ~~In any event, the~~ The parties may by agreement determine the standards by which the fulfillment of the debtor's or obligor's rights and the secured party's duties, ~~(~~other than duties concerning taking possession of collateral without a breach of the peace under Section 9-503, ~~)~~ is to be measured if, in a consumer [secured] transaction, the standards are not unreasonable, and if, in any other transaction, the standards are not manifestly unreasonable.

(~~d~~e) If ~~the~~ a security agreement covers both real and personal property, ~~the~~ a secured party may proceed:

(1) under this Part as to the personal property without prejudicing any rights and remedies in respect of the real property; or

(2) as to both the real and the personal property in accordance with the rights and remedies in respect of the real property, in which case the other provisions of this Part do not apply.

(~~e~~f) If ~~the~~ a security agreement covers goods that are or become fixtures, ~~the~~ a secured party may, subject to ~~subsection [(8)] of~~ Section 9-313([8]), proceed under this Part or in accordance with the rights and remedies in respect of real property, in which case the other provisions of this Part do not apply.

(~~f~~g) ~~When~~ If a secured party has reduced its ~~the~~ claim to judgment, the lien of any levy which may be made upon the collateral by virtue of any execution based upon the judgment ~~shall~~ relates back to the earlier of the date of ~~the~~ perfection of the security interest in the ~~such~~ collateral and the date of filing a financing statement covering the collateral. A judicial sale, pursuant to ~~such~~ the execution, is a foreclosure of the security interest by judicial procedure within the meaning of this section, and ~~the~~ a secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this Article.

Summary of Changes from July 1994 Draft

1. Subsection (a) continues to provide that "[t]he rights and remedies referred to in this subsection are cumulative and may be exercised simultaneously." We contemplate that the revised Reporters' Explanatory Notes will suggest that the Official Comments make it clear that subsection (a) is not intended to override non-UCC law that would render a creditor liable for abusive behavior or harassment.

2. Subsection (c) contains some additional nonwaivable provisions. Subsection (d) has been severed from subsection (c) and substitutes "reasonable" for the "manifestly unreasonable" test for agreed standards of compliance in consumer [secured] transactions. "Manifestly unreasonable" remains the test for other transactions.

3. The changes to subsection (g) are intended to provide a secured party that enforces its security interest by levy with the benefit of the "first-to-file-or-perfect" priority rule of § 9-312(5)(a).

SECTION 9-502. COLLECTION AND ENFORCEMENT RIGHTS OF SECURED PARTY.

(a) When so agreed, and in any event on default, a ~~the~~ secured party may ~~is entitled~~:

(1) ~~to~~ notify an account debtor to make payment or otherwise render performance to or for the benefit of the secured party, whether or not a ~~the~~ debtor theretofore was making collections on the collateral;

(2) ~~to~~ take control of any proceeds to which the secured party is entitled under Section 9-306; and

(3) ~~to~~ enforce the obligations of an ~~the~~ account debtor, including by exercising the rights and remedies of the debtor in respect of (i) the account debtor's obligation to make payment or otherwise render performance to the debtor, (ii) any property that secures the account debtor's obligations, and (iii) any guarantor or other surety for the account debtor's obligations.

[Prior to exercising under paragraph (3) the rights of a ~~the~~ debtor to enforce nonjudicially any [mortgage/deed of trust] covering real property a ~~the~~ secured party shall [file/record] in the office where the [mortgage/deed of trust] is [filed/recorded] (x) a copy of the security agreement that entitles that entitles the secured party to exercise those rights and (y) an affidavit signed by the secured party stating that a default has occurred and that the secured party is entitled to enforce nonjudicially the [mortgage/deed of trust].].

(b) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or against an affected obligor ~~who has a right of~~

~~recourse against the debtor with respect to the obligation secured by the collateral and~~ who undertakes to collect from or enforce the obligations of ~~the~~ account debtors must proceed in a commercially reasonable manner. The secured party may deduct from the collections the reasonable expenses of collection and enforcement, including the reasonable attorneys' fees and legal expenses incurred by the secured party.

(c) If a ~~the~~ security interest ~~agreement~~ secures payment or performance of an obligation:

(1) A ~~The~~ secured party shall apply or pay over for application the cash proceeds (Section 9-306) of collection or enforcement under this Section in the order following to:

(i) the reasonable expenses of collection and enforcement and, to the extent provided for in the agreement and not prohibited by law, ~~including~~ the reasonable attorneys' fees and legal expenses incurred by the secured party;

(ii) the satisfaction of obligations secured by the security interest under which the collection or enforcement is made;

(iii) the satisfaction of obligations secured by any subordinate security interest in or lien on the collateral subject to the security interest under which the collection or enforcement is made if the secured party receives a written notification of demand for proceeds before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest or lien must furnish reasonable proof of the interest within a reasonable time, and unless the holder does

so, the secured party need not comply with the demand.

(2) A ~~The~~ secured party need not ~~shall~~ apply or pay over for application the non-cash proceeds (Section 9-306) of collection and enforcement under this Section. A secured party that applies or pays over for application non-cash proceeds shall do so in a commercially reasonable manner.

(3) A ~~The~~ secured party must account to and pay a ~~the~~ debtor for any surplus notwithstanding any agreement to the contrary, and, unless otherwise agreed, the debtor and any ~~the~~ obligor are liable for any deficiency. Recovery of any deficiency under this subsection is subject to ~~the provisions of~~ Section 9-507.

[(d) A secured party that receives cash proceeds of collection or enforcement in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or lien that is not subordinate to the security interest under which the collection or enforcement is made:

(1) takes the cash proceeds free of any such security interest or lien;

(2) is not obligated to ~~(1)~~ apply the proceeds of collection or enforcement to the satisfaction of obligations secured by ~~any~~ such a security interest or lien; ~~that is not subordinate to the security interest under which the collection or enforcement is made; or~~ and

(~~2~~3) is not obligated to account to or pay the holder of such a security interest or lien for any surplus.]

(e) If the underlying transaction was a sale of accounts,

chattel paper, or general intangibles, the debtor is entitled to any surplus, and the debtor or obligor is liable for any deficiency, only if its agreement so provides. Recovery of any deficiency under this subsection is subject to ~~the provisions of~~ Section 9-507.

Summary of Changes from July 1994 Draft

1. Subsection (c)(1)(i) has been conformed to the corresponding language in Section 9-504(b)(1)(i), dealing with attorneys' fees.

2. Subsection (c)(2)has been revised to make clear that a secured party whose collection or disposition yields non-cash proceeds (e.g., a promissory note) is under no duty to apply the note to the outstanding obligation. If a secured party chooses to apply the note to the outstanding obligation, it must do so in a commercially reasonable manner.

3. No consensus was reached at the last Drafting Committee meeting on whether to delete or retain subsection (d). It remains in brackets. It has been revised, however, in two respects. First, it reflects the view that a junior secured party who does not act in good faith or who acts with knowledge that it is violating the rights of senior claimants should not be free to keep cash proceeds of collateral at the expense of the senior claims. Second, it adds language to make clear that receipt of cash proceeds by a qualifying junior secured party terminates the interest, if any, of a senior secured party or lienholder.

SECTION 9-503. SECURED PARTY'S RIGHT TO TAKE POSSESSION AFTER DEFAULT. Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If a ~~the~~ security agreement so provides a ~~the~~ secured party may require a ~~the~~ debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party that ~~which~~ is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and

may dispose of collateral on a ~~the~~ debtor's premises under Section 9-504.

Summary of Changes from July 1994 Draft

The Official Comments should explain that a senior secured party is entitled to possession as against a junior claimant. The revised Reporters' Explanatory Notes will address that issue.

SECTION 9-504. DISPOSITION OF COLLATERAL AFTER DEFAULT.

(a) A secured party after default may sell, lease, license, or otherwise dispose of any or all of the collateral [in its then condition or following any commercially reasonable preparation or processing]. Unless effectively excluded or modified, a contract for sale, lease, license, or other disposition includes the warranties related to title, possession, quiet enjoyment, ~~use~~ and the like that by operation of law ~~normally~~ accompany ~~such~~ a disposition of property of the kind subject to the contract. A warranty under this Section may be excluded or modified by giving a purchaser, before the purchaser gives value, a written statement that contains specific language excluding or modifying the warranty.

(b) (1) A ~~The~~ secured party shall apply or pay over for application the cash proceeds (Section 9-306) of disposition in the order following to:

(i) the reasonable expenses of retaking, holding, preparing for disposition, processing, and disposing, and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(ii) the satisfaction of obligations secured by the security interest under which the disposition is made;

(iii) the satisfaction of obligations secured by any subordinate security interest in or lien on the collateral if the secured party receives a written notification of demand for proceeds before distribution of the proceeds is completed. If requested by the secured party, the holder of ~~such~~ a subordinate security interest or lien must furnish reasonable proof of the interest within a reasonable time, and unless the holder does so, the secured party need not comply with the demand.

(2) A ~~The~~ secured party need not ~~shall~~ apply or pay over for application the non-cash proceeds (Section 9-306) of disposition under this Section. A secured party that applies or pays over for application non-cash proceeds shall do so in a commercially reasonable manner.

(3) If the security interest under which the disposition is made secures payment or performance of an obligation, (i) the secured party must account to and pay a ~~the~~ debtor that has a property interest, other than a security interest, in the collateral for any surplus; and (ii) unless otherwise agreed and except as otherwise provided in Section 9-504A, the debtor and obligor are liable for any deficiency. But if the underlying transaction was a sale of accounts, chattel paper or general intangibles, the debtor is entitled to any surplus, and the debtor or obligor is liable for any deficiency, only if its agreement so provides. Recovery of any deficiency under this subsection is subject to the provisions of

Section 9-507.

~~†~~(c) A secured party that receives cash proceeds of disposition in good faith and without knowledge that the receipt violates the rights of the holder of a security interest or lien that is not subordinate to the security interest under which the collection or enforcement is made:

(1) takes the cash proceeds free of any such security interest or lien;

(2) is not obligated to ~~(1)~~ apply the proceeds of disposition to the satisfaction of obligations secured by ~~any~~ such a security interest or lien~~; that is not subordinate to the security interest under which the disposition is made; or~~ and

(~~2~~3) is not obligated to account to or pay the holder of such a security interest or lien for any surplus.~~†~~

(d) Every aspect of ~~the~~ a disposition of collateral, including the method, manner, time, place, and terms, must be commercially reasonable. If commercially reasonable, a ~~the~~ secured party may dispose of collateral (i) by public or private proceedings, (ii) by one or more contracts, (iii) as a unit or in parcels, [and] (iv) [in its then condition or following preparation or processing, and (v)] at any time and place and on any terms. A ~~The~~ secured party may buy at any public sale. A ~~The~~ secured party may buy at a private sale only if the collateral is of a type customarily sold on a recognized market or is of a type that ~~which~~ is the subject of widely distributed standard price quotations.

(e) For purposes of this subsection the "notification date" is

the date on which a secured party sends to the debtor and any affected obligor written notification of a disposition or the date on which the debtor and any affected obligor waive the right to notification, whichever is earlier. A ~~The~~ secured party shall send to a ~~the~~ debtor [that has a property interest, other than a security interest, in the collateral] and any affected ~~an~~ obligor ~~who has a right of recourse against the debtor with respect to the obligation secured by the collateral~~ reasonable written notification of the time and place of any public sale or reasonable written notification of the time after which any private sale or other intended disposition is to be made, unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market. In the case of consumer goods no other notification need be sent. In other cases a ~~the~~ secured party shall send written notification (i) to any other person from whom the secured party has received, ~~(~~before the notification date, ~~sending written notification to the debtor and the obligor or before the debtor and the obligor waive the right to notification)~~ written notification of a claim of an interest in the collateral, ~~.~~ [(ii) to any other secured party who, [20] days before the notification date held a security interest in the collateral perfected by the filing of a financing statement that (x) identified the collateral, (y) was indexed under the debtor's name as of that date and (z) was filed in the proper office or offices in which to file a financing statement against the debtor covering the collateral as of that date (Sections 9-103 and 9-401), and (iii) to any other secured party who, [20]

days before the notification date held a security interest in the collateral perfected by compliance with a statute or treaty described in Section 9-302(3). A secured party has complied with the notification requirement specified in clause (ii) of the preceding sentence if (x) not later than thirty days before the notification date, the secured party requested, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the in the office or offices indicated in clause (ii)(z) of the preceding sentence, and (y) before the notification date, either (I) the secured party did not receive a response to the request for information or (II) the secured party received a response to the request for information and the secured party sent written notification to the secured parties, if any, named in that response and whose financing statements covered the collateral.]

(f) A debtor [that ~~who~~ has a property interest, other than a security interest, in collateral] or a consumer obligor ~~who is an individual obligor in a transaction entered into primarily for personal, family or household purposes~~ may waive the right to notification of its disposition (subsection (e)) only by signing a statement to that effect after default. In the case of a consumer [secured] transaction, ~~[consumer goods], any such~~ a signed statement is ineffective as a waiver unless the secured party proves by clear and convincing evidence that the signer understood and expressly agreed to its terms.

(g) Unless otherwise agreed, a notification of disposition sent

after default and, in the case of a consumer [secured] transaction, 21 days or more, and, in the case of other transactions, 10 ~~ten~~ days or more, before the earliest time of disposition set forth in the notification is sent within a reasonable time ~~prior to~~ before the disposition. Whether a notification sent less than 21 or 10 ~~ten~~ days, as applicable, before the earliest time of disposition set forth in the notification nevertheless is sent within a reasonable time is a question of fact to be determined in each case.

(h) (1) This subsection does not apply to a consumer [secured] transaction. Unless otherwise agreed, the contents of a notification of disposition are sufficient if the notification (i) describes ~~reasonably identifies~~ the debtor and the secured party, (ii) describes the collateral that is the subject of the intended disposition, (iii) states the method of intended disposition and (iv) states the time and place of any public sale or the time after which any other disposition is to be made, whether or not the notification contains additional information.

(2) Whether a notification that lacks any of the information set forth in paragraph (1) nevertheless is sufficient is a question of fact to be determined in each case.

(3) No particular phrasing of the notification is required. A notification substantially complying with the requirements of this subsection is sufficient even though it contains minor errors that are not seriously misleading.

(4) The following sample notification, when completed, ~~would~~ contains sufficient information:

Notification of Disposition of Collateral

~~Debtor: _____.~~

~~Secured party: _____.~~

~~Mailing address of secured party: _____.~~

~~Collateral that is the subject of the intended disposition: _____.~~

~~The collateral will be disposed of by the following method: [insert, as applicable: public sale, private sale, lease, license, etc.].~~

~~[For public sale, if applicable] The disposition will be made at the following time and place: _____.~~

~~[For disposition other than public sale, if applicable] The disposition will be made sometime after: _____.~~

To: [Name of debtor or obligor to whom 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].

[End of Sample]

(i) (1) This subsection applies to a consumer [secured] transaction. A notification of disposition must contain the following information: (i) the information specified in subsection (h)(1), (ii) a description of any liability for a deficiency of the person to which the notification is sent, (iii) the amount that must be paid to the secured party in order to redeem (Section 9-506) the obligation secured, (iv) the amount that must be paid to the secured party in order to reinstate (Section 9-506) the obligation secured, and (v) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is

available.

(2) No particular phrasing of the notification is required. A notification substantially complying with the requirements of this subsection is sufficient even though it contains minor errors that are not seriously misleading.

(3) The following sample notification, when completed, contains sufficient information:

Notice of Our Plan to Sell Property

To: [Name of debtor or obligor to whom 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]

[You] [name of obligor, if different] owe(s) us money on a debt and [you have] [has] not paid it to us on time. We have [your] [the debtor's] [describe collateral] because we took it from [you] [the debtor] or [you] [the debtor] voluntarily gave it to us. [You] [name of debtor, if different] agreed to let us do that when [you] [name of obligor, if different] created the debt.

[For a public disposition:]

We plan to sell [or lease or license, as applicable] the [describe collateral] [to the highest qualified bidder] in public. The sale [or lease or license, as applicable] will be held as follows:

Day and Date: _____

Time: _____

Place: _____

You can bring bidders to the sale if you want.

[For a private disposition:]

We will sell [or lease or license, as applicable] the [describe collateral] privately sometime after [day and date].

The money that we get from the sale [or lease or license, as applicable] (after paying our costs) will be paid on the debt that [you] [name of obligor, if different] owe(s) to us. [Include the following sentence only if the addressee is obligated on the secured debt.] IF WE GET LESS MONEY THAN YOU OWE, YOU WILL STILL OWE US THE DIFFERENCE, and we may sue you and take part of your wages or other property. [Include the following sentence only if the addressee is a debtor that has a property interest, other than a security interest, in the collateral.] If we get more money than [you] [name of obligor, if different] owe(s) to us, [you] [name of obligor, if different] will get the extra money.

You can stop the sale [and get] [and the debtor will get] the property back. To do this, [you] [name of obligor, if different] must:

Pay us $ _____ before the sale. That will pay off the debt plus our costs and [You] [name of obligor, if different] will not owe us any more money;

[add the following paragraph if applicable] OR

Pay us our costs of retaking the property, all regular payments that are overdue, all late charges, and a security deposit. That amount is now about $ _____, but that amount may change. To learn the exact amount, call us at (telephone number). You would have to make this payment by (date). If you make the payment, [You] [name of obligor, if different] will have to keep on making the rest of the regular [monthly] payments. When [you] [name of obligor, if different] make[s] the rest of the regular payments [you] [name of obligor, if different] will get back the security deposit of $ _____.

[End of Sample]

(j) This subsection applies to a consumer [secured] transaction. If the debtor is entitled to a surplus or the debtor or a consumer obligor is liable for a deficiency under subsection (b)(3), before or when the secured party accounts to the debtor and pays any surplus or first makes demand on the debtor or consumer obligor for payment of the deficiency [or begins an action to collect the deficiency] the secured party must send to the debtor

and a consumer obligor a written notification containing:

(1) the amount of the surplus or deficiency, and

(2) a reasonable description of how the secured party calculated the surplus or deficiency, including

(i) the amount of the obligation secured and its components, such as the unpaid balance of principal or purchase price, interest or other finance charges, additional charges (such as delinquency, default, or deferral charges), and reasonable expenses and attorneys' fees of the type described in Section 9-504(b)(1)(i), and

(ii) the amount of credits on the obligation secured and their components, such as payments, rebates, and proceeds of the disposition of collateral.

No particular phrasing of the notification is required. A notification substantially complying with the requirements of this subsection is sufficient even though it contains minor errors that are not seriously misleading.

(k~~l~~) A secured party's disposition of collateral after default transfers to a transferee for value all of a ~~the~~ debtor's rights in the collateral, discharges the security interest under which the disposition is made and any subordinate security interest or lien ~~subordinate thereto~~ [other than liens created pursuant to] [here should be listed acts or statutes providing for liens, if any, that are not to be discharged], and terminates any other interest subordinate thereto. The transferee takes free of all such rights and interests even though the secured party fails to comply with the

requirements of this Part or of any judicial proceedings:

(1) in the case of a public sale, if the transferee (i) has no knowledge of any defects in the sale, (ii) does not buy in collusion with the secured party, other bidders, or the person conducting the sale, and (iii) acts in good faith; or

(2) in any other case, if the transferee acts in good faith.

If the transferee does not take free of such rights and interests pursuant to clause (1) or (2) of this subsection, the transferee takes the collateral subject to the debtor's rights in the collateral and subject to any security interest under which the disposition is made and any security interest, lien, or other interest subordinate thereto. Except as provided to the contrary in this subsection or elsewhere in this Article, the disposition does not discharge any security interest or lien.

(l) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement or the like and who: (i) receives an assignment of a secured obligation from a secured party, or (ii) receives a transfer of collateral from a secured party and agrees to accept the rights and assume the duties of the secured party, or (iii) is subrogated to the rights of a secured party has thereafter the rights and the duties of the secured party. Such a subrogation, assignment, or transfer is not a disposition of collateral under this Article and does not relieve the secured party of its duties under this Article.

Summary of Changes from July 1994 Draft

1. The Drafting Committee did not reach a consensus on whether a secured party is entitled to sell collateral without preparation or processing in all cases or whether preparation or processing is required if it would not be commercially reasonable to omit it. Accordingly, the draft replaces, in brackets, language deleted from the first sentence of subsection (a) and inserts brackets around clause (iv) in subsection (d). Also, as requested by the Drafting Committee, we shall include in the Reporters' Explanatory Notes to be submitted to NCCUSL an explanation of the proper role that the price received for collateral in a disposition plays in the determination of commercial reasonableness.

2. To reflect the lack of consensus in the Drafting Committee, the draft replaces, in subsection (e), the previously deleted requirement that enforcing secured parties notify other secured parties of record (i.e., conduct searches) and the corresponding safe harbor for secured parties who search but fail to get complete search reports in a timely fashion. A new definition of "notification date" at the beginning of subsection (e) makes the provision somewhat more readable.

3. Subsection (f) conditions the effectiveness of a waiver by a consumer debtor or consumer obligor on the secured party's proof "by clear and convincing evidence that the signer understood and expressly agreed to its terms." Similar provisions are contained in other sections of Part 5. At the last Drafting Committee meeting we were asked to consider whether it would be advisable to include in the statute a safe-harbor form that would constitute clear and convincing evidence. In part because the issue involves the surrounding circumstances as well as the content of a writing, we are inclined not to include a form in the statute.

4. Under this draft, a buyer of collateral may become a "debtor." If so, should the original debtor (who created the security interest but no longer has an interest in it) be entitled to notification of an intended disposition? The bracketed language in the first sentence of subsection (e) raises this issue. Whatever conclusion the Drafting Committee reaches should also be reflected in subsection (f).

5. Subsection (g) has been revised to provide a 21-day safe harbor for timeliness of a notification in the case of consumer [secured] transactions, while retaining the 10-day rule for other transactions. As explained in the Explanatory Notes to the July 1994 Draft, the safe harbor works only if the manner of giving notice is reasonable. Should this be made explicit in the statute? Should the safe harbor be revised to protect notices actually received, say, 5 (non-consumer) or 15 (consumer) days, before the disposition.

6. The safe harbor form of notification of disposition in subsection (h) has been entirely rewritten. A new subsection (i)

provides special notification requirements for consumer [secured] transactions and a special safe harbor form of notification in "plain English."

7. The draft contains a new subsection (j), which requires a secured party to notify consumer debtors and consumer obligors of the method of calculating a surplus or deficiency. The notice must be given when the secured party accounts to a debtor for a surplus or first demands payment of a deficiency or brings an action to collect a deficiency. The phrase, "or begins an action to collect the deficiency" is bracketed because the concept may be included within the phrase, "makes demand . . . for payment."

SECTION 9-504A. ADJUSTMENT AND LIMITATION OF DEFICIENCY CLAIMS IN CONSUMER [SECURED] TRANSACTIONS.

(a) For purposes of this section "related person" means [to come].

(b) Except as otherwise provided in subsection (c), if (i) a secured party in a consumer [secured] transaction disposes of collateral [consisting of consumer goods] under Section 9-504 to a purchaser who is a related person (the "initial disposition"), (ii) during the XX-day period following the initial disposition the purchaser or another related person first disposes of the collateral to a purchaser that is not a related person (the "subsequent disposition"), and (iii) the amount of the cash proceeds from the subsequent disposition less the reasonable expenses of preparing for disposition and disposing (the "subsequent net cash proceeds") exceeds the amount of the cash proceeds from the initial disposition less the expenses and attorneys' fees of the initial disposition described in Section 9-504(b)(1)(i) (the "initial net cash proceeds") by an amount in excess (the "net excess") of XX percent (XX%) of the initial net cash proceeds, then the amount of a surplus or deficiency under Section 9-504(b)(3) shall be adjusted by

crediting to the obligation secured an amount equal to the net excess.

(c) Subsection (b) does not apply if (i) the initial disposition was conducted by an independent agent or contractor and (ii) the secured party did not know before the initial disposition that a related party would be the purchaser or a prospective purchaser.

(d) If, after default, (i) a secured party in a consumer [secured] transaction takes possession of collateral consisting of consumer goods and (ii) the amount owing on the obligation secured by the collateral does not exceed $XX at the time of default, neither a debtor nor a consumer obligor is liable to the secured party for the unpaid balance of the obligation secured.

Summary of Changes from July 1994 Draft

1. This section is new. It addresses the situation in which a secured party buys at its own sale (or sells to a related person) and subsequently the secured party (or related person) sells the collateral for a substantial profit. Under subsection (b), in a consumer [secured] transaction a secured party that buys collateral or sells collateral to a "related person" (to be defined if this section remains) in a § 9-504 disposition must give the debtor or obligor a credit if the secured party (or related person) then resells the collateral within a specified number (to be determined) of days. The rule applies only if the net subsequent resale price exceeds the net initial sale price by at least a specified percentage (to be determined). The credit is in the amount of the excess.

2. Subsection (c) relieves the secured party from the operation of subsection (b) when the initial purchase is fortuitous and not controlled by the secured party.

3. Subsection (d) provides for the elimination of any deficiency claim when a secured party takes possession of consumer goods and the debt at the time of default does not exceed an amount to be specified. We contemplate that this would be a fairly small amount.

SECTION 9-505. ~~COMPULSORY DISPOSITION OF COLLATERAL;~~ ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION ~~AS DISCHARGE~~ OF OBLIGATION; COMPULSORY DISPOSITION OF COLLATERAL.

(a) In this Section, "proposal" means a written statement by a secured party containing the terms on ~~under~~ which the secured party is willing to accept collateral in full or partial satisfaction of the obligation it secures.

(b) A secured party may accept collateral in full or partial satisfaction of the obligation it secures only if:

(1) the debtor consents to the acceptance ~~pursuant to~~ under subsection (c);

(2) the secured party does not receive, within the time set forth in subsection (e), a written notification of objection to the proposal from a person to whom the secured party was required to send notification under subsection (f) or from any other person holding an interest in the collateral subordinate to the security interest that is the subject of the proposal; and

(3) in the case of [collateral that is consumer goods] [a consumer [secured] transaction in which collateral is of a type in which a security interest can be perfected by possession under Section 9-305], the collateral is in the possession of the secured party at the time the debtor consents to the acceptance.

A purported or apparent acceptance of collateral under this Section is ineffective unless the secured party consents to the acceptance in a signed writing or sends [written notification of] a proposal to the debtor and the conditions of this subsection ~~paragraph (b)~~ are met.

(c) For purposes of this Section ~~subsection (b)(1)~~:

(1) the debtor consents to an acceptance of collateral in partial satisfaction of the obligation it secures only if the debtor agrees thereto in a signed writing after default; and

(2) the debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if:

(i) the debtor agrees thereto in a writing signed ~~writing~~ after default; or

(ii) (x) the secured party sends to the debtor after default [written notification of] a proposal that is unconditional or subject only to a condition that collateral not in the possession of the secured party be preserved or maintained ~~written notification of a[n irrevocable] [unconditional] proposal to the debtor after default~~;

(y) in the proposal, the secured party proposes to accept collateral in full satisfaction of the obligation it secures; and

(z) the secured party does not receive a written notification of objection from the debtor within 21 ~~twenty-one~~ days after the notification of the proposal is sent.

~~(d) In the case of [consumer goods], a writing signed by the debtor is ineffective as the debtor's agreement under subsection (c)(1) or (c)(2)(i) unless the secured party proves by clear and convincing evidence that the debtor understood and expressly agreed to its terms.~~

(d~~e~~) To be effective under subsection (b)(2), a notification of

objection must be received by the secured party:

(1) in the case of a person to whom notification of the proposal has been sent pursuant to subsection (f), within 21 ~~twenty-one~~ days after notification is sent to that person; and

(2) in other cases, within 21 ~~twenty-one~~ days after the last notification is sent pursuant to subsection (e~~f~~) or, if ~~no such~~ a notification is not sent, before the debtor consents to the acceptance under subsection (c).

(e~~f~~) Except in the case of [collateral that is consumer goods] [a consumer [secured] transaction], a secured party who wishes to accept collateral in full or partial satisfaction of the obligation it secures shall send written notification of its proposal to:

(1) any person from whom the secured party has received, before the debtor consented to the acceptance, written notification of a claim of an interest in the collateral;

(2) any other secured party or lien holder who, [20] days before the debtor consented to the acceptance, held a security interest in or lien on the collateral perfected [or evidenced] by the filing of a financing statement that (i) identified the collateral, (ii) was indexed under the debtor's name as of that date, and (iii) was filed in the proper office or offices in which to file a financing statement against the debtor covering the collateral as of that date (Sections 9-103 and 9-401); and

(3) to any other secured party [or lien holder] who, [20] days before the debtor consented to the acceptance, held a security interest in [or lien on] the collateral perfected [or evidenced] by

compliance with a statute or treaty described in Section 9-302(3). In addition to sending notification to the persons specified in the preceding sentence, in all cases a secured party who wishes to accept collateral in partial satisfaction of the obligation it secures shall send written notification of its proposal to any affected obligor ~~who has a right of recourse against the debtor with respect to the obligation secured by the collateral~~.

(f~~g~~) A secured party's acceptance of collateral in full or partial satisfaction of the obligation it secures:

(1) discharges the obligation to the extent consented to by the debtor;

(2) transfers to the secured party all of the debtor's rights in the collateral;

(3) discharges the security interest that is the subject of the debtor's consent and any subordinate security interest or lien ~~subordinate thereto~~; and

(4) terminates any other subordinate interest ~~subordinate thereto~~.

A subordinate interest is discharged or terminated regardless of whether the secured party is required to send, or does send, notification to the holder thereof; however, any person to whom the secured party was required to send, but did not send, notification has the remedy provided by ~~subsection (b) of~~ Section 9-507(b).

(g~~h~~) A consumer obligor may waive the right to notification or the right to object to a proposal only by signing a statement to that effect after default. ~~Any such signed statement is ineffective~~

~~as a waiver unless the secured party proves by clear and convincing evidence that the signer understood and expressly agreed to its terms.~~

(h~~t~~) If the debtor has paid ~~[~~sixty~~]~~ 60 ~~per cent~~ percent of the ~~[~~cash price~~]~~ ~~[~~obligation secured~~]~~ in the case of a ~~[~~purchase money~~]~~ security interest in consumer goods ~~[~~for ~~[~~sixty~~]~~ 60 percent ~~per cent~~ of the principal amount of the obligation secured ~~loan~~ in the case of another security interest in consumer goods~~]~~, and has not consented to an acceptance, a secured party who has taken possession of collateral must dispose of the collateral under Section 9-504 within ~~[~~ninety~~]~~ 90 days after taking possession or within any extended period to which the debtor has agreed by signing a statement to that effect after default. ~~Any such signed statement by the debtor is ineffective to extend the [ninety]-day period unless the secured party proves by clear and convincing evidence that the signer understood and expressly agreed to its terms.~~

(i) For purposes of this Section:

(1) "standardized collateral" means goods, including certain motor vehicles and boats, that are manufactured and sold as a standardized model, if

(i) the retail cash price of the goods, when new, exceeded $XX, and

(ii) the goods are the subject of a qualified report;

(2) a "qualified report" means one of a series of published reports of retail values and trade-in values (or wholesale values) for a type of used goods, if the reports

(i) are based on data for actual retail sales prices and trade-in credits (or wholesale prices),

(ii) are widely circulated and commonly relied upon in established wholesale and retail markets, and

(iii) are published not less frequently than [quarterly] [monthly]; and

(3) the "minimum collateral value" of an item of standardized collateral is an amount equal to one-half the sum of (x) an amount equal to the trade-in value (or wholesale price) for the item as reported in the most recent qualified report (or the average trade-value (or wholesale price), if more than one trade-in value (or wholesale price) is reported) and (y) an amount equal to the retail value for the item as reported in the most recent qualified report (or the average retail value, if more than one retail value is reported).

[(j) In a consumer [secured] transaction a secured party may accept collateral other than standardized collateral only in full satisfaction, and not in partial satisfaction, of the obligation is secures.]

[(k) A secured party in a consumer [secured] transaction may accept standardized collateral in partial satisfaction of the obligation it secures only if:

(1) the amount of the obligation that is satisfied equals or exceeds the minimum collateral value of the standardized collateral; or

(2) the amount of the obligation that is satisfied is less

than the minimum collateral value of the standardized collateral and the debtor and any affected obligor agree in good faith [and in writing] that the value of the collateral has been materially reduced by damage, neglect, or unreasonable care or use.]

(l) In the case of [collateral that is consumer goods] [a consumer [secured] transaction], a writing signed by the debtor or a consumer obligor is ineffective as the agreement of the debtor or consumer obligor under subsection (c)(1), (c)(2)(i), (e) (g), (h), or (k)(2) unless the secured party proves by clear and convincing evidence that the debtor or consumer obligor understood and expressly agreed to its terms.

Summary of Changes from July 1994 Draft

1. Most references to "consumer goods" have been supplemented with a bracketed, alternative reference to a "consumer [secured] transaction." Limitations of the operation of certain provisions to consumer goods may be unnecessary.

2. Several consumer protection advocates on the Task Force have expressed concern about partial strict foreclosures in consumer transactions. To highlight this issue, new subsection (j) of the draft adds a prohibition of partial strict foreclosure in consumer [secured] transactions. New subsection (k) contains an exception, under which partial strict foreclosure may be available for standardized collateral (such as cars) covered by qualified reports (such as "bluebooks"). (The new rule was inspired in part by a Connecticut statute, Conn. Gen. Stat. § 42-98(f) (see Tab 7 of the Consumer Issues Notebook).) Subsection (k)(1) permits partial strict foreclosure for standardized collateral only if the debt satisfied thereby is not less than the average of the retail and wholesale values as reported in the qualified report. Subsection (k)(2) permits partial strict foreclosure when the parties agree that the collateral is worth less because of damage, misuse, or the like.

3. The special requirements regarding the effectiveness of a consumer debtor or obligor's agreement have been consolidated in subsection (l). The Drafting Committee may wish to consider whether a single provision governing all such agreements in Part 5 (i.e., those in this section as well as in §§ 9-504 and 9-506) would be appropriate. Because the issue of effectiveness would arise in

litigation, § 9-507 might be the appropriate location for such a provision.

4. The time when a debtor consents to a strict foreclosure is significant in several circumstances under § 9-505. See subsections (b)(1), (b)(3), (c)(1), (d)(2), (e)(1), (2), and (3). We propose to point out in the Explanatory Notes that the official comments should explain that, for purposes of determining the time of consent under this section, a debtor's conditional consent constitutes consent.

SECTION 9-506. DEBTOR'S RIGHT TO REDEEM COLLATERAL; REINSTATEMENT OF OBLIGATION SECURED WITHOUT ACCELERATION.

(a) At any time before the secured party has collected collateral under Section 9-502, disposed of collateral or entered into a contract for its disposition under Section 9-504, or accepted collateral in full or partial satisfaction of the obligation it secures under Section 9-505, the debtor, any affected obligor ~~who has a right of recourse against the debtor with respect to the obligation secured by the collateral~~, any other secured party or lien holder, or any other person having an interest in the collateral may redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the reasonable expenses and attorneys' fees of the type described in Section 9-504(b)(1)(i) ~~incurred by the secured party in collecting the collateral, in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party~~.

(b) This subsection applies to a consumer [secured] transaction.

(1) A debtor that has a property interest, other than a

security interest, in the collateral or an affected obligor that is a consumer obligor may cure a default consisting only of the failure to make a required payment and may reinstate the secured obligation without acceleration by tendering

(i) the unpaid amount of the secured obligation due at the time of tender, without acceleration, including delinquency, default, or deferral charges, and reasonable expenses and attorneys' fees of the type described in Section 9-504(b)(1)(i), and

(ii) a performance deposit in the amount of (i) XX regularly scheduled instalment payments (or minimum payments, if there are no regularly scheduled instalment payments), or (ii) XX percent of the total unpaid secured obligation, whichever is less.

(2) Tender of payment under paragraph (1) is ineffective to cure a default or reinstate the secured obligation unless made

(i) within 21 days after the secured party sends a notification of disposition under Section 9-504(e) to the debtor and any consumer obligor that is an affected obligor, or

(ii) before the secured party has disposed of collateral or entered into a contract for its disposition under Section 9-504 or accepted collateral in full or partial satisfaction of the obligation it secures under Section 9-505,

whichever is later.

(3) Tender of payment under subsection (1) restores to the debtor and a consumer obligor that is an affected obligor their respective rights as if the default had not occurred and all payments had been made when scheduled, including the debtor's right,

if any, to possess the collateral. Promptly upon the tender, the secured party shall take all steps necessary to cause any judicial process affecting the collateral to be vacated and any pending action based on the default to be dismissed.

(4) A secured obligation may be reinstated under subsection (1) only once during any XX-month period.

(c~~b~~) A debtor that ~~who~~ has a property interest, other than a security interest, in the collateral or a consumer obligor may waive the right to redeem the collateral (subsection ~~paragraph~~ (a)) or reinstate a secured obligation (subsection (b)) only by signing a statement to that effect after default. In the case of [collateral that is ~~f~~consumer goods] [a consumer [secured] transaction], ~~any such~~ a signed statement is ineffective as a waiver unless the secured party proves by clear and convincing evidence that the signer understood and expressly agreed to its terms.

Summary of Changes from July 1994 Draft

New subsection (b) of the draft provides a right of reinstatement for consumer debtors and consumer obligors. The provision derives from several sources, including the Wisconsin Consumer Act (Wis. Stat. § 425.208) and UCCC § 5.111. Under subsection (b) the debtor could reinstate the debt and cure a payment default (but not other defaults) by tendering all past due amounts (including late charges) without acceleration plus a performance deposit in the amount of the lesser of XX scheduled payments or XX percent of the secured obligation. (We borrowed the performance deposit idea from Wisconsin.) The tender must be made within 21 days following a notice of disposition or before disposition (or contract for disposition) or retention under § 9-505, whichever is later. A debtor or obligor may use this reinstatement right only one time during a specific period (to be determined).

SECTION 9-507. SECURED PARTY'S FAILURE TO COMPLY WITH THIS PART.

(a) If it is established that a ~~the~~ secured party is not

proceeding in accordance with the provisions of this Part, collection, enforcement, or disposition of collateral may be ordered or restrained on appropriate terms and conditions.

(b) A ~~The~~ secured party is liable for damages in the amount of any loss caused by a failure to comply with ~~the provisions of~~ this Part. A ~~The~~ debtor, any affected obligor ~~who has a right of recourse against the debtor with respect to the obligation secured by the collateral~~, or any person who, at the time of the failure, held an interest in the collateral has a right to recover damages for its loss under this subsection. A ~~; however, a~~ debtor whose deficiency is eliminated pursuant to subsection (c)(3) may recover damages for the loss of any surplus, but a debtor or consumer obligor whose deficiency is eliminated or reduced pursuant to subsection (c)(3) ~~(2)(i) or (ii)~~ may not otherwise recover ~~damages~~ under this subsection [for noncompliance with Section 9-502, 9-504, or 9-505].

(c) (1) This subsection applies to actions in which the amount of a deficiency or surplus is in issue.

(2~~1~~) The secured party need not establish compliance with ~~the provisions of~~ this Part unless the debtor or obligor places the secured party's compliance in issue, in which case the secured party has the burden of establishing that the collection, enforcement, or disposition was conducted in accordance with the provisions of this Part.

(3~~2~~) ~~When the~~ If a secured party fails to meet the burden of establishing that the collection, enforcement, or disposition was

conducted in accordance with ~~the provisions of~~ this Part:

(i) in the case of a consumer [secured] transaction ~~[INSERT--see Attachment]~~, [for which no other collateral remains to secure the obligation,] neither a ~~the~~ debtor nor any consumer obligor who is an affected obligor is liable for a deficiency; and

(ii) in other cases, a ~~the~~ debtor's or obligor's liability for a deficiency is limited to any amount by which the sum of the secured obligation, expenses, and attorneys' fees~~, and secured obligation~~ (~~subsections (b)(i) and (ii) of~~ Section 9-504(b)(1) and (2)) exceeds the greater of (x) the actual proceeds of the collection, enforcement or disposition and (y) the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with ~~the provisions of~~ this Part; however, the amount referred to in clause (y) is ~~presumed to be~~ equal to the sum of the secured obligation, expenses, and attorneys' fees~~, and secured obligation~~ (~~subsections (b)(i) and (ii) of~~ Section 9-504(b)(1) and (2))~~,~~ unless the secured party meets the burden of establishing that the amount referred to in clause (y) is less than that sum[, and, in the case of a consumer [secured] transaction ~~[INSERT--see Attachment]~~, any liability is not a personal liability of a ~~the~~ debtor or obligor but can be satisfied only by enforcing a security interest or other consensual lien against property securing the obligation].

~~[~~(d~~bb~~) (1) This subsection applies only in the case of a consumer [secured] transaction ~~[INSERT--see Attachment]~~.

(2) A ~~The~~ debtor that has a property interest, other than

a security interest, has a right to recover from a secured party who fails to comply with ~~the provisions of~~ this Part an amount equal to [the credit service charge plus ~~ten per cent~~ 10 percent of the principal amount of the debt or the time price differential plus 10 percent ~~per cent~~ of the cash price] less the sum of (i) any amount by which the debtor's [personal] liability for a deficiency is eliminated or reduced under subsection (c) and (ii) any amount for which the secured party is liable under subsection (b). ~~amount of any damages recoverable under subsection (b). The recovery of a debtor whose deficiency is eliminated or reduced pursuant to subsection (c)(2)(i) or (ii) shall be limited to the amount by which the amount otherwise recoverable under this paragraph exceeds the amount of the personal liability that is eliminated or reduced under subsection (c)(2)(i) or (ii).~~

~~(3) The secured party has the burden of establishing the amount of any limitation on the debtor's recovery under subsection (2).]~~

(e~~d~~) The fact that a greater amount could have been obtained by a collection, enforcement, or disposition at a different time or in a different method from that selected by the secured party is not of itself sufficient to preclude the secured party from establishing that the collection, enforcement, or disposition was made in a commercially reasonable manner.

(f~~e~~) A disposition of collateral is made in a commercially reasonable manner if the disposition is made:

(1) in the usual manner on ~~in~~ any recognized market

therefor,

(2) at the price current in any such market at the time of the disposition, or

(3) otherwise in conformity with reasonable commercial practices among dealers in the type of property that was the subject of the disposition.

(gf) A collection, enforcement or disposition that has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors is commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

(hg) In the case of a consumer [secured] transaction [INSERT--see attachment], if the secured party's compliance with this Part is placed in issue in an action, the court shall award to a the prevailing consumer debtor or consumer obligor party on that issue the costs of the action and reasonable attorneys' fees to the attorneys for that party their reasonable fees. [In determining the attorneys' fees, the amount of the recovery on behalf of the prevailing party is not a controlling factor.]

Summary of Changes from July 1994 Draft

1. The draft now makes clear in subsection (b) what we had intended in the July 1994 Draft--that a debtor whose deficiency is reduced or eliminated can pursue a claim for a surplus.

2. Past discussions about the relationship between the "absolute bar" and "rebuttable presumption" rules of subsection (c) and the general right to recover for loss have focused on noncompliance that results in an unnecessarily low realization from collection, enforcement, or disposition of the collateral. Arguably, other kinds of noncompliance, such as a repossession that

breaches the peace or is not authorized by § 9-503 or by agreement, should not be affected by the rules of subsection (c). The new bracketed language at the end of subsection (b) raises the question whether a reduction in the amount of a deficiency should be credited against loss that is unrelated to the amount realized. A related question that the Drafting Committee may wish to consider is whether there are some types of noncompliance (e.g., wrongful repossession) that should not affect the deficiency.

3. In accordance with the Drafting Committee's discussions, the draft changes the "rebuttable presumption" rule (subsection (c)(3)(ii)) from one under which the secured party may rebut the presumption by meeting the burden of going forward to one under the secured party may rebut only by meeting the burden of persuasion.

4. The draft places square brackets in subsection (c)(3)(i) and (ii) to note the question whether a noncomplying secured party in a consumer [secured] transaction should, nevertheless, retain the right to pursue remaining collateral on a nonrecourse basis.

5. Subsection (d) (formerly, (bb)) has been revised to clarify the relationship among the statutory minimum recovery (subsection (d)), the general damage rules (subsection (b)), and the deficiency rules (subsection (c))). It now provides that the amount by which the deficiency is reduced or eliminated under subsection (c) and the amount of any other damages recoverable under subsection (b) (e.g., any surplus to which the debtor would have been entitled had the secured party complied with Part 5) are both to be credited against the minimum recovery.

6. Subsection (h) provides that a prevailing consumer in an action is entitled to attorneys' fees. It leaves a secured party's attorney's fees to agreement and other law.

APPENDIX

EXCERPT FROM
UNIFORM CONSUMER CREDIT CODE (1974)

SECTION 5.108. [Unconscionability; Inducement by Unconscionable Conduct; Unconscionable Debt Collection]

(1) With respect to a transaction that is, gives rise to, or leads the debtor to believe will give rise to, a consumer credit transaction, if the court as a matter of law finds:

(a) the agreement or transaction to have been unconscionable at the time it was made, or to have been induced by unconscionable conduct, the court may refuse to enforce the agreement; or

(b) any term or part of the agreement or transaction to have been unconscionable at the time it was made, the court may refuse to enforce the agreement, enforce the remainder of the agreement without the unconscionable term or part, or so limit the application of any unconscionable term or part as to avoid any unconscionable result.

(2) With respect to a consumer credit transaction, if the court as a matter of law finds that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt arising from that transaction, the court may grant an injunction and award the consumer any actual damages he has sustained.

(3) If it is claimed or appears to the court that the agreement or transaction or any term or part thereof may be

unconscionable, or that a person has engaged in, is engaging in, or is likely to engage in unconscionable conduct in collecting a debt, the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the agreement or transaction or term or part thereof, or of the conduct, to aid the court in making the determination.

(4) In applying subsection (1), consideration shall be given to each of the following factors, among others, as applicable:

(a) belief by the seller, lessor, or lender at the time a transaction is entered into that there is no reasonable probability of payment in full of the obligation by the consumer or debtor;

(b) in the case of a consumer credit sale or consumer lease, knowledge by the seller or lessor at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

(c) in the case of a consumer credit sale or consumer lease, gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in credit transactions by like consumers;

(d) the fact that the creditor contracted for or received separate charges for insurance with respect to a consumer credit sale or consumer loan with the effect of making the sale or loan, considered as a whole, unconscionable; and

(e) the fact that the seller, lessor, or lender has knowingly taken advantage of the inability of the consumer or debtor reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy, inability to understand the language of the agreement, or similar factors.

(5) In applying subsection (2), consideration shall be given to each of the following factors, among others, as applicable:

(a) using or threatening to use force, violence, or criminal prosecution against the consumer or members of his family;

(b) communicating with the consumer or a member of his family at frequent intervals or at unusual hours or under other circumstances so that it is a reasonable inference that the primary purpose of the communication was to harass the consumer;

(c) using fraudulent, deceptive, or misleading representations such as a communication which simulates legal process or which gives the appearance of being authorized, issued, or approved by a government, governmental agency, or attorney at law when it is not, or threatening or attempting to enforce a right with knowledge or reason to know that the right does not exist;

(d) causing or threatening to cause injury to the consumer's reputation or economic status by disclosing information affecting the consumer's reputation for credit-worthiness with knowledge or reason to know that the information is false; communicating with the consumer's employer before obtaining a

final judgment against the consumer, except as permitted by statute or to verify the consumer's employment; disclosing to a person, with knowledge or reason to know that the person does not have a legitimate business need for the information, or in any way prohibited by statute, information affecting the consumer's credit or other reputation; or disclosing information concerning the existence of a debt known to be disputed by the consumer without disclosing that fact; and

(e) engaging in conduct with knowledge that like conduct has been restrained or enjoined by a court in a civil action by the Administrator against any person pursuant to the provisions on injunctions against fraudulent or unconscionable agreements or conduct (Section 6.111).

(6) If in an action in which unconscionability is claimed the court finds unconscionability pursuant to subsection (1) or (2), the court shall award reasonable fees to the attorney for the consumer or debtor. If the court does not find unconscionability and the consumer or debtor claiming unconscionability has brought or maintained an action he knew to be groundless, the court shall award reasonable fees to the attorney for the party against whom the claim is made. In determining attorney's fees, the amount of the recovery on behalf of the consumer is not controlling.

(7) The remedies of this section are in addition to remedies otherwise available for the same conduct under law other than this Act, but double recovery of actual damages may not be had.

(8) For the purpose of this section, a charge or practice expressly permitted by this Act is not in itself unconscionable.

COMMENT

1. Subsections (1) and (3) are derived in significant part from UCC Section 2-302. Subsection (1), as does UCC Section 2-302, provides that a court can refuse to enforce or can adjust an agreement or part of an agreement that was unconscionable on its face at the time it was made. However, many agreements are not in and of themselves unconscionable according to their terms, but they would never have been entered into by a consumer if unconscionable means had not been employed to induce the consumer to agree to the contract. It would be a frustration of the policy against unconscionable contracts for a creditor to be able to utilize unconscionable acts or practices to obtain an agreement. Consequently subsection (1) also gives to the court the power to refuse to enforce an agreement if it finds as a matter of law that it was induced by unconscionable conduct. Finally, subsection (1) includes provisions for court determination of unconscionability in a transaction that a consumer is led to believe will give rise to a consumer credit transaction so that, for example, a seller cannot bind the consumer to a short term sale contract payable in a lump sum on the assurance the seller will secure financing for the consumer, and then inform the consumer financing is unavailable and keep the downpayment or goods traded in as a penalty for non-payment.

In subsection (3) the omission of the adjective "commercial" found in UCC Section 2-302 from the provision concerning the presentation of evidence as to the conduct's or contract's "setting, purpose, and effect" is deliberate. Unlike the UCC, this section is concerned only with transactions involving consumers, and the relevant standard of conduct for purposes of this section is not that which might be acceptable as between knowledgeable merchants but rather that which measures acceptable conduct on the part of a businessman toward a consumer.

2. Subsection (2) provides a consumer remedy for unconscionable conduct in the collection of consumer credit debts. In recent years, there has been much legislative activity in this area. In subjecting this type of creditor conduct to the concept of unconscionability, this section provides a more flexible device for halting multifarious activities than the specific and somewhat rigid treatment contained in other legislation, and follows the lead of Section 6.111 of this Act which affords the Administrator the means to deal with this type of practice. Indeed this section considered as a whole confers on the consumer the ability to obtain relief in basically the same situations the Administrator is authorized to seek relief under Section 6.111, although not necessarily under the same conditions, e.g., no course of conduct

is required. The section is not exclusive, however; subsection (7) stipulates that the remedies of this section are in addition to remedies otherwise available for the same conduct under law other than this Act so as to preserve, for example, the developing remedy for abusive debt collection in tort.

3. This section is intended to make it possible for the courts to police conduct which is, and contracts or clauses which are found to be unconscionable. The basic test is whether, in the light of the background and setting of the market, the needs of the particular trade or case, and the condition of the particular parties to the conduct or contract, the conduct involved is, or the contract or clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time the conduct occurs or is threatened or at the time of the making of the contract. The principle is one of the prevention of oppression and unfair surprise and not the disturbance of reasonable allocation of risks or reasonable advantage because of superior bargaining power or position. The particular facts involved in each case are of utmost importance since certain conduct, contracts or contractual provisions may be unconscionable in some situations but not in others. The following cases illustrate prior application of the doctrine of unconscionability: Williams v. Walker-Thomas Furn. Co., 350 F.2d 445, 121 U.S.App.D.C. 315 (1965); American Home Improvement, Inc. v. MacIver, 105 N.H. 435, 201 A.2d 886 (1964); Ellsworth Dobbs, Inc. v. Johnson, 50 N.J. 528, 236 A.2d 843 (1967); Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Frostifresh Corp. v. Reynoso, 54 Misc.2d 119, 281 N.Y.S.2d 964 (Sup.Ct., App.Term, 2d Dept.1967), rev'g in part 52 Misc.2d 26, 274 N.Y.S.2d 757 (Nassau Co.1966).

4. Subsections (4) and (5) list a number of specific factors to be considered on the issue of unconscionability. It is impossible to anticipate all of the factors and considerations which may support a conclusion of unconscionability in a given instance so the listing is not exclusive. The following are illustrative of individual transactions which would entitle a consumer to relief under this section:

Under subsection (4)(a), a sale of goods to a low income consumer without expectation of payment but with the expectation of repossessing the goods sold and reselling them at a profit;

Under subsection (4)(b), a sale to a Spanish speaking laborer-bachelor of an English language encyclopedia set, or the sale of two expensive vacuum cleaners to two poor families sharing the same apartment and one rug;

Under subsection (4)(c), a home solicitation sale of a set of cookware or flatware to a housewife for $375 in an area where a

set of comparable quality is readily available on credit in stores for $125 or less;

Under subsection (4)(e), a sale of goods on terms known by the seller to be disadvantageous to the consumer where the written agreement is in English, the consumer is literate only in Spanish, the transaction was negotiated orally in Spanish by the seller's salesman, and the written agreement was neither translated nor explained to the consumer, but the mere fact a consumer has little education and cannot read or write and must sign with an "X" is not itself determinative of unconscionability;

Under subsection (5)(a) and (c), threatening that the creditor will have the consumer thrown in jail and her welfare checks stopped if the debt is not paid.

5. Since the remedies of this section are non-monetary in nature except for the ability to recover actual damages for unconscionable debt collection, subsection (6) authorizes an award of reasonable attorneys fees to the successful consumer or debtor. However, to discourage litigation seeking exculpation from merely bad bargains, provision is also made for recovery by a creditor if the court does not find unconscionability and the consumer's or debtor's action was known by the consumer or debtor to be groundless.

6. Subsection (8) prohibits a finding that a charge or practice expressly permitted by this Act is in itself unconscionable. However, even though a practice or charge is authorized by this Act, the totality of a particular creditor's conduct may show that the practice or charge is part of unconscionable conduct. Therefore, in determining unconscionability, the creditor's total conduct, including that part of his conduct which is in accordance with the provisions of this Act, may be considered.