

UNIFORM COMMERCIAL CODE
REVISED ARTICLE 9
SECURED TRANSACTIONS; SALES OF
ACCOUNTS AND CHATTEL PAPER

[PROPOSED REVISED TITLE:

UNIFORM COMMERCIAL CODE
REVISED ARTICLE 9
SECURED TRANSACTIONS; SALES OF ACCOUNTS, CHATTEL PAPER,
AND PAYMENT INTANGIBLES; CONSIGNMENTS]

FEBRUARY, 1997

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**Reporters' Prefatory Comments
February, 1997, Draft**

We have prepared this draft for discussion at the meeting of the Drafting Committee to Revise Uniform Commercial Code Article 9, Washington, D.C., March 7-9. It has been marked to show changes from the previous draft, which appeared as the October, 1996, Draft and also as the American Law Institute's Council Draft No. 2 (November 15, 1996). The Reporters' comments in this draft generally are limited to explanations of changes that this draft makes to the previous draft and substantive observations that were not included in the earlier comments.

The following table lists the sections of the 1996 NCCUSL Annual Meeting Draft and the corresponding sections and subsections of this draft. Note that the organization of the 1996 Annual Meeting Draft substantially followed that of the Official Text of Article 9.

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PART 1

GENERAL PROVISIONS

[SUBPART 1. SHORT TITLE]

SECTION 9-101. SHORT TITLE. [MINOR STYLE CHANGES ONLY]

This article may be cited as Uniform Commercial Code-Secured Transactions.

[SUBPART 2. DEFINITIONS AND CONCEPTS]

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

[former draft § 9-105]

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

(1) "Account debtor" means the person obligated on an account, chattel paper, or general intangible, but the term does not include a person obligated to pay a negotiable instrument even if the instrument constitutes part of chattel paper.

(2) "Affiliate" of a person means [to come].

(3~~2~~) "Agricultural lien" means a statutory lien an
~~interest in farm products or proceeds of farm products which~~

~~secures payment or performance of an obligation, which is created by statute in favor of a person that in the ordinary course of its business furnishes goods or services to a debtor engaged in a farming operation, and the effectiveness of which does not depend on the person's possession of the farm products or proceeds of farm products. An agricultural lien is not a security interest.~~

(43) "Chattel paper" means a writing or writings that evidence both a monetary obligation and a security interest in or a lease of specific goods. The term does not include a charter or other contract involving the use or hire of a vessel. If a transaction is evidenced both by a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper.

(54) "Collateral" means the property subject to a security interest or a statutory ~~an agricultural~~ lien. The term includes proceeds to which a security interest attaches under Section 9-313, proceeds as to which a statutory ~~an agricultural~~ lien becomes effective, and accounts, chattel paper, and payment intangibles that have been sold.

(6) "Commercial tort claim" means a claim arising in tort if the claim is generally assignable under applicable law and:

(A) the claimant is an organization, or

(B) the claimant is an individual, the claim does not include damages arising out of bodily injury to or death of an individual, and the claim arose in the course of the claimant's business or profession.

(75) "Communicate" means to send a written or other tangible record, transmit a record by any means agreed upon by the persons sending and receiving the record, or in the case of transmission of a record to or by a filing office, transmit a record by any means prescribed by the rules.

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

(97) "Consumer obligor" means an obligor who is an individual and who incurred the obligation as part of a transaction entered into primarily for personal, family, or household purposes.

(108) "Consumer secured transaction" means a transaction in which an obligation is incurred primarily for personal, family, or household purposes, a security interest secures the obligation, and the collateral is used or held by the debtor for personal, family, or household purposes [, if

(A) 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];

(B) 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

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

The term does not include a transaction to the extent that the collateral is a security entitlement and the secured party has control under Section 8-106(e) or the collateral is a commodity contract and the secured party has control under the second sentence of Section 9-108(b).

(~~119~~) "Debtor" means:

(A) a person that has a property interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) the seller of accounts, chattel paper, or payment intangibles; or

(C) a consignee.

(~~1210~~) "Deposit account" means a demand, time, savings, passbook, or like account maintained with a depository institution. The term does not include investment property or an account evidenced by an instrument.

(~~1311~~) "Depository institution" means an organization that [is engaged in the business of banking] [and that] [accepts deposits in the ordinary course of its business]. The term includes a bank, savings bank, savings and loan association, credit union, and trust company.

(~~1412~~) "Document" means a document of title or a receipt of the kind described in Section 7-201(2).

(~~1513~~) "Encumbrance" includes a real estate mortgage, other lien on real estate, and any other right in real estate which is not an ownership interest.

(~~1614~~) "Filing office" means an office designated in Section 9-501 as the place to file a financing statement. [The term includes the filing officer and other personnel of the office.]

(~~1715~~) "Financing statement" means an initial financing statement and any record on file relating to the initial financing statement.

(~~1816~~) "Fixture filing" means a filing, in the office where a mortgage on the real estate would be filed or recorded, of a financing statement covering goods that are or are to become fixtures and conforming to the requirements of Section 9-502(a).

(~~1917~~) "Fixtures" means goods that have become so related to particular real estate that an interest in them arises under real estate law.

(~~2018~~) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(~~2119~~) "Goods" includes all things that are movable when a security interest attaches, fixtures, standing timber that is to be cut and removed under a conveyance or contract for sale, the unborn young of animals, and crops grown, growing, or to be grown, including crops produced on trees, vines, and bushes. The term does not include money, documents, instruments, investment property, accounts, chattel paper, general intangibles, deposit accounts, letters of credit, and minerals or the like, including oil and gas, before extraction.

(22) "Governmental entity" means:

(A) the United States, a State, a foreign nation, or

(B) a governmental subdivision, agency, department, commission, board, authority, instrumentality, public benefit corporation, or other governmental unit of the United States, a State, or a foreign nation.

(23~~20~~) "Instrument" means a negotiable instrument (Section 3-104), or any other writing that evidences a right to the payment of money and is not itself a security agreement or lease and is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment. The term does not include investment property or a writing that evidences a right to payment arising out of the use of a credit or charge card [or information contained on or for use with the card].

~~(21) "Jurisdiction of organization" with respect to a registered entity means the jurisdiction under whose law the entity is organized.~~

(24~~22~~) "Mortgage" means a consensual interest created by a real estate mortgage, a trust deed on real estate, or the like.

(25~~23~~) "New debtor" means a person that becomes bound as debtor, under Section 9-203(c), by a security agreement previously entered into by another person.

(26~~24~~) "New value" means money or money's worth in property, services, or new credit, or release by a transferee of

an interest in property previously transferred to the transferee. The term does not include an obligation substituted for another obligation.

(~~2725~~) "Obligor" means a person that owes, has provided property other than the collateral to secure, or is otherwise accountable in whole or in part for payment or other performance of an obligation secured by a security interest in or a statutory ~~an agricultural~~ lien on the collateral.

(~~2826~~) "Original debtor" means a person that, as debtor, entered into a security agreement to which a new debtor has become bound under Section 9-203(c).

(~~2927~~) An advance is made or other value is given "pursuant to commitment" if the secured party is bound to make or give it, whether or not a subsequent event of default or other event not within the secured party's control has relieved or may relieve the secured party from its obligation.

(~~3028~~) "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.

[(~~3129~~) "Registered agent" means a registered agent of a debtor designated under Section 9-525.]

(~~3230~~) "Registered entity" means an organization organized under the law of a State and as to which the State maintains a public record showing the organization to have been organized.

(~~3331~~) "Rule" means a rule adopted by [] pursuant to Section 9-528.

(~~3432~~) "Secondary obligor" means an obligor any portion of whose obligation is secondary.

(~~3533~~) "Secured party" means a person that holds a security interest or a statutory ~~an agricultural~~ lien. The term includes a consignor and a person to whom accounts, chattel paper, or payment intangibles have been sold. If a security interest [or statutory ~~agricultural~~ lien] is created in favor of a trustee, indenture trustee, agent, collateral agent, or other representative, the representative is the secured party.

(36) "Secured party of record" means a person stated to be the secured party or a representative of the secured party in a financing statement that has been filed in the filing office.

(~~3734~~) "Security agreement" means an agreement that creates or provides for a security interest.

(~~3835~~) "Sign" means to identify a record by means of a signature, mark, or other symbol with intent to authenticate it.

(~~3936~~) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(40) "State of organization" with respect to a registered entity means the State under whose law the entity is organized.

(41) "Statutory lien" means an interest in personal property which secures payment or performance of an obligation,

which is created by statute [in favor of a person that in the ordinary course of its business furnishes goods or services,] and the effectiveness of which does not depend on the person's possession of the personal property. A statutory lien is not a security interest.

(~~4237~~) "Support obligation" means a secondary obligation or letter of credit that supports the payment or performance of an account, chattel paper, general intangible, document, [insurance policy,] instrument, or investment property.

(~~4338~~) "Transmitting utility" means a person primarily engaged in the business of operating a railroad, subway, street railway, or trolley bus, transmitting electric or electronic communications, transmitting goods by pipeline or sewer, or transmitting or producing and transmitting electricity, steam, gas, or water.

(~~4439~~) "United States" means the United States of America.

(b) Other definitions applying to this article and the sections in which they appear are:

"Account"	Section 9-103.
"Accounting"	Section 9-209.
"Attach"	Section 9-203.
"Becomes Bound"	Section 9-203.
"Cash proceeds"	Section 9-313.
"Certificate of title"	Section 9-303.
"Commodity account"	Section 9-107.
"Commodity contract"	Section 9-107.

"Commodity customer"	Section 9-107.
"Commodity intermediary"	Section 9-107.
"Construction mortgage"	Section 9-331.
"Consumer goods"	Section 9-106.
"Control" (deposit account)	Section 9-109.
"Control" (investment property)	Section 9-108.
"Control" (letter of credit)	Section 9-110.
"Equipment"	Section 9-106.
"Farm products"	Section 9-106.
"General intangibles"	Section 9-103.
"Inventory"	Section 9-106.
"Inventory-proceeds"	Section 9-322.
"Investment property"	Section 9-107.
"Lien creditor"	Section 9-315.
"Noncash proceeds"	Section 9-313.
"Payment intangible"	Section 9-103.
"Proceeds"	Section 9-313.
"Production money crops"	Section 9-105.
"Production money obligation"	Section 9-105.
"Production money security interest"	Section 9-105.
["Production of crops"	Section 9-105.]
"Purchase money security interest"	Section 9-104.
"Purchase money collateral"	Section 9-104.
"Purchase money obligation"	Section 9-104.
"Request for a list of collateral"	Section 9-209.
"Request for a statement of account"	Section 9-209.
"Request for an accounting"	Section 9-209.

"Transfer Statement"	Section 9-617.
"United States"	Section 9-301.

(c) The following definitions in other articles apply to this article:

"Broker"	Section 8-102.
"Certificated security"	Section 8-102.
"Check"	Section 3-104.
"Clearing corporation"	Section 8-102.
"Consignee"	Section [2-102].
"Consignment"	Section [2-102].
"Consignor"	Section [2-102].
"Contract for sale"	Section 2-106.
"Control"	Section 8-106.
"Customer"	Section 4-104.
"Delivery"	Section 8-301.
"Entitlement holder"	Section 8-102.
"Financial asset"	Section 8-102.
"Holder in due course"	Section 3-302.
"Lease"	Section 2A-103.
"Lease agreement"	Section 2A-103.
"Lease contract"	Section 2A-103.
"Leasehold interest"	Section 2A-103.
"Lessee"	Section 2A-103.
"Lessee in ordinary course of business"	Section 2A-103.
"Lessor"	Section 2A-103.
"Lessor's residual interest"	Section 2A-103.
"Letter of credit"	Section 5-102.

"Note"	Section 3-104.
"Proceeds of a letter of credit"	Section 5-114.
"Sale"	Section 2-106.
"Securities intermediary"	Section 8-102.
"Security"	Section 8-102.
"Security certificate"	Section 8-102.
"Security entitlement"	Section 8-102.
"Uncertificated security"	Section 8-102.

(d) Article 1 contains general definitions and principles of construction and interpretation applicable throughout this article. For purposes of this article, "good faith," as used in Section 1-203, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

Changes from Prior Draft

1. The somewhat limited inclusion of statutory liens within the scope of this draft follows the recommendations made in the Report of the ABA Section of Business Law, Committee on Uniform Commercial Code, Subcommittee on Relation to Other Law (October, 1996). Under the revised definition of "agricultural lien," that term is a subset of the newly defined term, "statutory lien." Most references to the former have been changed to the latter in this draft. However, certain provisions, such as § 9-321, relate only to agricultural liens and not to statutory liens generally. In general, the draft deals with more aspects of agricultural liens than is the case with other statutory liens. For example, it covers priority contests between and among all statutory liens and security interests, but only those contests between and among agricultural liens and other persons, such as lien creditors and buyers. Also, part 6 excludes statutory liens (other than agricultural liens) from its scope. See § 9-601(e). The Drafting Committee should consider whether to retain the bracketed language in the definition of statutory lien, which would limit the definition to liens in favor of persons who furnish goods and services in the ordinary course of business.

2. A definition of "commercial tort claim" has been added. Under revised § 9-113(12), transfers of tort claims other than commercial tort claims are excluded from the article.

3. The definition of "governmental entity" is new. It is used in § 9-113, dealing with excluded transactions, and in part 3, subpart 1, dealing with choice of law. The term "governmental unit," which appears in the definition, is not used there in the same sense as in the Bankruptcy Code.

The definition derives from New York's nonuniform amendment to former § 9-104(e), which excludes from Article 9 the following:

any security interest created or granted by a government, governmental subdivision, agency, department, commission, board, authority, public benefit corporation or other governmental entity to the extent that the creation, validity, enforceability, perfection or priority of such security interest is expressly governed by any other law of this state.

The Drafting Committee may wish to consider whether the list of governmental entities is appropriate. In this connection, the New York statute, as well as the following definition from § 101(27) of the Bankruptcy Code, may be useful:

"governmental unit" means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States (but not a United States trustee while serving as a trustee in a case under this title), a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.

4. The term "jurisdiction of organization" has been changed to "State of organization," inasmuch as the term applies only to entities organized under the law of a "State," as defined.

5. A new definition of "secured party of record" has been added. The "secured party of record" is the person named as a secured party or a representative in a financing statement. This person is entitled to take actions under Part 5 concerning the financing statement. The person may or may not actually be a "secured party," as defined in this section. For example, no security interest may have been created, in which case no person is a secured party, or the person named as the secured party in the financing statement may be a representative, not the actual secured party.

SECTION 9-103. DEFINITIONS: "ACCOUNT"; "GENERAL INTANGIBLES"; "PAYMENT INTANGIBLE." [former draft § 9-106]

(a) "Account" means a right to payment, whether or not earned by performance, for property other than money that has been or is to be sold, leased, licensed, assigned, or otherwise disposed of, for services rendered or to be rendered, for a policy of insurance issued or to be issued, for a suretyship obligation incurred or to be incurred, for energy provided or to be provided, or for the use or hire of a vessel under a charter or other contract. The term does not include a right to payment evidenced by an instrument[,] [or] chattel paper[, or a deposit account].

(b) "General intangible" means any personal property other than goods, accounts, chattel paper, commercial tort claims, documents, instruments, investment property, letters of credit, deposit accounts, and money.

(c) "Payment intangible" means a general intangible under which the account debtor's principal obligation is to pay money.

SECTION 9-104. DEFINITIONS: "PURCHASE MONEY SECURITY INTEREST"; "PURCHASE MONEY COLLATERAL"; PURCHASE MONEY OBLIGATION"; APPLICATION OF PAYMENTS; BURDEN OF ESTABLISHING PURCHASE MONEY SECURITY INTEREST. [former draft § 9-107]

(a) A security interest in goods[, including fixtures,] is a "purchase money security interest" to the extent that the collateral ("purchase money collateral") secures an

obligation incurred by an obligor as the price of the collateral or for value given to enable the debtor to acquire rights in the collateral ("purchase money obligation") if the value is in fact so used.

(b) A purchase money security interest (subsection (a)) in inventory is a "purchase money security interest" also to the extent that the security interest secures a purchase money obligation incurred with respect to other inventory in which the secured party holds or held a purchase money security interest (subsection (a)).

(c) The interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory.

(d) This subsection does not apply to a consumer secured transaction. If the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation, the payment is to be applied:

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, first to obligations that are not secured and then, if more than one obligation is secured, to obligations secured by purchase

money security interests in the order in which those obligations were incurred.

(e) This subsection applies to a consumer secured transaction [and may not be varied by agreement]. If the extent to which a security interest is a purchase money security interest depends on the application of a payment to a particular obligation[, notwithstanding any contrary agreement,] the payment is to be applied first to obligations that are not secured and then, if more than one obligation is secured, to obligations secured by purchase money security interests in the order in which those obligations were incurred. [This subsection may not be varied by agreement.]

(f) A purchase money security interest does not lose its status as such even if:

(1) the purchase money collateral also secures an obligation that is not a purchase money obligation;

(2) collateral that is not purchase money collateral also secures the purchase money obligation; or

(3) the purchase money obligation has been renewed, refinanced, or restructured.

(g) If the status of a security interest as a purchase money security interest or the extent to which it is a purchase money security interest is placed in issue, the secured party claiming a purchase money security interest has the burden of establishing the extent to which the security interest is a purchase money security interest.

SECTION 9-105. DEFINITIONS: "PRODUCTION MONEY SECURITY INTEREST"; "PRODUCTION MONEY CROPS"; "PRODUCTION MONEY OBLIGATION"; ["PRODUCTION OF CROPS"]; BURDEN OF ESTABLISHING PRODUCTION MONEY SECURITY INTEREST." [former draft § 9-107A]

(a) A security interest in crops is a "production money security interest" to the extent that the collateral ("production money collateral") secures an obligation incurred by an obligor for new value given to enable the debtor to produce the crops ("production money obligation") if the value is in fact used for the production of crops.

[(b) The "production of crops" includes tilling and otherwise preparing land for growing, planting, cultivating, fertilizing, protecting from damage or disease, irrigating, harvesting, and gathering crops.]

(c) If the extent to which a security interest is a production money security interest depends on the application of a payment to a particular obligation, the payment is to be applied:

(1) in accordance with any reasonable method of application to which the parties agree;

(2) in the absence of the parties' agreement to a reasonable method, in accordance with any intention of the obligor manifested at or before the time of payment; or

(3) in the absence of an agreement to a reasonable method and a timely manifestation of the obligor's intention, first to obligations that are not secured and then, if more than one obligation is secured, to obligations secured by production

money security interests in the order in which those obligations were incurred.

(d) A production money security interest does not lose its status as such even though:

(1) the production money collateral also secures an obligation that is not a production money obligation;

(2) collateral that is not production money collateral also secures the production money obligation; or

(3) the production money obligation has been renewed, refinanced, or restructured.

(e) If the status of a security interest as a production money security interest or the extent to which it is a production money security interest is placed in issue, the secured party claiming a production money security interest has the burden of establishing the extent to which the security interest is a production money security interest.

SECTION 9-106. CLASSIFICATION OF GOODS: "CONSUMER GOODS"; "EQUIPMENT"; "FARM PRODUCTS"; "INVENTORY." [former draft § 9-109]

(a) "Consumer goods" means goods that are used or bought for use primarily for personal, family, or household purposes.

(b) "Equipment" means goods [that are used or bought for use primarily in business, including farming or a profession, or by a debtor that is a non-profit organization or a governmental subdivision or agency. The term includes goods]

that are not included in the definitions of inventory, farm products, or consumer goods.

(c) "Farm products" means (i) crops grown, growing, or to be grown, including crops produced on trees, vines, and bushes, (ii) livestock, born or unborn, (iii) supplies used or produced in farming, livestock, or aquacultural operations, or (iv) products of crops or livestock in their unmanufactured states, in each case if the debtor is engaged in raising, cultivating, propagating, fattening, grazing, or other farming, livestock, or aquacultural operations. If goods are farm products they are neither equipment nor inventory. The terms "crops" and "livestock" include aquatic goods produced in aquacultural operations.

(d) "Inventory" means goods that are leased by a person, held by a person for sale or lease or to be furnished under contracts of service, furnished by a person under contracts of service, or raw materials, work in process, or materials used or consumed in a business. [If goods are inventory they are not equipment.]

Changes from Prior Draft

Brackets inserted in the definition of equipment reflect the Drafting Committee's division over whether the first sentence is necessary or useful. If the bracketed language in that definition is deleted, the brackets around the final sentence of the definition of inventory indicate that it also should be deleted.

**SECTION 9-107. DEFINITIONS: "COMMODITY ACCOUNT";
"COMMODITY CONTRACT"; "COMMODITY CUSTOMER"; "COMMODITY
INTERMEDIARY"; "INVESTMENT PROPERTY." [former draft § 9-115]**

(a) "Commodity account" means an account maintained by a commodity intermediary in which a commodity contract is carried for a commodity customer.

(b) "Commodity contract" means a commodity futures contract, an option on a commodity futures contract, a commodity option, or other contract that, in each case, is:

(1) traded on or subject to the rules of a board of trade that has been designated as a contract market for such a contract pursuant to the federal commodities laws; or

(2) traded on a foreign commodity board of trade, exchange, or market, and is carried on the books of a commodity intermediary for a commodity customer.

(c) "Commodity customer" means a person for whom a commodity intermediary carries a commodity contract on its books.

(d) "Commodity intermediary" means:

(1) a person that is registered as a futures commission merchant under the federal commodities laws; or

(2) a person that in the ordinary course of its business provides clearance or settlement services for a board of trade that has been designated as a contract market pursuant to the federal commodities laws.

(e) "Investment property" means a security, whether certificated or uncertificated, a security entitlement, a securities account, a commodity contract, or a commodity account.

SECTION 9-108. CONTROL OVER INVESTMENT PROPERTY. [former draft § 9-118]

(a) "Control" with respect to a certificated security, uncertificated security, or security entitlement has the meaning specified in Section 8-106.

(b) A secured party has control over a commodity contract if, by agreement among the commodity customer, the commodity intermediary, and the secured party, the commodity intermediary has agreed that it will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer. If a commodity customer grants a security interest in a commodity contract to its own commodity intermediary, the commodity intermediary as secured party has control.

(c) A secured party that has control over all security entitlements or commodity contracts carried in a securities account or commodity account has control over the securities account or commodity account.

SECTION 9-109. CONTROL OVER DEPOSIT ACCOUNT. [former draft § 9-109(a), (b)]

(a) A secured party has control over a deposit account if:

(1) the secured party is the depository institution with which the deposit account is maintained;

(2) the depository institution with which the deposit account is maintained agrees in a signed record ~~writing~~ that, without further consent by the debtor, the depository

institution will comply with instructions originated by the secured party directing disposition of the funds in the account; or

(3) the secured party becomes the depositary institution's customer (Section 4-104) with respect to the deposit account.

(b) A secured party that has satisfied the requirements of subsection (a) [(2) or (3)] has control even if the debtor retains the right to direct the disposition of funds from the deposit account.

SECTION 9-110. CONTROL OVER LETTER OF CREDIT AND PROCEEDS OF LETTER OF CREDIT. [former draft § 9-119] A secured party has control over a letter of credit and proceeds of the letter of credit if:

(1) the issuer (Section 5-102(a)(9)) and any nominated person (Section 5-102(a)(11)) have consented to an assignment of proceeds of the letter of credit (Section 5-114(c)), or

(2) the secured party is a transferee beneficiary of the letter of credit [and the issuer has no right to refuse to recognize or carry out the transfer (Section 5-112(b))].

SECTION 9-111. SUFFICIENCY OF DESCRIPTION. [former draft § 9-110]

(a) Except as otherwise provided in subsections (c) and (d) ~~(b)~~, a description of personal property or real estate is sufficient to create or perfect a security interest, whether or not it is specific, if it reasonably identifies what is described.

[(b) A description of collateral is sufficient if it identifies the collateral by specific listing, by category, by quantity, by a computational or allocational formula or procedure, or by any other method, if the identity of the collateral is objectively determinable.]

~~(b) A description of a deposit account is sufficient only if it describes the deposit account by item, as all of the debtor's deposit accounts, or as an identified class of the debtor's deposit accounts.~~

(c) A description of collateral in a security agreement or financing statement is sufficient to create or perfect a security interest in a certificated security, uncertificated security, a security entitlement, securities account, commodity contract, or commodity account is sufficient whether it describes the collateral by those terms, or as investment property, or by a description of the underlying security, financial asset, or commodity contract. ~~A description of investment property collateral in a security agreement or financing statement is sufficient if it identifies the collateral by specific listing, by category, by quantity, by a computational or allocational formula or procedure, or by any other method, if the identity of the collateral is objectively determinable.~~

(d) A description of a commercial tort claim by type alone is not sufficient

(e) A description of a commercial tort claim is sufficient only if it is specific.

Changes from Prior Draft

1. Under § 9-504, a financing statement sufficiently indicates the collateral if it "contains a description" of the collateral or "covers all assets." In its November, 1996, meeting, the Drafting Committee considered whether a similar test should apply for purposes of a security agreement. The Drafting Committee voted to retain what most assume is current law--an "all assets" or "all personal property" description for purposes of a security agreement is not sufficient. Consequently, subsection (a) retains substantially the same formulation as current § 9-110. The Drafting Committee may wish to consider whether the statute should provide explicitly that "supergeneric" descriptions are insufficient or whether the point should appear only in the official comments.

2. New subsection (b) derives from the former second sentence of subsection (c) (former §9-115(3))--i.e., "by specific listing, by category, by quantity, by a computational or allocational formula or procedure, or by any other method, if the identity of the collateral is objectively determinable." Ordinarily, such a description should suffice for any kind of collateral, not just investment property. For this reason, new subsection (b) is not limited to investment property. However, it appears in brackets to remind the Drafting Committee to consider whether it is necessary in the statute or whether its substance could be moved to the official comments.

3. As suggested above, the deleted portions of subsection (c) are not peculiar to investment property. The only part of subsection (c) that seems unique to investment property is the suggestion that the use of the wrong Article 8 terminology does not render a description invalid (e.g., a security agreement intended to cover a debtor's "security entitlements" is sufficient if it refers to the debtor's "securities"). The remaining portion of subsection (c) makes this point.

4. Under revised § 9-204, an after-acquired collateral provision will not reach future commercial tort claims. It follows that when an effective security agreement covering a commercial tort claim is entered into the claim already will exist. Accordingly, in its November, 1996, meeting, the Drafting Committee took the position that a more exacting description than one by "type" (e.g., "all existing commercial tort claims") should be required.

5. Much litigation has arisen over whether a description in a security agreement is sufficient to include after-acquired collateral if the agreement does not explicitly so provide. We think this question is one of contract interpretation and is not susceptible to a statutory rule (other than a rule to the effect that it is a question of contract interpretation). Accordingly,

this section contains no reference to descriptions of after-acquired collateral.

[SUBPART 3. APPLICABILITY OF ARTICLE]

SECTION 9-112. SCOPE OF ARTICLE. [former draft § 9-102]

(a) Except as otherwise provided in Section 9-113 on excluded transactions, this article applies to:

(1) any transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

(2) a statutory ~~an agricultural~~ lien;

(3) a sale of an account, chattel paper, or payment intangible; and

(4) a consignment.

(b) The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

SECTION 9-113. TRANSACTIONS EXCLUDED FROM ARTICLE. [former draft § 9-104] This article does not apply to:

(1) a security interest subject to any statute, regulation, or treaty of the United States, to the extent that the statute, regulation, or treaty preempts this article;

(2) a transfer by this State or by a governmental entity of this State, to the extent that another statute of this State [expressly] governs the creation, perfection, priority, or enforcement of the security interest created by the transfer;

(3) a transfer by another State, a foreign nation, or a governmental entity of another State or a foreign nation, to the extent that a statute of the State or nation, other than a statute generally applicable to security interests, [expressly] governs creation, perfection, priority, or enforcement of the security interests created by the transfer;

(~~4~~) a landlord's lien;

(~~5~~) a lien given by statute or other rule of law for services or materials, except as otherwise provided in Section 9-330 on priority of the lien;

(~~6~~) a transfer of a claim for wages, salary, or other compensation of an employee;

~~(5) a transfer by a government or governmental subdivision or agency;~~

(~~7~~) a sale of accounts, chattel paper, or payment intangibles as part of a sale of the business out of which they arose, or an assignment of accounts, chattel paper, or payment intangibles which is for the purpose of collection only, or an assignment of a right to payment under a contract to an assignee that is also obliged to perform under the contract, or an assignment of a single account or payment intangible to an assignee in whole or partial satisfaction of a preexisting indebtedness;

(~~8~~) a transfer of an interest in or claim under any policy of insurance, except[:

(A) a transfer by a healthcare provider of a right to payment arising out the furnishing of healthcare goods or services, and

(B)] as provided in Sections 9-313 and 9-319 with respect to proceeds and priorities in proceeds;

(~~98~~) a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;

(~~109~~) a right of recoupment or set-off, except as provided in Section 9-337 with respect to the effectiveness of rights of recoupment or set-off against deposit accounts and in Section 9-404(a) with respect to defenses or claims of an account debtor;

(~~1110~~) the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder, except to the extent that provision is made for fixtures in Section 9-331;

(~~1211~~) a transfer ~~by an individual~~ of any ~~tort claim arising in tort, except:~~

(A) a transfer of a commercial tort claim, and

(B) as provided in Sections 9-313 and 9-319 with respect to proceeds and priorities in proceeds ~~for damages resulting from an injury to an individual;~~

(~~1312~~) a transfer of an interest in a deposit account maintained with a Federal Reserve Bank or maintained by a depository institution with another depository institution; or

(~~1413~~) a transfer of an interest in a deposit account in a consumer secured transaction.

Changes from Prior Draft

1. At the suggestion of the International Secured Transactions Task Force, the exclusion of former paragraph (5), concerning security interests created by governmental debtors, has been revised and replaced by the exclusions in new paragraphs (2) and (3). These paragraphs reflect the view that Article 9 should apply to security interests created by a "governmental entity" (as defined in draft § 9-102) except to the extent that another statute governs the issue in question. Under paragraph (2), the draft defers to all statutes of the forum state. (A forum cannot determine whether it should consult the choice-of-law rules in the forum's UCC unless it first determines that its UCC applies to the transaction before it.) Paragraph (3) defers to statutes of another State or a foreign nation only to the extent that those statutes contain rules applicable specifically to security interests created by the governmental entity in question.

Example: A New Jersey state commission creates a security interest in favor of a New York bank. The validity of the security interest is litigated in New York. To the extent that a New Jersey statute contains rules peculiar to creation of security interests by governmental entities generally, to creation of security interests by state commissions, or to creation of security interests by this particular state commission, then that law will govern. On the other hand, to the extent that New Jersey law provides that security interests created by governmental entities, state commissions, or this state commission are governed by the law generally applicable to secured transactions (i.e., New Jersey's Article 9), then the New York's Article 9 will govern.

Example: A airline that is an instrumentality of the foreign nation creates a security interest in favor of a New York bank. The analysis used in the previous example would apply here. That is, if the matter is litigated in New York, New York law would govern except to the extent that the foreign nation enacted a statute applicable to security interests created by governmental entities generally or by the airline specifically.

The fact that New York law applies does not necessarily mean that perfection is accomplished by filing in New York. Rather, it means that the court should apply New York's Article 9, including its choice-of-law provision. Under that provision (assuming New York adopts draft § 9-301), perfection is governed by the law of the jurisdiction in which the debtor is located. Draft § 9-307 determines the debtor's location for choice-of-law purposes.

2. If a transaction does not bear an appropriate relation to the forum state, then that state's Article 9 will not apply, regardless of whether the transaction would be excluded by paragraph (3).

Example: A Belgian governmental entity grants a security interest in its equipment to a Swiss secured party. The equipment is located in Belgium. A dispute arises and, for some reason, an action is brought in a New York state court. Inasmuch as the transaction bears no "appropriate relation" to New York, New York's UCC, including its Article 9, is inapplicable. See § 1-105(1). New York's § 9-113 on excluded transactions should not come into play. Even if the parties agreed that New York law would govern, the parties' agreement would not be effective because the transaction does not bear a "reasonable relation" to New York. See § 1-105(1).

Conversely, Article 9 will come into play only if the litigation arises in a UCC jurisdiction or if a foreign choice-of-law rule leads a foreign court to apply the law of a UCC jurisdiction. For example, if issues concerning a security interest granted by a foreign airline to a New York bank are litigated overseas, the court may choose to apply the law of the debtor's jurisdiction and not New York's Article 9.

3. As an alternative or supplemental approach, the Drafting Committee may wish to consider making certain specified parts or provisions of Article 9 (e.g., part 6, dealing with enforcement; or § 9-609, dealing with self-help repossession) inapplicable to governmental entities, regardless of the existence of conflicting law.

4. The tort-claim exclusion has been revised. It now excludes transfers of all tort claims except a "commercial tort claim," as defined in § 9-102. The official comments should make clear that once a claim arising in tort has been settled and reduced to a contractual obligation to pay, the right to payment becomes a payment intangible and no longer is a claim arising in tort.

[SECTION 9-114. APPLICABILITY OF ARTICLE ON BULK SALES.]

[MINOR STYLE CHANGES ONLY] **[former draft § 9-111]** The creation of a security interest is not a bulk sale under Article 6 (Section 6-102).]

Legislative Note: States that adopt Article 6, Alternative A, should not adopt this section.

SECTION 9-115. APPLICABILITY OF OTHER STATUTES. [former draft § 9-203(e)] A transaction, although subject to this article, is also subject to _____ *. In case of conflict between this article and that statute, the statute controls. Failure to comply with an applicable statute has only the effect the statute specifies.

Legislative Note: At * insert reference to any local statute regulating small loans, retail installment sales and the like. This section is designed to make it clear that certain transactions, although subject to this article, also must comply with other applicable legislation.

SECTION 9-116. SECURITY INTERESTS ARISING UNDER ARTICLE ON SALES OR UNDER ARTICLE ON LEASES. [MINOR STYLE CHANGES ONLY]

[former draft § 9-113] A security interest arising solely under the Article on Sales (Article 2) or the Article on Leases (Article 2A) is subject to the provisions of this article except that to the extent that and so long as the debtor does not have or does not lawfully obtain possession of the goods

(a) no security agreement is necessary to make the security interest enforceable;

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

(c) the rights of the secured party on default by the debtor are governed (i) by the Article on Sales (Article 2) in

the case of a security interest arising solely under such Article or (ii) by the Article on Leases (Article 2A) in the case of a security interest arising solely under that article.

PART 2

VALIDITY OF SECURITY AGREEMENT,
ATTACHMENT OF SECURITY INTEREST,

AND RIGHTS OF PARTIES TO SECURITY AGREEMENT

[SUBPART 1. VALIDITY AND ATTACHMENT]

SECTION 9-201. GENERAL VALIDITY OF SECURITY AGREEMENT.

[MINOR STYLE CHANGES ONLY.]

(a) Except as otherwise provided by this Act, a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) Nothing in this article validates any charge or practice illegal under any statute or regulation governing usury, small loans, retail installment sales, or the like, or extends the application of any such statute or regulation to any transaction not otherwise subject the statute or regulation.

SECTION 9-202. TITLE TO COLLATERAL IMMATERIAL. Except as otherwise provided with respect to consignments or sales of accounts, chattel paper, or payment intangibles, each provision of this article with regard to rights, obligations, and remedies applies whether title to collateral is in the secured party or in the debtor.

SECTION 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; SUPPORT OBLIGATIONS; FORMAL REQUISITES.

[includes former draft § 9-115(b), (f)]

(a) Subject to Section 4-210 on the security interest of a collecting bank, Section 5-118 on the security interest of a letter of credit issuer or nominated person, Section 9-206 on security interests in investment property, Section 9-116 on a security interest arising under the Article on Sales (Article 2) or the Article on Leases (Article 2A), and subsection (b) on new debtors, a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless:

(1) the collateral is in the possession of the secured party (Section 9-311) pursuant to the debtor's agreement, the collateral is investment property or a deposit account and the secured party has control pursuant to the debtor's agreement, or the debtor has signed a security agreement that contains a description of the collateral and in addition, if the security interest covers ~~[crops growing or to be grown or]~~ timber to be cut, a description of the land concerned;

(2) value has been given; and

(3) the debtor has rights in [or the power to transfer rights in] the collateral.

(b) If a new debtor becomes bound as debtor by a security agreement entered into by another person, the agreement satisfies the requirement of subsection (a)(1) as to existing or after-acquired property of the new debtor to the extent the

property is described in the agreement, and no other agreement is necessary to make a security interest in the property enforceable.

(c) A person becomes bound as debtor by a security agreement entered into by another person if, by operation of other law or by contract:

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

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

(d) A security interest attaches when it becomes enforceable against the debtor with respect to the collateral. Attachment occurs as soon as all of the events specified in subsection (a) have occurred unless explicit agreement postpones the time of attaching.

(e) Unless otherwise agreed:

(1) a security agreement gives the secured party the rights to proceeds provided by Section 9-313;

(2) attachment of a security interest in collateral is also attachment of a security interest in a support obligation with respect to the collateral;

(3) attachment of a security interest in a securities account is also attachment of a security interest in all security entitlements carried in the securities account;

including returned or repossessed goods, or to collect, compromise, enforce, or otherwise deal with collateral, or to accept the return of collateral or make repossessions, or to use, commingle, or dispose of proceeds, or by reason of the failure of the secured party to require the debtor to account for proceeds or replace collateral. This section does not relax the requirements of possession for attachment, perfection, or enforcement of a security interest which depends upon possession of the collateral by the secured party.

SECTION 9-206. SECURITY INTEREST ARISING IN PURCHASE OR DELIVERY OF FINANCIAL ASSET. [MINOR STYLE CHANGES ONLY] [former draft § 9-116]

(a) If a person buys a financial asset through a securities intermediary in a transaction in which the buyer is obligated to pay the purchase price to the securities intermediary at the time of the purchase, and the securities intermediary credits the financial asset to the buyer's securities account before the buyer pays the securities intermediary, the securities intermediary has a security interest in the buyer's security entitlement securing the buyer's obligation to pay. A security agreement is not required for attachment or enforceability of the security interest.

(b) If a certificated security, or other financial asset represented by a writing which in the ordinary course of business is transferred by delivery with any necessary indorsement or assignment, is delivered pursuant to an agreement between persons in the business of dealing with such securities

or financial assets and the agreement calls for delivery versus payment, the person delivering the certificate or other financial asset has a security interest in the certificated security or other financial asset securing the seller's right to receive payment. A security agreement is not required for attachment or enforceability of the security interest.

[SUBPART 2. RIGHTS AND DUTIES]

SECTION 9-207. RIGHTS AND DUTIES IF COLLATERAL IS IN SECURED PARTY'S POSSESSION.

(a) If a security interest secures an obligation or a buyer of accounts, chattel paper, or payment intangibles is entitled by agreement to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or against a secondary obligor, the secured party shall use reasonable care in the custody and preservation of collateral in the secured party's possession. In the case of an instrument or chattel paper, reasonable care includes taking necessary steps to preserve rights against prior parties unless otherwise agreed.

(b) Unless otherwise agreed and notwithstanding any contrary provision in Section 9-602, if a security interest secures an obligation and collateral is in the secured party's possession:

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

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

(3) the secured party may hold as additional security any increase or profits, except money, received from the collateral, but money so received, unless remitted to the debtor, must be applied to reduce the secured obligation;

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

(5) the secured party may create a security interest in the collateral.

~~(c) A secured party is liable for any loss caused by the failure to meet an obligation imposed by subsection (a) or (b) but does not lose its security interest.~~

(c) If a security interest secures an obligation, a secured party may use or operate collateral for the purpose of preserving the collateral or its value or pursuant to an order of a court of appropriate jurisdiction or, except in the case of consumer goods, in the manner and to the extent provided in the security agreement.

SECTION 9-208. DUTIES OF SECURED PARTY HAVING CONTROL OVER COLLATERAL DEPOSIT ACCOUNT. [former draft § 9-117(d), (e)]

~~(a)~~ If there is no outstanding secured obligation and the secured party has no commitment to make advances, incur obligations, or otherwise give value:

(1) a secured party that has control over a investment property under Section 8-106(d) (2) or 9-108(b), within

10 days after the secured party receives a signed demand by the debtor, shall send the securities intermediary or commodity intermediary with which the security entitlement or commodity contract is maintained a signed record that releases the securities intermediary or commodity intermediary from any further obligation to comply with entitlement orders or directions originated by the secured party;

(2~~1~~) a secured party that has control over a deposit account under Section 9-109(a)(2), within 10 days after the secured party receives a signed ~~written~~ demand by the debtor, shall send the depository institution with which the deposit account is maintained a signed ~~written~~ statement that releases the depository institution from any further obligation to comply with instructions originated by the secured party; ~~and~~

(3~~2~~) a secured party that has control over a deposit account under Section 9-109(a)(3), within 10 days after the secured party receives a signed ~~written~~ demand by the debtor, shall pay the debtor all funds on deposit in the account;i

(4) a secured party that has control over a letter of credit and proceeds of the letter of credit under Section 9-110(1), within 10 days after the secured party receives a signed demand by the debtor, shall send the issuer of the letter of credit and any nominated person a signed release of the issuer from any further obligation to pay or deliver proceeds of the letter of credit to the secured party; and

(5) a secured party that has control over a letter of credit and proceeds of the letter of credit under Section 9-

110(2), within [a reasonable time] [10 days] after the secured party receives a signed demand by the debtor, shall take such actions as the debtor may reasonably request with respect to the letter of credit.

~~(b) A secured party that fails to comply with subsection (a) is liable to the debtor for \$500 and, in addition, for any loss caused to the debtor by the failure.~~

Changes from Prior Draft

1. These revisions give effect to the Drafting Committee's view that this section should be applicable to control of investment property and letters of credit as well as deposit accounts. New paragraph (a) (5) is problematic, however. For example, one cannot safely assume that a letter of credit that has been transferred to a secured party is (re)transferable by the secured party to the debtor. Although it is appropriate to place some duties on the secured party-transferee, the details may best be left to the agreement of the parties.

2. The Drafting Committee may wish to consider whether the 10-day period in paragraph (a) (3) is too long in the case of a demand deposit account in the secured party's name and whether an exception should be made in the case of a time deposit account.

SECTION 9-209. REQUEST FOR ACCOUNTING, LIST OF COLLATERAL, OR STATEMENT OF ACCOUNT. [former draft § 9-208]

(a) In this section:

(1) "Accounting" means a record, signed by a secured party, ~~writing~~ that indicates the aggregate unpaid secured obligations as of a date not more than XX days earlier than the date of the record ~~writing[,]~~ ~~[and]~~ reasonably identifies the components of the obligations ~~[, and indicates the [source] [nature] of the obligations and how payments have been applied towards satisfaction of the obligations];~~

(2) "Request for an accounting" means a record writing, signed by a debtor ~~for secondary obligor~~, requesting that the recipient provide an accounting of the unpaid obligations secured by collateral and reasonably identifying the transaction or relationship that is the subject of the request;

(3) "Request for a list of collateral" means a record writing, signed by a debtor ~~for secondary obligor~~, requesting that the recipient approve or correct a list of what the ~~debtor~~ ~~person~~ believes to be the collateral securing an obligation and reasonably identifying the transaction or relationship that is the subject of the request; and

(4) "Request for a statement of account" means a record writing, signed by a debtor ~~for secondary obligor~~, requesting that the recipient approve or correct a statement indicating what the ~~debtor~~ ~~person~~ believes to be the aggregate amount of unpaid obligations secured by collateral as of a specified date and reasonably identifying the transaction or relationship that is the subject of the request.

(b) Subject to subsections (c), (d), and (e), a secured party ~~other than a buyer of accounts, chattel paper, or payment intangibles~~ shall comply with a request for an accounting, list of collateral, or statement of account within two weeks ~~[XX] days~~ after receipt by sending to the ~~debtor~~ ~~person making the request~~ a signed written correction or approval or an accounting, as applicable.

(c) A secured party that claims a security interest in all of a particular type of collateral owned by the debtor may

comply with a request for a list of collateral by sending to the ~~[debtor] [person making the request]~~ a signed ~~written~~ statement to that effect within two weeks ~~[XX] days~~ after receipt.

(d) A person that claims no interest in the collateral when it receives a request for a list of collateral shall comply with the request within two weeks ~~[XX] days~~ after receipt by sending to the ~~[debtor] [person making the request]~~ a signed ~~written~~ statement disclaiming any interest in the collateral and, if known to the recipient, containing the name and mailing address of any assignee of or successor to the recipient's security interest in the collateral.

(e) A person that claims no interest in the obligations when it receives a request for a statement of account or an accounting shall comply with the request within two weeks ~~[XX] days~~ after receipt by sending to the ~~[debtor] [person making the request]~~ a signed ~~written~~ statement disclaiming any interest in the obligations and, if known to the recipient, containing the name and mailing address of any assignee of or successor to the recipient's interest in the obligations.

~~————— (f) A person that fails to comply with a request under this section without reasonable excuse is liable for ~~[\$XXX and] any loss caused to the [debtor] [person making the request] by the noncompliance. As against a person reasonably misled by a secured party's failure to comply with a request for a list of collateral or a statement of account, the secured party may claim a security interest only as shown in the statement contained in the request. A recipient that never claimed an interest in the~~~~

~~collateral or obligations that are the subject of a request under this section has a reasonable excuse for failure to comply with the request.~~

(fg) A [debtor] [person] is entitled to an approval or correction or an accounting under this section once during any six-month period without charge. The secured party may require payment of a charge not exceeding \$XXX for each additional response to a request.

Changes from Prior Draft

1. The revisions to this section reflect the Drafting Committee's deliberations at its November, 1996, meeting.

2. The descriptions of requests in paragraphs (a) (2), (3), and (4) now require that the requests identify the relevant transactions or relationships. This change accommodates secured parties that may have numerous transactions and relationships with a debtor. Problems also may arise for secured parties that have many places of business and who may receive a request at a place of business where the transaction involved is unknown. We believe that problem could be addressed best by modifications to § 1-201(26) and (27). Those provisions should be expanded to address not only notifications but also demands and other records that may be sent and received.

3. We understand that "[a] person that claims no interest in the obligations" under subsection (e) would include one who has assigned the obligation to another person and who retains no interest. Former subsection (f) is now included in Section 9-624.

PART 3

PERFECTION AND PRIORITY OF SECURITY INTERESTS

[SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY]

SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF CERTAIN NONPOSSESSORY SECURITY INTERESTS. [former draft § 9-103(a)(1)-(3)] The following rules apply to a nonpossessory

security interest in collateral other than goods covered by a certificate of title described in Section 9-303, deposit accounts, investment property, and minerals and related accounts described in Section 9-306:

(1) Except as otherwise provided in paragraphs (2), ~~and (3), and (4),~~ during the time that while a debtor is located in a jurisdiction, perfection, the effect of perfection or nonperfection, and the priority of a security interest in the collateral are governed by the local law of that jurisdiction.

(2) While goods are located in a jurisdiction, perfection of a security interest in the goods by filing a fixture filing is governed by the local law of that jurisdiction.

(3) ~~Except as otherwise provided in paragraph (4),~~ ~~while~~ While goods, documents, or instruments are located in a jurisdiction, the effect of perfection or nonperfection and the priority of a security interest in the collateral are governed by the local law of that jurisdiction.

~~(4) While the debtor is located in a jurisdiction not a part of the United States and that does not provide for perfection of a security interest by filing or recording, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or nonperfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction that is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest~~

~~may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States.~~

Changes from Prior Draft

1. Subsection (4) (former § 9-103(3)(c)), which contained the choice-of-law rule governing security interests created by debtors located in a non-U.S. jurisdiction, has been deleted. The rule has proven unsatisfactory for several reasons. First, it determines the applicable law for non-U.S. debtors by reference to the location of the debtor's "major executive office in the United States." Some, perhaps many, non-U.S. debtors lack any "executive office" at all in the U.S.; with respect to others, determining which of the executive offices in the U.S. is the "major" one has proven quite difficult.

Second, the rule permits perfection of security interests in accounts and payment intangibles by notification to account debtors. This means of perfection often is not feasible and, even when accomplished, is not likely to afford effective public notice.

At the suggestion of the International Secured Transactions Task Force, the former rule has been replaced with a new rule, which appears in draft § 9-307 and is explained following that section.

2. At the November, 1996, meeting, the Drafting Committee approved a bifurcated approach to determining the law applicable to goods and other tangible collateral. Questions of perfection are determined by the law of the location of the debtor, see subsection (2), whereas the law of the location of the collateral governs "the effect of perfection or nonperfection and . . . priority." By deleting the exception to subsection (3), this draft adopts the bifurcated approach for non-U.S. debtors, as well.

SECTION 9-302. LAW GOVERNING PERFECTION AND PRIORITY OF STATUTORY AGRICULTURAL LIENS AND CERTAIN POSSESSORY SECURITY INTERESTS. [former draft § 9-103(b)(1)-(4)] The following rules apply to a possessory security interest in collateral, other than

goods covered by a certificate of title described in Section 9-303 and minerals described in Section 9-306, and to a statutory ~~an agricultural~~ lien on collateral:

(1) While collateral is located in a jurisdiction, perfection, the effect of perfection or nonperfection, and the priority of a security interest in the collateral are governed by the local law of that jurisdiction.

(2) Perfection of a statutory ~~an agricultural~~ lien on the collateral is governed by the local law of the jurisdiction in which the debtor is located.

(3) While collateral is located in a jurisdiction, the effect of perfection or nonperfection and the priority of a statutory ~~an agricultural~~ lien on the collateral are governed by the local law of that jurisdiction.

SECTION 9-303. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN GOODS COVERED BY A CERTIFICATE OF TITLE.
[former draft § 9-103(c) (1)-(4)]

(a) This section applies to a security interest in goods covered by a certificate of title.

(b) In this section:

(1) "certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of perfection; and

(2) goods become "covered" by a certificate of title when an appropriate application for the certificate and the applicable fee are delivered to the appropriate authority.

(c) The absence of any other relationship between the jurisdiction under whose certificate the goods are covered and the goods or the debtor does not affect the applicability of this section to the goods.

(d) Perfection, the effect of perfection or non-perfection, and the priority of the security interest are governed by the local law of the jurisdiction under whose certificate the goods are covered from the time the goods become covered by the certificate until the earlier of the time the certificate becomes ineffective under the law of that jurisdiction or the time the goods become covered subsequently by a certificate of title from another jurisdiction. After that time, the goods are not covered by the certificate of title within the meaning of this section.

SECTION 9-304. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS. [former draft § 9-103(d)(1)-(2)] Perfection, the effect of perfection or nonperfection, and the priority of a security interest in a deposit account are governed by the local law of the depository institution's jurisdiction. The following rules determine a depository institution's jurisdiction for purposes of this section:

(1) If an agreement between the depository institution and the debtor expressly specifies a particular jurisdiction as the depository institution's jurisdiction for purposes of this part, this article, or this act, that jurisdiction is the depository institution's jurisdiction.

(2) If an agreement between the depository institution and its customer does not specify the depository institution's jurisdiction as provided in paragraph (1), but expressly specifies that the deposit account is maintained at an office in a particular jurisdiction, that jurisdiction is the depository institution's jurisdiction.

(3) If an agreement between the depository institution and its customer does not specify a jurisdiction as provided in paragraphs (1) or (2), the depository institution's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the customer's account.

(4) If an agreement between the depository institution and its customer does not specify a jurisdiction as provided in paragraphs (1) or (2) and an account statement does not identify an office serving the customer's account as provided in paragraph (3), the depository institution's jurisdiction is the jurisdiction in which is located the chief executive office of the depository institution.

SECTION 9-305. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY. [former draft § 9-103(f)]

(a) Except as otherwise provided in subsection (b), the following rules apply to a security interest in investment property:

(1) While a security certificate is located in a jurisdiction, perfection, the effect of perfection or

nonperfection, and the priority of a security interest in the certificated security represented thereby are governed by the local law of that jurisdiction.

(2) Perfection, the effect of perfection or nonperfection, and the priority of a security interest in an uncertificated security are governed by the local law of the issuer's jurisdiction as specified in Section 8-110(d).

(3) Perfection, the effect of perfection or nonperfection, and the priority of a security interest in a security entitlement or securities account are governed by the local law of the securities intermediary's jurisdiction as specified in Section 8-110(e).

(4) Perfection, the effect of perfection or nonperfection, and the priority of a security interest in a commodity contract or commodity account are governed by the local law of the commodity intermediary's jurisdiction. The following rules determine a "commodity intermediary's jurisdiction" for purposes of this paragraph and Section 9-314:

(A) If an agreement between the commodity intermediary and commodity customer expressly specifies the commodity intermediary's jurisdiction for purposes of this part, this article, or this act, that jurisdiction is the commodity intermediary's jurisdiction.

(B) If an agreement between the commodity intermediary and commodity customer does not specify the commodity intermediary's jurisdiction as provided in subparagraph (A), but expressly specifies that the commodity account is

maintained at an office in a particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

(C) If an agreement between the commodity intermediary and commodity customer does not specify a jurisdiction as provided in subparagraphs (A) or (B), the commodity intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the commodity customer's account.

(D) If an agreement between the commodity intermediary and commodity customer does not specify a jurisdiction as provided in subparagraphs (A) or (B) and an account statement does not identify an office serving the commodity customer's account as provided in subparagraph (C), the commodity intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the commodity intermediary.

(b) Perfection of a security interest by filing, automatic perfection of a security interest in investment property granted by a broker or securities intermediary, and automatic perfection of a security interest in a commodity contract or commodity account granted by a commodity intermediary are governed by the local law of the jurisdiction in which the debtor is located.

SECTION 9-306. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN MINERALS. [MINOR STYLE CHANGES ONLY]
[former draft § 9-103(e)] Perfection, the effect of perfection or nonperfection, and the priority of a security interest that is

created by a debtor having an interest in minerals or the like, including oil and gas, before extraction, and which attaches to the collateral as extracted or which attaches to an account resulting from the sale of the collateral at the wellhead or minehead, are governed by the law of the jurisdiction in which the wellhead or minehead is located.

SECTION 9-307. LOCATION OF DEBTOR. [former draft § 9-103(a)(4)-(5)]

(a) Except as otherwise provided in this section, ~~subsection (b)~~, for purposes of this part:

~~(1) a registered entity is located in the jurisdiction of its organization; and~~

~~(2) any other a debtor having only one place of business is located at its place of business if it has only one, a debtor having more than one place of business is located at its chief executive office if it has more than one place of business, and a debtor having no place of business is located at the debtor's residence, if the debtor has no place of business but only if the place of business, chief executive office, or residence, as applicable, is located in a jurisdiction whose law requires information concerning the [possible] existence of a security interest to be made publicly available as a condition or result of perfection of the security interest. In other cases, the debtor is located in the District of Columbia.~~

(b) For purposes of this part, a registered entity is located in its State of organization.

(c) For purposes of this part, the United States and its governmental entities are located in the District of Columbia.

(d) For purposes of this part, a foreign air carrier under the Federal Aviation Act of 1958, as amended, is located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

Changes from Prior Draft

1. This section effectuates the suggestion of the International Secured Transactions Task Force, that perfection of security interests created by non-U.S. debtors be accomplished by filing in a domestic (U.S.) jurisdiction. It replaces draft § 9-301(4) (former § 9-103(3)(c)). The shortcomings of that section are discussed in connection with draft § 9-301.

2. Section 9-301(1) provides that the location of the debtor determines the jurisdiction whose law governs perfection of a security interest. Under the prior versions of § 9-307(a), a debtor (other than a registered entity) was deemed to be located at its place of business if it had only one, at its chief executive office if it had more than one place of business, or at its residence if it had no place of business. Under these rules, a non-U.S. debtor normally would be located in a foreign jurisdiction. As a consequence, foreign law would have governed perfection. The Task Force urged us to provide for domestic law to govern this issue, at least when foreign law affords no public notice of security interests.

To this end, subsection (a) has been revised. It provides that the normal rules for determining the location of a debtor apply only if they yield a location that is either a State (as broadly defined in § 9-102) or "a jurisdiction whose law requires information concerning the [possible] existence of a security interest to be made publicly available as a condition or result of perfection of the security interest." In other cases, the debtor is located in the District of Columbia. As used in subsection (a), "perfection" means whatever step, if any, is a prerequisite to enabling a security interest to take priority over a subsequent judicial lien. Compare § 9-303(b)(1). Note that the law of the jurisdiction in which the debtor is located governs not only perfection but also, with respect to accounts and other intangible collateral, "the effect of perfection or nonperfection and the priority of a security interest. § 9-301(1). With respect to goods and other tangible collateral,

these issues are governed by the law of the jurisdiction in which the collateral is located. See § 9-301(3).

A "registered entity" is located in its State of organization. See subsection (b). Inasmuch as "registered entity" is defined to exclude entities that are not organized under the law of a "State," both foreign individuals and foreign corporations may be deemed located in the District of Columbia.

Example: Debtor is an English corporation with its chief executive office in London. Debtor creates a security interest in its accounts. Subsection (a) provides that Debtor is located in London if English law conditions perfection on giving public notice. Otherwise, Debtor is located in the District of Columbia. Under § 9-301(1), perfection, the effect of perfection, and priority are governed by the law of the jurisdiction of the debtor's location--here, England or the District of Columbia (depending on the content of English law).

Example: Debtor is an English corporation with its chief executive office in London. Debtor creates a security interest in its equipment. Subsection (a) provides that Debtor is located in London if English law conditions perfection on giving public notice. Otherwise, Debtor is located in the District of Columbia. Under § 9-301(1), perfection is governed by the law of the jurisdiction of the debtor's location, whereas the law of the jurisdiction in which the collateral is located--here, England--governs priority. See § 9-301(3).

4. The foregoing discussion assumes that each transaction bears an appropriate relation to the forum state. In the absence of an appropriate relation, the forum state's entire UCC, including the choice-of-law provisions in Article 9 (§§ 9-301 through 9-307), will not apply. See Note 2 to § 9-113.

5. To the extent that Article 9 governs (see §§ 1-105; 9-113(a)(1)), the United States and its subdivisions, instrumentalities, and other governmental entities are located in the District of Columbia. See subsection (c).

Example: Debtor is an instrumentality of the United States, having its chief executive office in New York City. Debtor creates a security interest in its equipment, which is located in Boulder, Colorado. Assuming Article 9 applies, subsection (c) provides that Debtor is located in the District of Columbia. Under § 9-301(1), perfection is governed by the law of the debtor's location, i.e., the District of Columbia, whereas under 9-301(3), the law of the jurisdiction in

which the collateral is located--here, Colorado-- governs priority.

We are informed that the filing office of the District of Columbia is not as efficient as one might like. The Drafting Committee may wish to consider whether another office would be preferable.

6. In November, the Drafting Committee deferred the question of where filings against consumer goods and consumer investment property should be made. Following is an excerpt from the Reporters' Comments to § 9-307 of the October, 1996, Draft:

Suppose, for example, a debtor who operates a sole proprietorship in Massachusetts lives in New Hampshire. Under § 9-301, perfection of a security interest in the debtor's consumer goods are governed by the law of the location of the debtor. According to this section, the location is not New Hampshire, where the debtor resides, but Massachusetts. Would secured parties be less likely to file in the wrong place if perfection of a security interest in consumer goods . . . were governed by the law of the jurisdiction in which the debtor resides? Or, are filings against consumer goods likely to be coupled with filings against business assets, so that a change would require more filings? The same issue arises with respect to perfection by filing with respect to the debtor's investment property in a consumer secured transaction.

[SUBPART 2. PERFECTION]

**SECTION 9-308. WHEN SECURITY INTEREST OR STATUTORY
~~AGRICULTURAL~~ LIEN IS PERFECTED; CONTINUITY OF PERFECTION.**

[former draft § 9-303]

(a) Except as otherwise provided in this section and in Section 9-308A, a security interest is perfected if it has attached and all of the applicable requirements for perfection specified in Sections 9-309 through 9-313 have been met. If the steps are taken before the security interest attaches, it is perfected when it attaches.

(b) A statutory ~~An agricultural~~ lien is perfected if it has become effective and all of the applicable requirements for perfection specified in Sections 9-309 and 9-313 have been met. If the steps are taken before the statutory ~~agricultural~~ lien becomes effective, it is perfected when it becomes effective.

(c) If a security interest or statutory ~~agricultural~~ lien is originally perfected in one manner permitted under this article and is later perfected in another manner under this article, without an intermediate period when it was unperfected, the security interest or agricultural lien is perfected continuously.

(d) Perfection of a security interest in an account, chattel paper, a document, an instrument, [an insurance policy,] a general intangible, or a security also perfects a security interest in a support obligation for the collateral.

(e) Perfection of a security interest in a securities account also perfects a security interest in all security entitlements carried in the securities account. Perfection of a security interest in a commodity account also perfects a security interest in all commodity contracts carried in the commodity account.

(f) Notwithstanding other law to the contrary, perfection of a security interest in a right to payment or performance, other than a right to payment evidenced by chattel paper, also perfects a security interest in a [mortgage on real estate] [lien on property] securing the right.

Changes from Prior Draft

The new language in subsection (a) takes account of the fact that the automatic perfection rules have been moved from § 9-309 into a new section, § 9-308A. It also reflects the fact that other subsections of this section, e.g., subsection (d), contain perfection steps.

SECTION 9-308A. SECURITY INTEREST PERFECTED UPON

ATTACHMENT. [former draft § 9-302]

The following security interests are perfected when they attach:

_____ (1) a purchase money security interest in consumer goods, except as otherwise provided in Section 9-309(d) with respect to consumer goods that are subject to a statute or treaty described in Section 9-309(c);

_____ (2) an assignment of accounts or payment intangibles which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;

_____ (3) a sale of a payment intangible.

_____ (4) a security interest of a collecting bank (Section 4-210) or arising under the Article on Sales or the Article on Leases (see Section 9-116); _____

_____ (5) a security interest arising in the purchase or delivery of a financial asset under Section 9-206;

_____ (6) a security interest in investment property created by a broker or securities intermediary;

_____ (7) a security interest in a commodity contract or a commodity account created by a commodity intermediary;

(8) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;

(9) a security interest created by an assignment of a beneficial interest in a trust, if the beneficial interest does not constitute investment property; and

(10) a security interest created by an assignment of a beneficial interest in decedent's estate.

Changes from Prior Draft

1. This section is new. It contains the automatic perfection rules previously located in draft § 9-309(a) (former § 9-302(1)). Rather than continue to state the rule by indirection, this section explicitly provides for perfection upon attachment.

2. Subsection (1) has been revised slightly. No change in meaning is intended.

3. The formulation of subsection (9) is new. It explicitly limits automatic perfection in a beneficial interest in a trust to those beneficial interests that do not constitute investment property. Thus, a collateral assignment of the beneficial interest in a business trust would not be automatically perfected, whereas a collateral assignment of the beneficial interest in a family trust would be.

SECTION 9-309. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST OR STATUTORY AGRICULTURAL LIEN; SECURITY INTERESTS AND STATUTORY AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY. [former draft § 9-302]

(a) A financing statement must be filed to perfect all security interests and agricultural liens, other than:

(15) a security interest in a support obligation under Section 9-308(d);

(2) a security interest that is perfected when it attaches (Section 9-308A);

(153) a security interest in property subject to a statute, regulation, or treaty described in subsection (c);

(43) a security interest in instruments, certificated securities, chattel paper, or documents perfected without filing or possession under Section 9-310(d) or (e);

(51) a security interest in collateral in the secured party's possession under Section 9-311;

(146) a security interest in investment property, a deposit account, or a letter of credit and proceeds of the letter of credit which is perfected without filing under Section 9-312;

(74) a security interest in or agricultural lien on proceeds under Section 9-313(e); and

(82) a security interest perfected under Section 9-314(a), (c), or (d);

~~(6) a security interest created by an assignment of a beneficial interest in a trust or a decedent's estate;~~

~~(7) a purchase money security interest in consumer goods; but subsection (d) applies to consumer goods that are subject to a statute or treaty described in subsection (c);~~

~~(8) an assignment of accounts or payment intangibles which does not alone or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles;~~

~~(9) a security interest of a collecting bank (Section 4-210) or arising under the Article on Sales or the Article on Leases (see Section 9-116);~~

~~(10) an assignment for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;~~

~~(11) a security interest arising in the purchase or delivery of a financial asset under Section 9-206;~~

~~(12) a security interest in investment property created by a broker or securities intermediary;~~

~~(13) a security interest in a commodity contract or a commodity account created by a commodity intermediary;~~

~~(16) a security interest in a deposit account which is perfected without filing under Section 9-312; and~~

~~(17) a sale of a payment intangible.~~

(b) If a secured party assigns a perfected security interest, no filing under this article is required to continue the perfected status of the security interest against creditors of and transferees from the original debtor.

(c) The filing of a financing statement is not necessary or effective to perfect a security interest in property subject to:

(1) a statute, regulation, or treaty of the United States whose requirements for a security interest's obtaining priority over the rights of a lien creditor with respect to the property preempt subsection (a); [or]

(2) the following statutes of this State; [list any certificate-of-title statute covering automobiles, trailers, mobile homes, boats, farm tractors, or the like, which provides for a security interest to be indicated on the certificate as a condition or result of perfection, and any non-UCC central filing statute]; but during any period in which collateral is inventory held for sale or lease or leased by a person that is in the business of selling or leasing goods of that kind, the otherwise applicable filing provisions of this article apply to a security interest in that collateral created by that person as debtor[; or

(3) a certificate-of-title statute of another jurisdiction which provides for a security interest to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the property.]

(d) Compliance with the requirements prescribed by a statute, regulation, or treaty described in subsection (c) for obtaining priority over the rights of a lien creditor is equivalent to the filing of a financing statement under this article. Except as otherwise provided in Sections 9-311 and 9-314(c) for goods covered by a certificate of title, a security interest in property subject to a statute, regulation, or treaty described in subsection (c) can be perfected only by compliance with those requirements, and a security interest so perfected remains perfected notwithstanding a change in the use or transfer of possession of the collateral. Except as otherwise provided in Section 9-314(c), duration and renewal of perfection of a

security interest perfected by compliance with the requirements prescribed by the statute, regulation, or treaty are governed by the statute, regulation, or treaty. In other respects the security interest is subject to this article.

Changes from Prior Draft

The automatic perfection rules have been relocated to new § 9-308A, to which subsection (a) now makes reference. The remaining subsections have been reordered. References to perfection-by-control rules have been consolidated and expanded in subsection (a)(6).

SECTION 9-310. PERFECTION OF SECURITY INTERESTS IN INSTRUMENTS, CHATTEL PAPER, INVESTMENT PROPERTY, DOCUMENTS, MONEY, DEPOSIT ACCOUNTS, LETTERS OF CREDIT, AND GOODS COVERED BY DOCUMENTS; PERFECTION BY PERMISSIVE FILING; TEMPORARY PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION. [former draft § 9-304]

(a) A security interest in instruments, chattel paper, investment property, or negotiable documents may be perfected by filing. Except as otherwise provided in Section 9-313(e) for cash proceeds:

(1) a security interest in money can be perfected only by the secured party's taking possession (Section 9-311);

(2) a security interest in a deposit account can be perfected only by control (Section 9-312); and

(3) except as otherwise provided in Section 9-308(d) for support obligations, a security interest in a letter of credit and proceeds of the letter of credit can be perfected only by control (Section 9-312).

(b) While goods are in the possession of a bailee (Section 7-102(1)) that has issued a negotiable document (Section 7-104(1)) covering the goods, a security interest in the goods is perfected by perfecting a security interest in the document, and any security interest in the goods otherwise perfected during the period is subordinate to the security interest perfected in the document.

(c) A security interest in goods in the possession of a bailee (Section 7-102(1)) that has issued a non-negotiable document (Section 7-104(2)) covering the goods is perfected by issuance of a document in the name of the secured party, by the bailee's receipt of notification of the secured party's interest, or by filing as to the goods.

(d) A security interest in instruments, certificated securities, or negotiable documents is perfected without filing or the taking of possession for a period of 20 days from the time it attaches to the extent that it arises for new value given under a signed ~~written~~ security agreement.

(e) A security interest remains perfected for 20 days without filing if a secured party having a perfected security interest in an instrument, a certificated security, a negotiable document, or goods in possession of a bailee other than one that has issued a negotiable document for the goods

(1) makes available to the debtor the goods or documents representing the goods for the purpose of ultimate sale or exchange or for the purpose of loading, unloading, storing, shipping, transshipping, manufacturing, processing, or otherwise

dealing with them in a manner preliminary to their sale or exchange, but priority among conflicting security interests in the goods is subject to Section 9-322; or

(2) delivers the instrument or certificated security to the debtor for the purpose of ultimate sale or exchange or of presentation, collection, enforcement, renewal, or registration of transfer.

(f) After the 20-day period in subsections (d) and (e) expires, perfection depends upon compliance with this article.

SECTION 9-311. WHEN POSSESSION BY SECURED PARTY PERFECTS SECURITY INTEREST WITHOUT FILING. [former draft § 9-305]

(a) Except as otherwise provided in subsection (b), a security interest in goods, instruments, money, negotiable documents, or chattel paper may be perfected by the secured party's taking possession of the collateral. A security interest in certificated securities may be perfected by the secured party's taking possession of the security certificates.

(b) A security interest in goods covered by a certificate of title issued by this State may be perfected by the secured party's taking possession of the collateral only in the circumstances described in Section 9-314(c).

(c) This subsection applies to collateral other than goods covered by a document. If the collateral is in the possession of a person other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business (Section 2A-103), the secured party takes possession when the person in possession signs a

record acknowledging ~~acknowledges [in writing]~~ that it holds possession for the secured party's benefit. If a person, other than the debtor, the secured party, or a lessee of the collateral from the debtor in the ordinary course of the debtor's business, takes possession of the collateral after having signed a record acknowledging ~~acknowledged [in writing]~~ that it will hold possession of collateral for the secured party's benefit, the secured party takes possession when the person takes possession. [A security interest is perfected by possession when the secured party takes possession, without a relation back, and continues only while the secured party retains possession, unless otherwise specified in this article.]

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

(e) If a person acknowledges that it holds possession for the secured party's benefit:

(1) the acknowledgment is effective under subsection (c) even if the acknowledgment violates the rights of a debtor; and

(2) unless the person otherwise agrees or other law otherwise provides, the person owes no duties to the secured party and is not required to confirm the acknowledgment to another person.

(f) A security interest may be perfected as otherwise provided in this article before or after a period of possession by a secured party.

SECTION 9-312. PERFECTION BY CONTROL. [former draft § 9-305A]

(a) A security interest in investment property, a deposit account, or a letter of credit and proceeds of the letter of credit may be perfected by control of the collateral under Section 9-108, 9-109, or 9-110.

(b) A security interest is perfected by control from the time the secured party obtains control [without a relation back] and continues only while control is retained[, unless otherwise provided in this article].

(c) A security interest may be otherwise perfected as provided in this article before or after the period of control by the secured party.

SECTION 9-313. "PROCEEDS"; SECURED PARTY'S RIGHTS ON DISPOSITION OF COLLATERAL; SECURED PARTY'S RIGHTS IN PROCEEDS. [former draft § 9-306]

(a) "Proceeds" includes the following property:

(1) whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral;

(2) whatever is collected on, or distributed on account of, collateral;

(3) rights arising out of collateral;

(4) to the extent of the value of collateral, claims arising out of the loss or nonconformity of, defects in, or damage to the collateral; and

(5) to the extent of the value of collateral and to the extent payable to the debtor or the secured party, insurance

payable by reason of the loss or nonconformity of, defects in, or damage to the collateral.

(b) Money, checks, deposit accounts, and the like are "cash proceeds." All other proceeds are "noncash proceeds."

(c) Except as otherwise provided in this article, a security interest continues in collateral notwithstanding sale, lease, license, exchange, or other disposition thereof unless the secured party authorized the disposition free of the security interest in the security agreement or otherwise, and also attaches to any identifiable proceeds. Other law determines whether a statutory ~~an agricultural~~ lien continues on collateral notwithstanding disposition or becomes effective as to proceeds.

(d) Proceeds that are commingled with other property are identifiable proceeds:

(1) if the proceeds are goods, to the extent provided by Section 9-333; and

(2) if the proceeds are not goods, to the extent that the secured party identifies the proceeds by a method of tracing, including application of equitable principles, that is permitted under other law with respect to commingled property of the type involved.

(e) A security interest in or a statutory ~~an agricultural~~ lien on proceeds is a perfected security interest or statutory ~~agricultural~~ lien if the interest in or lien on the original collateral was perfected. The security interest in or statutory ~~agricultural~~ lien on proceeds ceases to be a perfected interest or lien and becomes unperfected on the 21st day after

the security interest attaches to the proceeds or the statutory ~~agricultural~~ lien becomes effective as to the proceeds unless:

(1) a filed financing statement covers the original collateral and the proceeds are collateral in which a security interest may be perfected by filing in the office in which the financing statement has been filed and, if the proceeds are acquired with cash proceeds or funds from a deposit account, the description of collateral in the financing statement indicates the type of property constituting the proceeds;

(2) the proceeds are identifiable cash proceeds; or

(3) the security interest in or statutory ~~agricultural~~ lien on the proceeds is perfected before the 21st day after the security interest attaches to the proceeds or the statutory ~~agricultural~~ lien becomes effective as to the proceeds.

(f) Except as otherwise provided in subsection (e), a security interest in or statutory ~~agricultural~~ lien on proceeds can be perfected only by the methods or under the circumstances permitted in this article for original collateral of the same type.

(g) If a filed financing statement covers the original collateral, a security interest in or a statutory ~~an agricultural~~ lien on proceeds which remains perfected under subsection (e) (1) becomes unperfected when the effectiveness of the filed financing statement lapses under Section 9-516 or is terminated under Section 9-511, but in no event before the 21st day after the security interest attaches to the proceeds or the statutory ~~agricultural~~ lien becomes effective as to the proceeds.

SECTION 9-314. PERFECTION OF SECURITY INTEREST OR STATUTORY AGRICULTURAL LIEN FOLLOWING CHANGE IN APPLICABLE LAW. [former draft § 9-103(a)(6), (b)(5), (c)(5), (d)(3)]

(a) This subsection applies to a statutory ~~an agricultural~~ lien and to a nonpossessory security interest in collateral other than goods covered by a certificate of title (Section 9-303), deposit accounts, investment property, and minerals and related accounts described in Section 9-306. A security interest or a statutory ~~an agricultural~~ lien perfected under the law of the jurisdiction in which the debtor is located remains perfected until the expiration of four months after a change of the debtor's location to another jurisdiction, or until perfection would have ceased under the law of the first jurisdiction, whichever occurs first. If it becomes perfected under the law of the other jurisdiction before the end of that period, the security interest or statutory ~~agricultural~~ lien continues perfected thereafter. If it does not become perfected under the law of the other jurisdiction before the end of that period, the security interest or statutory ~~agricultural~~ lien becomes unperfected and as against a purchaser of the collateral for value is deemed never to have been perfected.

(b) This subsection applies to a possessory security interest in collateral, other than goods covered by a certificate of title (Section 9-303) and minerals described in Section 9-306. A security interest remains continuously perfected if:

(1) the collateral is located in one jurisdiction and subject to a security interest perfected under the law of that jurisdiction;

(2) thereafter the collateral is brought into another jurisdiction; and

(3) upon entry into the other jurisdiction the security interest is perfected under the law of the other jurisdiction.

[Subsection (c)--Alternative A]

(c) This subsection applies to goods covered by a certificate of title (Section 9-303). A security interest in goods which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this jurisdiction remains perfected until the earlier of the time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered or the expiration of four months after the goods had become so covered. If it becomes perfected under Section 9-309(d) or 9-311 before the earlier of that time or the expiration of that period, the security interest continues perfected thereafter. If it does not become perfected under Section 9-309(d) or Section 9-311 before the earlier of that time or the expiration of that period, the security interest becomes unperfected and as against a purchaser of the collateral for value is deemed never to have been perfected.

[Subsection (c)--Alternative B]

(c) This subsection applies to goods covered by a certificate of title (Section 9-303). A security interest in goods which is perfected by any method under the law of another jurisdiction when the goods become covered by a certificate of title from this jurisdiction remains perfected until the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered. However, if the applicable steps required for perfection under Section 9-309(d) or 9-311 are not taken before the earlier of the time the security interest would have become unperfected under the law of the other jurisdiction had the goods not become so covered or the expiration of four months after the goods had become so covered, as against a purchaser of the goods for value the security interest becomes unperfected and as against a purchaser of the collateral for value is deemed never to have been perfected.

(d) This subsection applies to deposit accounts [and investment property]. A security interest perfected under the law of the depository institution's jurisdiction[, the securities intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as applicable] remains perfected until the expiration of four months after a change of the [depository institution's] jurisdiction, or until perfection would have ceased under the law of the first jurisdiction, whichever occurs first. If it becomes perfected under the law of the other jurisdiction before the end of that period, the security interest continues perfected thereafter. If it does not become perfected

under the law of the other jurisdiction before the end of that period, the security interest becomes unperfected and as against a purchaser of the collateral for value is deemed never to have been perfected.

[(e) This subsection applies to investment property. A security interest perfected under the law of the securities intermediary's jurisdiction or the commodity intermediary's jurisdiction, as applicable, remains perfected until the expiration of four months after a change of the intermediary's jurisdiction, or until perfection would have ceased under the law of the first jurisdiction, whichever occurs first. If it becomes perfected under the law of the other jurisdiction before the end of that period, the security interest continues perfected thereafter. If it does not become perfected under the law of the other jurisdiction before the end of that period, the security interest becomes unperfected and as against a purchaser of the collateral for value is deemed never to have been perfected.]

Changes from Prior Draft

This section deals with security interests that have been perfected under the law of another jurisdiction. The changes reflect the consensus reached at the November, 1996, meeting concerning the consequences of a secured party's failure to reperfect a security interest within four months after the other jurisdiction's law ceases to apply. The draft now provides that loss of perfection is retroactive only as against purchasers for value and not as against donees or lien creditors, notwithstanding the potential for circular priorities. This is the same approach taken with respect to lapse under § 9-516.

Reporters' Comment

The Drafting Committee has yet to reach consensus on which alternative subsection (c) it prefers. Under both alternatives, the failure to reperfect within four months results in the security interest becoming unperfected both prospectively and

retroactively as against purchasers of the goods for value. With respect to prospective unperfection against lien creditors, Alternative A takes the same approach as subsections (a), (d), and (e); i.e., the failure to reperfect results in the security interest becoming unperfected prospectively against lien creditors. However, under Alternative B, the prior perfection can remain effective against lien creditors until perfection lapses under the law of the other jurisdiction, which may occur well beyond the four-month period.

[SUBPART 3. PRIORITY]

SECTION 9-315. INTERESTS THAT TAKE PRIORITY OVER AND TAKE FREE OF UNPERFECTED SECURITY INTEREST OR AGRICULTURAL LIEN;

DEFINITION: "LIEN CREDITOR." [former draft § 9-301]

(a) An unperfected security interest or agricultural lien is subordinate to the rights of:

(1) a person entitled to priority under Section 9-319; and

(2) a person that becomes a lien creditor before the security interest is perfected and before a financing statement covering the collateral is filed.

(b) An unperfected statutory lien other than an agricultural lien is subordinate to the rights of a person entitled to priority under Section 9-319.

(c) Except as otherwise provided in subsection (e), a buyer of goods, instruments, documents, [a security certificate,] or chattel paper that is not a secured party takes free of a security interest if the buyer gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected.

(~~d~~) Except as otherwise provided in subsection (e), a lessee of goods takes free of a security interest if the lessee receives delivery of the collateral without knowledge of the security interest and before it is perfected.

(~~e~~) A buyer of accounts, general intangibles, or investment property [other than a security certificate] which is not a secured party takes free of a security interest if the buyer gives value without knowledge of the security interest and before it is perfected.

(~~f~~) Except as otherwise provided in Section 9-316, if a secured party files a financing statement with respect to a purchase money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.

(~~g~~) "Lien creditor" means a creditor that has acquired a lien on the property involved by attachment, levy, or the like. The term includes an assignee for benefit of creditors from the time of assignment, a trustee in bankruptcy from the date of the filing of the petition, and a receiver in equity from the time of appointment.

Changes from Prior Draft

1. Under subsection (a) of the prior draft, as under current § 9-301(1)(b), a lien creditor's rights have priority over an unperfected security interest. Perfection requires attachment (§ 9-308) and attachment requires the giving of value (§ 9-203). It follows that, if a secured party has filed a financing statement but has not yet given value, an intervening lien creditor whose lien arises after filing but before

attachment of the security interest, acquires rights that are senior to those of the secured party that later gives value. At its November, 1996, meeting, the Drafting Committee decided to change this result. Under revised paragraph (a)(2), a lien that arises after the secured party files and before the security interest attaches and becomes perfected is subordinate to the security interest.

2. New subsection (b) recognizes that Article 9 provides a priority rule as among statutory liens and security interests but contains no priority rule as between a non-agricultural statutory lien and the interest of a lien creditor.

SECTION 9-315A. RIGHTS AND TITLE OF CONSIGNEE AND SELLER OF ACCOUNT OR CHATTEL PAPER WITH RESPECT TO CREDITORS AND PURCHASERS.

(a) For purposes of determining the rights of creditors of, and purchasers of goods from, a consignee, while goods are in the possession of the consignee and the consignor's security interest is unperfected, the consignee has rights and title to the goods identical to those the consignor had or had power to transfer.

(b) For purposes of determining the rights of creditors of, and purchasers of an account or chattel paper from, a debtor that has sold an account or chattel paper, while the buyer's security interest is unperfected, the debtor has rights and title to the account or chattel paper identical to those the debtor sold.

Changes from Prior Draft

"Security interest" is defined in revised § 1-201(37) to include the interest of a true consignor and the interest of a buyer of certain receivables (accounts, chattel paper, and payment intangibles). It is implicit from the priority rule of § 9-315(a)(2) that a consignee or a seller of receivables each has rights in the collateral that a lien creditor may reach, so long as the competing security interest of the consignor or buyer is

unperfected. This is so even though the debtor-consignee or debtor-seller may not have any rights in the collateral as between it and the consignor or buyer. The same implication arises from other priority rules, such as § 9-319, which provides that an unperfected security interest (including one held by a consignor or buyer of receivables) is subordinate to a perfected security interest. For example, consider a debtor that has sold receivables and has no further interest in them as between the debtor and the secured party-buyer. If the security interest held by the secured party-buyer were unperfected, the debtor-seller subsequently could create in favor of another secured party a security interest that, if perfected, would be senior to that of the secured party-buyer.

At its June, 1996, meeting the Drafting Committee voted to eliminate § 9-114, which read substantially as new § 9-315A. It requested the reporters to explain in the comments that the same results may be achieved by implication from a proper reading of Article 9's priority rules. At its November, 1996, meeting, the Drafting Committee voted to return to the statutory approach.

SECTION 9-316. BUYERS OF GOODS IN ORDINARY COURSE OF BUSINESS. [former draft § 9-307]

(a) This section does not affect a security interest in goods in the possession of the secured party under Section 9-311.

(b) A buyer in ordinary course of business [, other than a person buying farm products from a person engaged in farming operations,] takes free of a security interest created by the buyer's seller, even if the security interest is perfected and even if the buyer knows of its existence.

(c) A buyer of consumer goods takes free of a security interest, even if perfected, if the buyer buys without knowledge of the security interest, for value, and for the buyer's own personal, family, or household purposes, unless before the buyer's purchase the secured party filed a financing statement covering the goods. Insofar as it affects the priority of a

security interest over a buyer of consumer goods under this section, the period of the effectiveness of a filing made in the jurisdiction in which the debtor is located is governed by the rules with respect to perfection in Section 9-314(a).

SECTION 9-317. LESSEES OF GOODS IN ORDINARY COURSE OF BUSINESS. [new; derived from § 2A-307(3)] A lessee of goods in ordinary course of business takes the leasehold interest free of a security interest in the goods created by the lessor even though the security interest is perfected and the lessee knows of its existence.

SECTION 9-318. LICENSEES IN ORDINARY COURSE OF BUSINESS.

[To be moved from Article 2B]

SECTION 9-319. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS AND AGRICULTURAL LIENS IN THE SAME COLLATERAL. [former draft § 9-312(a), (m), (n)]

(a) Except as otherwise provided in this part, Section 4-210 with respect to a security interest of a collecting bank, and Section 5-118 with respect to a security interest of an issuer or nominated person, priority among conflicting security interests and agricultural liens in the same collateral is determined according to the following rules:

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

(2) So long as conflicting security interests and agricultural liens are unperfected, the first to attach or to become effective has priority.

(b) For the purposes of subsection (a) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

(c) If a statute under which an agricultural lien in collateral is created provides that the agricultural lien has priority over a conflicting security interest or agricultural lien in the same collateral, the statute governs priority if the agricultural lien is perfected.

Changes from Prior Draft

This section has been revised to clarify that it deals with priority contests between and among secured parties holding security interests and agricultural liens. New subsection (c) is the former § 9-321(d).

SECTION 9-319A. PRIORITIES BETWEEN CONFLICTING SECURITY INTERESTS AND STATUTORY LIENS OTHER THAN AN AGRICULTURAL LIEN IN THE SAME COLLATERAL. [New]

(a) Except as otherwise provided in this part, priority between a conflicting security interest and a statutory lien other than an agricultural lien in the same collateral is determined according to the following rules:

(1) A conflicting security interest and a statutory lien other than an agricultural lien rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest or statutory lien is first perfected, whichever

is earlier, if there is no period thereafter when there is neither filing nor perfection.

(2) So long as a conflicting security interest and statutory lien other than an agricultural lien are unperfected, the first to attach or to become effective has priority.

(b) For the purposes of subsection (a) a date of filing or perfection as to collateral is also a date of filing or perfection as to proceeds.

(c) If a statute under which a statutory lien other than an agricultural lien in collateral is created provides that the statutory lien has priority over a conflicting security interest in the same collateral, the statute governs priority [if the statutory lien is perfected].

Changes from Prior Draft

This section is new. Although it derives from the first-to-file-or-perfect rule of § 9-319, its scope is more narrow. Consistent with the apparent recommendation in the Report of the Subcommittee on Relation to Other Law, this section governs priority between a statutory lien (other than an agricultural lien) and a security interest, but does not address priority contests between or among statutory liens. Inasmuch as the approach taken in this section could give rise to circular priorities and statutory liens are being brought into the Article 9 filing regime, the Drafting Committee may wish to consider whether this approach should be abandoned in favor of the approach taken in § 9-319 for agricultural liens. Also, the bracketed language in subsection (c) invites the Drafting Committee to consider whether an overriding non-Article 9 statutory priority rule should control when a statutory lien is unperfected.

SECTION 9-320. FUTURE ADVANCES. [former draft §§ 9-312(o), 9-301(d), 9-307(d)]

(a) This subsection applies only to a security interest that secures an obligation. For purposes of determining

the priority of a security interest under Section 9-319(b), to the extent that the security interest secures an advance made [other than] [not] pursuant to commitment and made while the security interest is temporarily perfected under Section 9-310(d) or (e) [or is perfected when it attaches under Section 8-308A] and by no other method, perfection of the security interest dates from the time an advance is made.

(b) This subsection applies only to a security interest that secures an obligation. A security interest is subordinate to the rights of a person that becomes a lien creditor while the security interest is perfected only to the extent that it secures advances made more than 45 days after the person becomes a lien creditor, unless the advance is made without knowledge of the lien or pursuant to a commitment entered into without knowledge of the lien.

(c) A buyer of goods other than a buyer in ordinary course of business takes free of a security interest to the extent that it secures advances made after the secured party acquires knowledge of the buyer's purchase, or more than 45 days after the purchase, whichever occurs first, unless the advance is made pursuant to a commitment entered into without knowledge of the buyer's purchase and before the expiration of the 45-day period. This subsection does not affect a security interest in goods in the possession of the secured party under Section 9-311.

(d) A lessee of goods other than a lessee of goods in ordinary course of business takes the leasehold interest free of a security interest to the extent that it secures advances made

after the secured party acquires knowledge of the lease or more than 45 days after the lease contract becomes enforceable, whichever first occurs, unless the future advances are made pursuant to a commitment entered into without knowledge of the lease and before the expiration of the 45-day period.

Changes from Prior Draft

1. During the November, 1996, meeting, some people expressed sentiment for stating the basic rule of priority when future advances are concerned. After consideration, we believe that such a statement is neither necessary nor wise, except insofar as it is clearly stated in § 9-319(a)--the first-to-file-or-perfect rule. Section 9-320(a) is an exception to that rule. It is clear enough that the time of an advance cannot affect the time of filing. It can, of course, affect the time of perfection if it constitutes the value that gives rise to attachment, an element of perfection. We believe that this can be made sufficiently clear in the official comments.

2. The bracketed language added to subsection (a) addresses what may have been an inadvertent change from current law. Under current law (current § 9-312(7)), the time that an advance is made does not affect the the application of the first-to-file-or-perfect rule (except as an element of attachment and, therefore, perfection) if the security interest is perfected by filing, possession, or under § 9-115 or § 9-116. Subsection (a) takes the approach of identifying, as exceptions, the only situations in which perfection occurs by another method. The prior draft specified only temporary perfection as an exception. It has been pointed out to us, correctly, that if no change in law is intended, subsection (a) should also identify cases of "automatic" perfection (see new § 9-308A). The new language would address that omission. However, the drafting history of the 1972 amendments suggests that the drafters may have assumed that the special rule would apply only to cases of temporary perfection. The Drafting Committee should determine whether the reference to automatic perfection should be added to subsection (a).

3. We also believe that the official comments can explain adequately that a secured party's knowledge does not cut short the 45-day period during which future advances can achieve priority over an intervening lien creditor's interest.

SECTION 9-321. PRIORITY OF PRODUCTION MONEY SECURITY INTERESTS AND AGRICULTURAL LIENS. [former draft § 9-312(b), (f), (k), (l)]

(a) Except as otherwise provided in subsection (e), if the requirements of subsection (b) are met, a perfected production money security interest in production money crops has priority over a conflicting security interest in the same crops and, except as otherwise provided in Section 9-325, also has priority in their identifiable proceeds. A production money security interest has priority under this subsection only to the extent that the conflicting security interest secures obligations incurred more than XXX months before the production money secured party first gives new value to enable the debtor to produce the crops.

(b) A production money security interest has priority under subsection (a) if:

(1) the production money security interest is perfected by filing when the production money secured party first gives new value to enable the debtor to produce the crops;

[Paragraph (2)--Alternative A]

(2) the production money secured party gives a signed ~~written~~ notification to the holder of the conflicting security interest before the production money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production money secured party; and

[Paragraph (2)--Alternative B]

(2) the production money secured party gives a signed ~~written~~ notification to the holder of the conflicting security interest not less than 10 nor more than 30 days before the production money secured party first gives new value to enable the debtor to produce the crops if the holder had filed a financing statement covering the crops before the date of the filing made by the production money secured party; and

(3) the notification states that the production money secured party has or expects to acquire a production money security interest in the debtor's crops and contains a description of the crops.

(c) Except as otherwise provided in subsection (d), if more than one security interest qualifies for priority in the same collateral under subsection (a), the security interests rank according to priority in time of filing under Section 9-319(b).

~~(d) If a statute under which an agricultural lien in collateral is created provides that the agricultural lien has priority over a conflicting security interest or agricultural lien in the same collateral, the statute governs priority if the agricultural lien is perfected.~~

~~(d)~~ (e) To the extent that a person holds both an agricultural lien and a production money security interest in the same collateral securing the same obligations, the rules of priority applicable to agricultural liens govern priority.

Changes from Prior Draft

Former subsection (d) is now § 9-319(c).

SECTION 9-322. PRIORITY OF PURCHASE MONEY SECURITY

INTERESTS. [former draft § 9-312(c)-(e), (g)]

(a) Except as otherwise provided in subsection (e), a perfected purchase money security interest in inventory has priority over a conflicting security interest in the same inventory and, except as otherwise provided in Section 9-325, also has priority in its identifiable cash proceeds to the extent the identifiable cash proceeds are received on or before the delivery of the inventory to a buyer if:

(1) the purchase money security interest is perfected when the debtor receives possession of the inventory ~~for a negotiable document covering the inventory~~;

(2) the purchase money secured party gives a signed ~~written~~ notification to the holder of the conflicting security interest[,] if [the holder had filed a financing statement covering the same types of inventory] before the date of a filing made by the purchase money secured party or, if the purchase money security interest is temporarily perfected without filing or possession under Section 9-310(e), before the beginning of the 20-day period [the holder had filed a financing statement covering the same types of inventory];

(3) the holder of the conflicting security interest receives the notification within five years before the debtor receives possession of the inventory ~~for a negotiable document covering the inventory~~; and

(4) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in inventory of the debtor, describing the inventory by item or type.

(b) If a purchase money security interest in inventory has priority over a conflicting security interest under subsection (a), a security interest held by the purchase money secured party in chattel paper constituting proceeds of the inventory has priority over a conflicting security interest in the chattel paper if the purchase money secured party takes possession of the chattel paper in good faith, in the ordinary course of the secured party's business, and without knowledge that the security interest violates the rights of the holder of the conflicting security interest.

(c) Except as otherwise provided in subsection (e), a perfected purchase money security interest in livestock that are farm products has priority over a conflicting security interest in the same livestock and, except as otherwise provided in Section 9-325, also has priority in its identifiable proceeds [and identifiable products in their unmanufactured states] if:

(1) the purchase money security interest is perfected when the debtor receives possession of the livestock ~~for a negotiable document covering the livestock~~;

(2) the purchase money secured party gives a signed ~~written~~ notification to the holder of the conflicting security interest if the holder had filed a financing statement covering the same types of livestock before the date of a the filing made

by the purchase money secured party, or before the beginning of the 20 day period if the purchase money security interest is temporarily perfected without filing or possession under Section 9-310(e);

(3) the holder of the conflicting security interest receives the notification within six months before the debtor receives possession of the livestock ~~for a negotiable document covering the livestock~~; and

(4) the notification states that the person giving the notice has or expects to acquire a purchase money security interest in livestock of the debtor, describing the livestock by item or type.

(d) Except as otherwise provided in subsection (e), a purchase money security interest in collateral other than inventory or livestock has priority over a conflicting security interest in the same collateral and, except as otherwise provided in Section 9-325, also has priority in its identifiable proceeds if the purchase money security interest is perfected when the debtor receives possession of the collateral ~~for a negotiable document covering the collateral~~ or within 20 days thereafter.

(e) If more than one security interest qualifies for priority in the same collateral under subsection (a), (c), or (d):

(1) a security interest securing an obligation incurred [by an obligor] as the price of the collateral has priority over a security interest securing an obligation incurred

[by an obligor] for value given to enable the debtor to acquire rights in collateral, and

(2) in all other cases, Section 9-319(b) applies to the qualifying security interests.

SECTION 9-323. PRIORITY OF SECURITY INTERESTS IN TRANSFERRED COLLATERAL. [former draft § 9-312(h)] If a debtor acquires property subject to a security interest created by another person, the security interest is perfected when the debtor acquires the property, and there is no period thereafter when it is unperfected, any security interest created by the debtor is subordinate to the security interest created by the other person, notwithstanding anything to the contrary in this part. However, if the security interest created by the other person is unperfected when the debtor acquires the property or at any time thereafter, the other sections of this subpart govern, as applicable.

SECTION 9-323A. PRIORITY OF SECURITY INTERESTS CREATED BY NEW DEBTOR. [former draft § 9-312(i)] A security interest that is perfected by a filed financing statement that is effective solely under Section 9-510 in collateral in which a new debtor has or acquires rights is subordinate to a security interest in the same collateral that is perfected in another manner. However, if more than one security interest in the same collateral is subordinate under this subsection, the other rules stated in this subpart, as applicable, determine the priority of the subordinated security interests as among themselves.

SECTION 9-324. PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY. [former draft § 9-115(e)-(f)] Priority among conflicting security interests in the same investment property is governed by the following rules:

(1) A security interest of a secured party that has control over investment property has priority over a security interest of a secured party that does not have control over the investment property.

(2) A possessory security interest in a security certificate in registered form has priority over a conflicting security interest perfected by a method other than control.

(3) Except as otherwise provided in paragraphs (4) and (5), conflicting security interests of secured parties each of whom has control rank equally.

(4) Except as otherwise agreed by the securities intermediary, a security interest in a security entitlement or a securities account granted to the debtor's own securities intermediary has priority over any security interest granted by the debtor to another secured party.

(5) Except as otherwise agreed by the commodity intermediary, a security interest in a commodity contract or a commodity account granted to the debtor's own commodity intermediary has priority over any security interest granted by the debtor to another secured party.

(6) Conflicting security interests granted by a broker, a securities intermediary, or a commodity intermediary which are perfected without control rank equally.

(7) In all other cases, priority among conflicting security interests in investment property is governed by Sections 9-319(b) and (c) and 9-320(a).

SECTION 9-325. PRIORITY OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS. [former draft § 9-312(j)] Priority among conflicting security interests in the same deposit account is governed by the following rules:

(1) A security interest held by a secured party that has control over the deposit account has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraphs (3) and (4), security interests perfected by control rank equally.

(3) Except as otherwise provided in paragraph (4), a security interest held by the depository institution with which the deposit account is maintained has priority over a conflicting security interest held by another secured party.

(4) A security interest perfected by control pursuant to Section 9-109(a)(3) has priority over a security interest held by the depository institution with which the deposit account is maintained.

SECTION 9-326. PRIORITY OF SECURITY INTERESTS IN LETTERS OF CREDIT. [former draft § 9-312(p)] Priority among conflicting security interests in the same letter of credit and proceeds of the letter of credit is governed by the following rules:

(1) A security interest held by a secured party that has control over the letter of credit and proceeds of the letter

of credit has priority over a conflicting security interest held by a secured party that does not have control.

(2) Except as otherwise provided in paragraph (3), security interests perfected by control rank equally.

(3) A security interest held by a transferee beneficiary has priority over a conflicting security interest held by another secured party.

SECTION 9-327. PURCHASE OF CHATTEL PAPER AND INSTRUMENTS.
[former draft § 9-308]

(a) A purchaser of chattel paper ~~for an instrument~~ has priority over a security interest in the chattel paper ~~for instrument~~ and, except as otherwise provided in Section 9-325, in ~~the proceeds of either~~ ~~its~~ proceeds if the purchaser, in good faith, in the ordinary course of the purchaser's business, and without knowledge that the purchase violates the rights of the secured party, gives new value and takes possession of the chattel paper ~~for instrument~~.

(b) For purposes of subsection (a), if chattel paper ~~for an instrument~~ indicates that it has been assigned to an identified assignee, a purchaser of the chattel paper ~~for instrument~~ has knowledge that the purchase violates the rights of the assignee.

(c) A possessory security interest in an instrument has priority over a conflicting security interest perfected by another method.

Changes from Prior Draft

At its November, 1996, meeting, the Drafting Committee approved the priority rule in subsection (c), under which a possessory security interest in an instrument takes priority over a conflicting security interest perfected by another method, e.g., filing or temporary automatic perfection. Accordingly, this draft limits the application of subsections (a) and (b) to chattel paper. The rule in subsection (c) applies regardless of the pledgee's knowledge. However, like all priority rules, it is subject to the duty of good faith.

SECTION 9-328. [PROTECTION] [RIGHTS] OF PURCHASERS OF INSTRUMENTS, DOCUMENTS, AND SECURITIES UNDER OTHER ARTICLES.

[former draft § 9-309] Nothing in this article limits the rights of a holder in due course of a negotiable instrument (Section 3-302), a holder to whom a negotiable document of title has been duly negotiated (Section 7-501), or a protected purchaser of a security (Section 8-303). These holders or purchasers take priority over an earlier security interest, even if perfected, to the extent provided in Articles 3, 7, and 8. Filing under this article does not constitute notice of the security interest to those holders or purchasers.

SECTION 9-329. TRANSFER OF MONEY; TRANSFER OF FUNDS FROM DEPOSIT ACCOUNT. [former draft § 9-308A]

(a) A transferee of money takes the money free of a security interest unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

(b) A transferee of funds from a deposit account takes the funds free of a security interest in the deposit account unless the transferee acts in collusion with the debtor in violating the rights of the secured party.

SECTION 9-330. PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW. [MINOR STYLE CHANGES ONLY] [**former draft § 9-**

310] If a person in the ordinary course of the person's business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of the person given by statute or rule of law for the materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

SECTION 9-331. PRIORITY OF SECURITY INTERESTS IN FIXTURES.
[**former draft § 9-313(a)-(g)**]

(a) A mortgage is a construction mortgage to the extent that it secures an obligation incurred for the construction of an improvement on land including the acquisition cost of the land, if the recorded record ~~writing~~ so indicates.

(b) A security interest under this article may be created in goods that are fixtures or may continue in goods that become fixtures, but no security interest exists under this article in ordinary building materials incorporated into an improvement on land.

(c) This article does not prevent creation of an encumbrance upon fixtures under real estate law.

(d) A perfected security interest in fixtures has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(1) the security interest is a purchase money security interest, the interest of the encumbrancer or owner

arises before the goods become fixtures, the security interest is perfected by a fixture filing before the goods become fixtures or within ten days thereafter, and the debtor has an interest of record in the real estate or is in possession of the real estate;

(2) the security interest is perfected by a fixture filing before the interest of the encumbrancer or owner is of record, the security interest has priority over any conflicting interest of a predecessor in title of the encumbrancer or owner, and the debtor has an interest of record in the real estate or is in possession of the real estate;

(3) the fixtures are readily removable factory or office machines, readily removable equipment that is not primarily used or leased for use in the operation of the real estate, or readily removable replacements of domestic appliances that are consumer goods, and before the goods become fixtures the security interest is perfected by any method permitted by this article; or

(4) the conflicting interest is a lien on the real estate obtained by legal or equitable proceedings after the security interest was perfected by any method permitted by this article.

(e) A security interest in fixtures, whether or not perfected, has priority over a conflicting interest of an encumbrancer or owner of the real estate if:

(1) the encumbrancer or owner has, in a signed record, consented ~~in writing~~ to the security interest or ~~has~~ disclaimed an interest in the goods as fixtures; or

(2) the debtor has a right to remove the goods as against the encumbrancer or owner.

(f) If the debtor's right to remove the goods as against the encumbrancer or owner terminates, the priority of the security interest under subsection (e) continues for a reasonable time.

(g) Notwithstanding paragraph (1) of subsection (d) but otherwise subject to subsections (d), (e), and (f), a security interest in fixtures is subordinate to a construction mortgage recorded before the goods become fixtures if the goods become fixtures before the completion of the construction. To the extent that it is given to refinance a construction mortgage, a mortgage has this priority to the same extent as the construction mortgage.

(h) In cases not within subsections (b) through (g), a security interest in fixtures is subordinate to a conflicting interest of an encumbrancer or owner of the related real estate which is not the debtor.

SECTION 9-332. ACCESSIONS. ~~[MINOR STYLE CHANGES ONLY]~~
[former draft § 9-314]

Subsection (a) - Alternative A

(a) "Accession" means goods that are [installed in,] [affixed to,] [attached to,] [assembled with,] [manufactured into,] [processed with,] [or] [processed into] other goods in a manner such that the identity of the original goods is not lost.

Subsection (a) - Alternative B

(a) "Accession" means goods that are physically united with other goods in a manner such that the identity of the original goods is not lost.

(b) A security interest may be created in an accession and continues in collateral that becomes an accession.

(c) If a security interest is perfected when the collateral becomes an accession, the security interest remains perfected in the [collateral] [accession].

(d) Except as otherwise provided in subsection (e), the other provisions of this part determine the priority of a security interest in an accession.

(e) A security interest in an accession is subordinate to a security interest in the whole that is perfected by compliance with the requirements of a certificate-of-title statute pursuant to § 9-309(d).

(f) Subject to Part 6, on default, a secured party may remove an accession from other goods if[:

(1)] the security interest in the accession has priority over the claims of every person having an interest in the whole[; and

(2) removal will not cause [material] [serious] [irreparable] physical injury to the whole].

(g) [Unless otherwise agreed, a] [A] secured party that removes an accession pursuant to subsection (f) shall promptly reimburse any encumbrancer or owner of the whole, other than the debtor, for the cost of repair of any physical injury to

the whole. The secured party need not reimburse for any diminution in value of the whole caused by the absence of the accession removed or by any necessity for replacing it. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate assurance for the performance of this obligation.

Reporters' Comments

1. Background. This section replaces § 9-314 of existing Article 9 and § 9-332 of the October, 1996, Draft. It has been completely rewritten, in accordance with the discussion at the November, 1996, meeting.

Grant Gilmore set forth the pre-UCC rule governing accessions as follows: when accessories were installed in or attached to goods in which a security interest existed (e.g., a radio was installed in an automobile), courts subordinated the security interest in the automobile to the (usually, purchase money) security interest in the accessory; however, when the accessories could be described as "integral" parts of the car (e.g., an engine), the security interest in the accessory was not infrequently subordinated to the competing interest in the automobile. Former § 9-314 was, in Gilmore's words, "an exact replica" of the 1962 version of § 9-313 on fixtures. As such, it went somewhat beyond the protection that the pre-UCC automobile cases afforded security interests in accessories.

2. The draft offers alternative definitions of "accession." They are intended to convey the same meaning and differ only in the level of specificity. This section applies to an "accession," as defined, regardless of the cost or difficulty of removing the accession from the other goods, and regardless of whether the original goods have come to form an integral part of the other goods. This section does not apply to goods whose identity has been lost. Goods of that kind are "commingled goods" governed by § 9-333. Neither this section nor the following one addresses case of collateral that changes form without the addition of other goods.

3. This section distinguishes among the "accession," the "other goods," and the "whole." The last term refers to the combination of the "accession" and the "other goods." If one person's collateral becomes physically united with another person's collateral, each is an "accession."

Example: SP-1 holds a security interest in the debtor's tractors (which are not subject to a

certificate-of-title law), and SP-2 holds a security interest in a particular tractor engine. The engine is installed in a tractor. From the perspective of SP-1, the tractor becomes an "accession" and the engine is the "other goods." From the perspective of SP-2, the engine is the "accession" and the tractor is the "other goods." The completed tractor--tractor cum engine--constitutes the "whole."

4. This section governs only a few issues concerning accessions. Subsection (b) contains rules governing continuation of a security interest in an accession. Subsection (c) contains a rule governing continued perfection of a security interest in goods that become an accession. Subsection (e) contains a special priority rule governing accessions that become part of a whole covered by a certificate of title. Subsections (f) and (g) govern enforcement of a security interest in an accession. The Drafting Committee may wish to consider whether these disparate provisions should remain together in a single section or should be divided according to topic (e.g., subsections (f) and (g) might fit better in part 6).

5. In this connection, consider that other provisions of this Article often will govern accession-related issues. For example, this section does not address whether a secured party acquires a security interest in the whole if its collateral becomes an accession. Normally this will turn on the description of the collateral in the security agreement. The Drafting Committee may wish to consider whether to add a per se rule under which a security interest would extend automatically to all accessions, as it does to proceeds.

Example: Debtor owns a computer subject to a perfected security interest in favor of SP-1. Debtor acquires memory and installs it in the computer. Whether SP-1's security interest attaches to the memory depends on whether the security agreement covers it.

Similarly, this section does not determine whether perfection against collateral that becomes an accession is effective to perfect a security interest in the whole. Other provisions of this article, including the requirements for indicating the collateral covered by a financing statement, resolve that question.

6. With one exception, concerning goods covered by a certificate of title (see subsection (e)), the other provisions of this part, including the rules governing purchase money security interests, determine the priority of most security interests in an accession, including the relative priority of a security interest in an accession and a security interest in the whole. See subsection (d).

Example: Debtor owns an office computer subject to a security interest in favor of SP-1. Debtor acquires memory and grants a perfected security interest in the memory to SP-2. Debtor installs the memory in the computer, at which time (we assume) SP-1's security interest attaches to the memory. The first-to-file-or-perfect rule of § 9-319 governs priority in the memory. If, however, SP-2's security interest is a purchase money security interest, § 9-322(d) would afford priority in the memory to SP-2, regardless of which security interest was perfected first.

7. This section does govern the priority of a security interest in an accession that is or becomes part of a whole that is subject to a security interest perfected by compliance with a certificate-of-title statute. Subsection (e) provides that a security interest in the whole, perfected by compliance with a certificate-of-title statute, takes priority over a security interest in the accession. It enables a secured party to rely upon a certificate of title without having to check the UCC files to determine whether any components of the collateral may be encumbered. The subsection imposes a corresponding risk upon those who finance goods that may become part of goods covered by a certificate of title. In doing so, it reverses the priority that appeared reasonable to most pre-UCC courts.

Example: Debtor owns an automobile subject to a security interest in favor of SP-1. The security interest is perfected by notation on the certificate of title. Debtor buys tires subject to a perfected-by-filing purchase money security interest in favor of SP-2 and mounts the tires on the automobile's wheels. If the security interest in the automobile attaches to the tires, then SP-1 acquires priority over SP-2. The same result would obtain if SP-1's security interest attached to the automobile and was perfected after the tires had been mounted on the wheels.

SECTION 9-333. COMMINGLED GOODS ~~THAT ARE COMMINGLED OR PROCESSED~~. [former draft § 9-315]

Subsection (a) - Alternative A.

(a) "Commingled goods" means goods that are manufactured, processed, assembled, or commingled with other goods in such a manner that their identity is lost in a product or mass.

Subsection (a) - Alternative B.

(a) "Commingled goods" means goods that are physically [united with] [related to] other goods in such a manner that their identity is lost in a product or mass.

Subsections (b) and (c) - Alternative A.

(b) Except as otherwise provided in subsection (c), a security interest may not be created in commingled goods.

(c) When collateral becomes commingled goods, the security interest in the collateral is discharged, and a security interest attaches to the product or mass. [The secured party may not enforce the security interest in the product or mass to the extent the value of product or mass at the time of enforcement exceeds the value of the collateral at the time it became commingled goods.]

Subsections (b) and (c) - Alternative B

(b) Except as otherwise provided in subsection (c), no security interest exists [under this Article] in commingled goods.

(c) When collateral becomes commingled goods, a security interest attaches to the product or mass. [The secured party may not enforce the security interest in the product or mass to the extent the value of product or mass at the time of enforcement exceeds the value of the collateral at the time it became commingled goods.]

(d) If a security interest in collateral is perfected before the collateral becomes commingled goods, the security

interest that attaches to the product or mass under subsection (c) is perfected.

(e) Except as otherwise provided in subsection (f), the other sections of this part, as applicable, determine the priority of a security interest that attaches to the product or mass under subsection (d).

(f) When more than one security interest attaches to the product or mass under subsection (c), the following rules determine priority:

(1) a security interest that is perfected under subsection (d) has priority over a security interest that is unperfected at the time the collateral becomes commingled goods; and

(2) when more than one security interest is perfected under subsection (d), the security interests rank equally in proportion to value of the collateral at the time it became commingled goods.

Reporters' Comments

1. This section replaces § 9-315 of existing Article 9 and § 9-333 of the October, 1996, Draft. It has been completely rewritten, in accordance with the discussion at the November, 1996, meeting.

2. Subsection (a) defines "commingled goods." It is meant to include not only goods whose identity is lost through manufacturing or production (e.g., flour that has become part of baked goods) but also goods whose identity is lost by commingling with other goods from which they cannot be distinguished (e.g., ball bearings).

3. By definition, the identity of the original collateral cannot be determined once the original collateral becomes commingled goods. Consequently, the security interest in the specific original collateral alone is lost once the collateral becomes commingled goods, and no security interest in the

original collateral can be created thereafter except as a part of the resulting product or mass. See subsections (b) and (c).

4. Once collateral becomes commingled goods, the secured party's security interest is transferred from the original collateral to the product or mass. See subsection (c). If the security interest in the original collateral was perfected, the security interest in the product or mass is a perfected security interest. See subsection (d). This perfection continues until lapse.

5. A security interest in a product or mass that arises under subsection (c) can be enforced only to the extent of the value of the original collateral (or, if it is less, the amount of the secured obligation). The draft would leave the courts free to define "value" in this context.

6. This section governs the priority of competing security interests in a product or mass only when both security interests arise under this section. In that case, if both security interests are perfected by operation of this section (see subsection (d)), then the security interests rank equally, in proportion to the value of the collateral at the time it became commingled goods. See subsection (f)(2).

Example 1: SP-1 has a perfected security interest in Debtor's eggs, which have a value of \$ 300 and secure a debt of \$ 400, and SP-2 has a perfected security interest in Debtor's flour, which has a value of \$ 500 and secures a debt of \$ 600. Debtor uses the flour and eggs to make cakes, which have a value of \$ 1000. The two security interests rank equally and share in the ratio of 3:5. Applying this ratio to the entire value of the product, SP-1 would be entitled to \$ 375 (i.e., $3/8 \times \$ 1000$), and SP-2 would be entitled to \$ 625 (i.e., $5/8 \times \$ 1000$). However, under subsection (c), SP-1 may enforce its security interest only to the extent of \$ 300, and SP-2 may enforce its security interest only to the extent of \$ 500. This leaves \$ 200 for Debtor.

Example 2: Assume the facts of Example 1, except that SP-1's collateral, worth \$ 300, secures a debt of \$ 200. Recall that, if the cake is worth \$ 1000, then applying the ratio of 3:5 would entitle SP-1 to \$ 375 and SP-2 to \$ 625. However, SP-1 is not entitled to collect from the product more than it is owed. Accordingly, SP-1's share would be only \$ 200, SP-2 would receive \$ 500 (the value of its original collateral), and Debtor would keep the remaining \$ 300.

Example 3: Assume that the cakes in the previous examples have a value of only \$ 600. Again, the

parties share in the ratio of 3:5. If, as in Example 1, SP-1 is owed \$ 400, then SP-1 is entitled to \$ 225 (i.e., $3/8 \times \$ 600$), and SP-2 is entitled to \$ 375 (i.e., $5/8 \times \$ 600$). Debtor receives nothing. If, however, as in Example 2, SP-1 is owed only \$ 200, then Debtor receives \$ 25.

The results in the foregoing examples remain the same, regardless of whether SP-1 or SP-2 (or each) has a purchase money security interest.

8. The rule explained in the preceding note applies only when both security interests in original collateral are perfected when the goods become commingled goods. If a security interest in original collateral is unperfected at the time the collateral becomes commingled goods, subsection (f)(1) applies.

Example 4: SP-1 has a perfected security interest in the debtor's eggs, and SP-2 has an unperfected security interest in the debtor's flour. Debtor uses the flour and eggs to make cakes. Under subsection (c), both security interests attach to the cakes. But since SP-1's security interest was perfected at the time of commingling and SP-2's was not, only SP-1's security interest in the cakes is perfected. See subsection (d). Under subsection (f)(1), SP-1's perfected security interest has priority over SP-2's unperfected security interest.

If both security interests are unperfected, the residual first-to-attach rule of § 9-319 would apply.

9. On occasion, a single input may be encumbered by more than one security interest. In those cases, we suggest that the multiple secured parties be treated like a single secured party for purposes of determining their collective share under subsection (f)(2). The normal priority rules would determine how that share would be allocated between them. Consider the following example, which is a variation on Example 1 above:

Example 5: SP-1A has a perfected, first-priority security interest in Debtor's eggs. SP-1B has a perfected, second-priority security interest in the same collateral. The eggs have a value of \$ 300. Debtor owes \$ 200 to SP-1A and \$ 200 to SP-1B. SP-2 has a perfected security interest in Debtor's flour, which has a value of \$ 500 and secures a debt of \$ 600. Debtor uses the flour and eggs to make cakes, which have a value of \$ 1000.

For purposes of subsection (f)(2), we suggest that SP-1A and SP-1B be treated like a single secured party. The collective security interest would rank equally

with that of SP-2. Thus, the secured parties would share in the ratio of 3 (for SP-1A and SP-1B combined) to 5 (for SP-2). Applying this ratio to the entire value of the product, SP-1A and SP-1B in the aggregate would be entitled to \$ 375 (i.e., $3/8 \times \$ 1000$), and SP-2 would be entitled to \$ 625 (i.e., $5/8 \times \$ 1000$). However, under subsection (c), SP-1A and SP-1B may enforce their security interest only to the extent of \$ 300. (Likewise, SP-2 would be limited to a \$ 500 recovery.)

SP-1A and SP-1B would share the \$ 300 in accordance with their priority, as established under other rules. Inasmuch as SP-1A has first priority, it would receive \$ 200, and SP-1B would receive \$ 100.

If the Drafting Committee agrees with this approach, we will attempt to draft an appropriate provision. It is possible that an explanation in the official comments would suffice.

10. Normal priority rules determine the priority of a security interest that attaches to the product or mass other than by operation of this section. For example, assume that SP-1 has a perfected security interest in Debtor's existing and after-acquired baked goods, and SP-2 has a perfected security interest in Debtor's flour. When the flour is processed into cakes, subsections (c) and (d) provide that SP-2 acquires a perfected security interest in the cakes. If SP-1 filed against the baked goods before SP-2 filed against the flour, then SP-1 will enjoy priority in the cakes. See draft § 9-319 (first-to-file-or-perfect). But if SP-2 filed against the flour before SP-1 filed against the baked goods, then SP-2 will enjoy priority in the cakes to the extent of its security interest.

11. As is the case with draft § 9-332, this section contains attachment, perfection, and priority rules. The Drafting Committee may wish to consider whether these disparate provisions should remain together in a single section or should be divided according to topic.

**SECTION 9-334. PRIORITY OF SECURITY INTERESTS IN GOODS
COVERED BY A CERTIFICATE OF TITLE. [former draft § 9-103(c)(6)]**

If, while a security interest in goods is perfected by any method under the law of another jurisdiction, this State issues a certificate of title (Section 9-303) that does not show that the goods are subject to the security interest or contain a statement

that they may be subject to security interests not shown on the certificate:

(1) a buyer of the goods, other than a person that is in the business of selling goods of that kind, takes free of the security interest to the extent that the buyer gives value and receives delivery of the goods after issuance of the certificate and without knowledge of the security interest; and

(2) the security interest is subordinate to a conflicting security interest in the goods that attaches, and is perfected under Section 9-309(d), after issuance of the certificate and without the conflicting secured party's knowledge of the security interest.

†SECTION 9-335. PRIORITY OF SECURITY INTEREST OR STATUTORY LIEN PERFECTED BY EFFECTIVE FINANCING STATEMENT CONTAINING INCORRECT INFORMATION. [former draft § 9-403(f)]

(a) A security interest or agricultural lien perfected by a filed financing statement complying with Section 9-502(a) but containing information described in Section 9-515(b)(5) that is incorrect is subordinate to the rights of a holder of a perfected security interest in or [another purchaser] [a buyer] of the collateral to the extent that the secured party or [other purchaser] [buyer] which gives value in reasonable reliance upon the incorrect information.

(b) A statutory lien, other than an agricultural lien, perfected by a filed financing statement complying with Section 9-502(a) but containing information described in Section 9-515(b)(5) that is incorrect is subordinate to the rights of a

holder of a perfected security interest in the collateral to the extent that the secured party gives value in reasonable reliance upon the incorrect information.†

Changes from Prior Draft

At its November, 1996, meeting the Drafting Committee decided that a security interest perfected by an effective, but flawed, financing statement should not be subordinated absolutely but only to the extent of value given in reliance on the incorrect information.

SECTION 9-336. PRIORITY SUBJECT TO SUBORDINATION. [MINOR STYLE CHANGES ONLY] [**former draft § 9-316**] Nothing in this article prevents subordination by agreement by any person entitled to priority.

[SUBPART 4. RIGHTS OF DEPOSITARY INSTITUTION]

SECTION 9-337. EFFECTIVENESS OF RIGHT OF RECOUPMENT OR SET-OFF AGAINST DEPOSIT ACCOUNT. [**former draft §§ 9-312A, 9-209**]

(a) Except as otherwise provided in subsection (c), a depositary institution with which a deposit account is maintained may exercise against a secured party that holds a security interest in the deposit account any right of recoupment and any right of set-off.

(b) Except as otherwise provided in subsection (c), the application of this article to a security interest in a deposit account does not affect a right of recoupment or set-off of the secured party as to a deposit account maintained with the secured party.

(c) The exercise by a depositary institution of a set-off against a deposit account is ineffective against a secured

party that holds a security interest in the deposit account which is perfected by control under Section 9-109(a)(3).

SECTION 9-338. DEPOSITARY INSTITUTION'S RIGHT TO DISPOSE OF FUNDS IN DEPOSIT ACCOUNT. [former draft § 9-318A] Except as otherwise provided in Section 9-337(c), and unless the depositary institution otherwise agrees in a signed record [~~in writing~~], a depositary institution's rights and duties with respect to a deposit account maintained with the depositary institution are not terminated, suspended, or modified by:

(1) the creation or perfection of a security interest in the deposit account;

(2) the depositary institution's knowledge of the security interest; or

(3) the depositary institution's receipt of instructions from the secured party.

SECTION 9-339. DEPOSITARY INSTITUTION'S RIGHT TO REFUSE TO ENTER INTO OR DISCLOSE EXISTENCE OF CONTROL AGREEMENT. [former draft § 9-117(c)] This article does not require a depositary institution to enter into an agreement of the type described in Section 9-109(a)(2) even if its customer so requests or directs. A depositary institution that has entered into such an agreement is not required to confirm the existence of the agreement to another person unless requested to do so by its customer.

PART 4

RIGHTS OF THIRD PARTIES

SECTION 9-401. ALIENABILITY OF DEBTOR'S RIGHTS. ~~[MINOR STYLE CHANGES ONLY]~~ **[former draft § 9-311]** A debtor's rights in collateral may be voluntarily or involuntarily transferred notwithstanding any provision in the security agreement prohibiting a transfer or making a transfer a default.

SECTION 9-402. SECURED PARTY NOT OBLIGATED ON CONTRACT OF DEBTOR. ~~[MINOR STYLE CHANGES ONLY]~~ **[former draft § 9-317]**

The existence of a security interest or statutory agricultural lien or of authority given to a debtor to dispose of or use collateral, without more, does not impose contract or tort liability upon a secured party for the debtor's acts or omissions.

SECTION 9-403. AGREEMENT NOT TO ASSERT DEFENSES AGAINST ASSIGNEE. **[former draft § 9-206]**

(a) This section is subject to other law that establishes a different rule for consumer account debtors.

(b) This section does not displace other law that gives effect to an agreement by a non-consumer account debtor not to assert a claim or defense against an assignee.

~~(c)~~ Except as otherwise provided in subsection (c), an agreement between an account debtor and an assignor not to assert against an assignee any claim or defense that the account debtor may have against the assignor is enforceable by an assignee that takes an assignment for value (Section 3-303(a)), in good faith, without notice of a claim of a property or

possessory right to the property assigned, and without notice of a defense or claim in recoupment of the type that may be asserted against a person entitled to enforce a negotiable instrument under Section 3-305(a).

(~~d~~) An agreement of the kind described in subsection (b) is not enforceable with respect to defenses of a type that may be asserted against a holder in due course of a negotiable instrument under Section 3-305(b).

Changes from Prior Text

This section has been revised to clarify that it does not displace other law that gives effect to a non-consumer account debtor, even if the waiver would not qualify under subsection (c).

SECTION 9-404. RIGHTS ACQUIRED BY ASSIGNEE; DEFENSES AGAINST ASSIGNEE; MODIFICATION OF CONTRACT; DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; TERM PROHIBITING ASSIGNMENT INEFFECTIVE. [former draft § 9-318]

(a) This section is subject to other law that establishes a different rule for consumer account debtors.

(~~b~~) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsection (b), the rights of an assignee are subject to:

(1) all the terms of the contract between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

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

~~(c)~~ The claim of an account debtor may be asserted against an assignee under subsection ~~(b)~~ only to reduce the amount owing or for the assignee's fraud ~~when the action is brought.~~

~~(d)~~ To the extent that the right to payment or a part thereof under an assigned contract has not been fully earned by performance, or to the extent that the right to payment or a part thereof has been fully earned by performance and the account debtor has not received notification of the assignment under subsection (d), ~~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 the modification or substitution is a breach by the assignor.

~~(e)~~ This subsection is subject to subsections (f), (g), and (h) ~~(e), (f), and (g)~~. An account debtor on an account, chattel paper, or a payment intangible may discharge its obligation by paying the assignor until but not after the account debtor receives a signed notification that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account

debtor may discharge its obligation by paying the assignee and
may not discharge the obligation by paying the assignor.

~~(e) An assignee may not send a notification under
subsection (d) that notifies an account debtor to make less than
the full amount of any installment payment to the assignee,
regardless of whether only a portion of the account, chattel
paper, or general intangible has been assigned to that assignee,
a portion has been assigned to another assignee, or the account
debtor knows that the assignment to that assignee is limited.~~

(f) A notification is ineffective under subsection
(~~ed~~):

(1) if it does not reasonably identify the rights
assigned;

(2) to the extent that an agreement between an
account debtor and a seller of a payment intangible limits the
account debtor's duty to pay a person other than the seller and
the limitation is effective under other law; or

(3) at the option of an account debtor, if the
notification notifies the account debtor to make less than the
full amount of any installment payment to the assignee,
regardless of whether only a portion of the account, chattel
paper, or general intangible has been assigned to that assignee,
a portion has been assigned to another assignee, or the account
debtor knows that the assignment to that assignee is limited it
is sent in violation of subsection (f).

(g) If requested by the account debtor, the assignee
must seasonably furnish reasonable proof that the assignment has

been made. Unless the assignee does so, the account debtor may discharge its obligation by paying the assignor even if the account debtor has received [an effective] [a] notification under subsection (ed).

(h) This subsection does not apply to the sale of a payment intangible. Except as otherwise provided in Sections 2A-303 and 9-405, a term in any contract between an account debtor and an assignor is ineffective if it prohibits, restricts, or requires the account debtor's consent to assignment of an account, chattel paper, or a payment intangible.

Changes from Prior Text

1. This section has been revised to reflect several suggestions made during the Drafting Committee's November, 1996, meeting.

2. New subsection (a) derives from § 9-403(a). It makes clear that other law establishing special consumer rules for consumer account debtors control. The term "consumer account debtor" remains undefined.

3. Subsection (c) (former subsection(b)) now permits an assignee to assert an affirmative claim based on the assignee's fraud as well as a claim to reduce the amount owing. The reference to "when the action is brought," which appears to be unnecessary, has been deleted.

4. Subsection (d) (former subsection(c)) has been revised to provide that good faith modifications are binding against an assignee except to the extent that the right to payment has been earned and notification has not been given to the account debtor.

5. Subsection (e) (former subsection (d)) has been clarified.

6. At the November, 1996, meeting some concern was expressed about the use of the words "may not" in former subsection (e), inasmuch as only the ineffectiveness of the notification would follow from a violation. Revised Subsection (f) addresses this problem. It clarifies and combines former subsections (e) and (f). The Drafting Committee should decide which approach it prefers.

SECTION 9-405. RESTRICTIONS ON CREATION OR ENFORCEMENT OF SECURITY INTEREST IN LEASEHOLD INTEREST OR IN LESSOR'S RESIDUAL INTEREST. [derived from § 2A-303]

(a) As used in this section, "creation of a security interest" includes the sale of a lease contract that is subject to this article.

(b) A provision in a lease agreement which (i) prohibits the creation or enforcement of a security interest in an interest of a party under the lease contract or in the lessor's residual interest in the goods, or (ii) makes such a transfer an event of default, is not enforceable unless, and then only to the extent that, there is an actual transfer by the lessee of the lessee's right of possession or use of the goods in violation of the provision or an actual delegation of a material performance of either party to the lease contract in violation of the provision. Neither the granting nor the enforcement of a security interest in (i) the lessor's interest under the lease contract or (ii) the lessor's residual interest in the goods is a transfer that materially impairs the prospect of obtaining return performance by, materially changes the duty of, or materially increases the burden or risk imposed on, the lessee within the purview of Section 2A-303(5) unless, and then only to the extent that, there is an actual delegation of a material performance of the lessor.

**SECTION 9-406. RESTRICTIONS ON ASSIGNMENT OF CERTAIN
GENERAL INTANGIBLES INEFFECTIVE. [former draft § 9-318B]**

(a) Subsection (b) applies to a security interest in a payment intangible only if the security interest arises out of a sale of the payment intangible.

(b) A term in a general intangible, including a contract, permit, license, or franchise, between an account debtor and a debtor that prohibits, restricts, or requires the account debtor's consent to the assignment or transfer of or creation, attachment, or perfection of a security interest in the general intangible, is ineffective to the extent that (i) the term would impair the creation, attachment, or perfection of a security interest, or (ii) the creation, attachment, or perfection of the security interest would cause a default, breach, right of recoupment, claim, defense, termination, right of termination, or remedy under the general intangible.

(c) A term in a statute or governmental rule or regulation that prohibits, restricts, or requires the consent of a government or governmental body or official to the assignment or creation of a security interest in a general intangible, including a contract, permit, license, or franchise, between an account debtor and a debtor is ineffective to the extent that (i) the term would impair the creation, attachment, or perfection of a security interest, or (ii) the creation, attachment, or perfection of the security interest would cause a default, breach, claim, defense, termination, right of termination, or remedy under the general intangible.

(d) To the extent that a term in a general intangible, statute, rule, or regulation is ineffective under subsection (b) or (c) but is effective under other law, the creation, attachment, or perfection of a security interest in the general intangible (i) is not enforceable against the account debtor, (ii) imposes no duties or obligations on the account debtor, and (iii) does not require the account debtor to recognize the security interest, pay or render performance to the secured party, or accept payment or performance from the secured party.

(e) This section controls over any inconsistent provisions of the following statutes, rules, and regulations:

[List here any statutes, rules, and regulations containing provisions inconsistent with this section.]

Reporters' Comments

1. The official comments should that under subsection (a) this section applies only to security interests in payment intangibles that arise out of sales of the payment intangibles. Security interests in payment intangibles that secure an obligation are subject to an even broader anti-assignment rule under § 9-404(h).

2. The official comments also should explain that this section does not render ineffective any term that restricts outright sales of general intangibles (other than payment intangibles). It deals only with restrictions on security interests. The only sales of general intangibles that create security interests are sales of payment intangibles.

3. This section continues to use the term "account debtor" to refer to the party other than the debtor to a general intangible such as a permit, franchise, or the like. It is true that in many cases the principal payment obligation under a general intangible may be a obligation to pay by the debtor to the account debtor. But the definition of "account debtor" in § 9-102 does not limit the term to persons who are obligated to pay under a general intangible. Because the other party to a general intangible may not have affirmative executory duties or obligations, it has been suggested that another term be used. Alternatively, the Drafting Committee may wish to consider

whether the definition of "account debtor" should be expanded to include "a person, other than the debtor, that is a party to a general intangible."

PART 5

FILING

[SUBPART 1. PLACE OF FILING, CONTENTS AND
EFFECTIVENESS OF FINANCING STATEMENT]

SECTION 9-501. PLACE OF FILING. [former draft § 9-401]

(a) Except as otherwise provided in subsection (b), if the law of this State governs perfection of a security interest (Sections 9-301 through 9-307), the place to file a financing statement to perfect the security interest is:

(1) the office designated for the filing or recording of a mortgage on the real estate, if the collateral is timber to be cut or is minerals or the like, including oil and gas, or accounts subject to Section 9-306, or the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures; [and]

[(2) the office of the debtor's registered agent, if the debtor has designated a registered agent under Section 9-525; and]

(3) the office of [] [in all other cases] [or any location duly authorized by []], including if the goods are or are to become fixtures and the financing statement is not filed as a fixture filing.

(b) Subject to Section 9-309(c), the place to file a financing statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is the office of []. This financing statement constitutes a fixture filing as to the described collateral that is or is to become fixtures.

Legislative 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 that maintains the state's filing system (see Section 9-526).

SECTION 9-502. CONTENTS OF FINANCING STATEMENT; MORTGAGE AS FINANCING STATEMENT; TIME OF FILING FINANCING STATEMENT. [former draft § 9-402(a), (b), (m)]

(a) A financing statement is sufficient only if it states ~~gives~~ the names and mailing addresses of the debtor and the secured party or a representative of the secured party and contains a statement indicating the collateral covered by the financing statement. If the financing statement covers timber to be cut or covers minerals or the like, including oil and gas, or accounts subject to Section 9-306, or if the financing statement is filed as a fixture filing and the collateral is goods that are or are to become fixtures, the financing statement also must state ~~show~~ that it covers this type of collateral, recite that it is to be filed [for record] in the real estate records, 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, state
~~show~~ the name of a record owner.

Legislative Note: Language in brackets is optional.

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 (a) and Section 9-520(b) may be necessary.

See Mass. Gen. Laws Chapter 106, Section 9-410.

(b) A real estate mortgage is effective as a financing statement filed as a fixture filing from the date of its recording only if:

- (1) the mortgage indicates the goods that it covers;
- (2) the goods are or are to become fixtures related to the real estate described in the mortgage;
- (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
- (4) the mortgage is [duly] recorded.

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

SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY. [former draft § 9-402(c)-(f)]

(a) A financing statement sufficiently states ~~gives~~ the name of the debtor:

(1) if the debtor is a registered entity, only if the financing statement states ~~gives~~ the name of the debtor as shown on the public records of the debtor's State of organization;

(2) if the debtor is a decedent's estate, only if the financing statement states ~~gives~~ the name of the decedent and indicates that the debtor is an estate;

(3) if the debtor is a trust, only if the financing statement states ~~gives~~ the name, if any, specified for the trust in its organic documents or, if no name is specified, states ~~gives~~ the name of the settlor and additional information sufficient to distinguish the debtor from other trusts having one or more of the same settlors and indicates, in the debtor's name or otherwise, that the debtor is a trust; and

(4) in other cases, only if it states ~~gives~~ the individual or organization name of the debtor.

(b) A financing statement that sufficiently states ~~gives~~ the name of the debtor is not rendered ineffective by the absence of a trade or other name or names of partners, members, or associates.

(c) A financing statement may state ~~give~~ the name of more than one debtor, may state ~~give~~ as an additional debtor, a trade or other name for the debtor, and may state ~~give~~ the name of more than one secured party.

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

Reporters' Comment

During its November, 1996, meeting the Drafting Committee asked the reporters to add to paragraph (a)(4) a list of the various types of entities that could be debtors. We have not settled on that list as yet.

SECTION 9-504. INDICATION OF COLLATERAL. [former draft § 9-402 (g)] A description of the collateral, an indication of the type of collateral, or a statement to the effect that the financing statement covers all assets or all personal property is sufficient to indicate the collateral that is covered by a financing statement.

SECTION 9-505. FILING AND COMPLIANCE WITH OTHER STATUTES AND TREATIES FOR CONSIGNMENTS, LEASES, BAILMENTS, AND OTHER TRANSACTIONS. [former draft § 9-408] A consignor, lessor, or bailor of goods or a buyer of a payment intangible may file a financing statement, or may comply with a statute or treaty described in Section 9-309(c), 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." This part applies to a financing statement and, as appropriate, to compliance that is equivalent to filing a financing statement under Section 9-309(d), but the filing or compliance is not of itself a factor in determining whether the collateral secures an obligation. However, if it is determined for another reason that the collateral secures an obligation, a security interest held by the consignor, lessor, bailor, owner, or buyer which attaches to the collateral is perfected by the filing or compliance.

SECTION 9-506. EFFECT OF MINOR ERRORS. [former draft § 9-402(h)] A financing statement substantially complying with the requirements of this part is effective, even if it contains minor errors that are not seriously misleading. A financing statement that fails to state ~~give~~ the correct name of the debtor in accordance with Section 9-503(a) is seriously misleading unless a search of the records of the filing office conducted [in accordance with a rule adopted pursuant to Section 9-528] under the debtor's correct name would disclose the financing statement, in which case the incorrect name does not render the financing statement seriously misleading.

SECTION 9-507. EFFECT OF CERTAIN CHANGES ON EFFECTIVENESS OF FINANCING STATEMENT. [former draft § 9-402(i)-(k)]

(a) If a debtor so changes its name that a filed financing statement becomes seriously misleading:

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

(2) the financing statement is not effective to perfect a security interest in collateral acquired by the debtor more than four months after the change, unless an amendment to the financing statement that renders the financing statement not seriously misleading is filed within four months after the change.

(b) A filed financing statement remains effective with respect to collateral that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a security interest

continues under Section 9-313(c), even if the secured party knows of or consents to the disposition.

(c) Except as otherwise provided in subsection (a) and Section 9-510, 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.

**SECTION 9-508. AUTHORIZATION OF FINANCING STATEMENT;
LIABILITY FOR UNAUTHORIZED FILING. [former draft § 9-402(n)-(p)]**

(a) A person may not file an initial financing statement or an amendment that adds collateral covered by a financing statement unless:

(1) the debtor authorizes the filing in a ~~signed writing or in a signed record in another medium authorized by the debtor in a signed writing~~; or

(2) the person holds a statutory ~~an agricultural~~ lien that has become effective at the time of filing and the financing statement covers only collateral in which the person holds a statutory ~~an agricultural~~ lien.

(b) By signing a ~~written~~ security agreement, a debtor authorizes the secured party to file an initial financing statement and an amendment covering the collateral described in the security agreement.

(c) A person that files an initial financing statement or an amendment that adds collateral and that claims a statutory ~~an agricultural~~ lien in the collateral covered by the financing statement shall send to the debtor a record containing the

information contained in a copy of the financing statement or the amendment ~~to the debtor~~ not later than the 10th day after the filing. The person shall send the information copy to the most recent mailing address of the debtor known to the person.

~~(d) A person that files an initial financing statement or an amendment in violation of subsection (a) or that fails to send a copy of a financing statement or amendment to the debtor in accordance with subsection (c) is liable to the debtor for \$500 and any loss thereby sustained by the debtor.~~

Changes from Prior Draft

1. As we would interpret subsection (b), if a signed security agreement covers inventory, and the secured party files a financing statement covering inventory and accounts, the financing statement is not a nullity. It is authorized insofar as it covers inventory and unauthorized insofar as it covers accounts.

2. In order to be useful, the information that is to be sent under subsection (c) should include an indication that it is of record in a particular filing office. The Drafting Committee may wish to consider whether that should be specified in the statute or whether it is sufficiently implicit.

3. Subsection (d), with modification, is now included in § 9-624.

SECTION 9-509. AMENDMENT OF FINANCING STATEMENT. [former draft § 9-402(1)] Subject to Section 9-513, a secured party of record may add or release collateral covered by a financing statement or otherwise amend the information contained in a financing statement by filing an amendment that identifies the initial financing statement by the date of filing and the file number assigned pursuant to Section 9-520(a) or by another method prescribed by rule. An amendment does not extend the period of

effectiveness of a financing statement. If an amendment adds collateral, it is effective as to the added collateral only from the date of filing of the amendment.

SECTION 9-510. EFFECTIVENESS OF FINANCING STATEMENT IF NEW DEBTOR BECOMES BOUND BY SECURITY AGREEMENT. [former draft § 9-402A]

(a) Except as otherwise provided in subsections (b) and (c), a filed financing statement naming an original debtor is effective to perfect a security interest in collateral in which a new debtor has or acquires rights to the extent that the financing statement would have been effective if the original debtor acquired rights in the collateral.

(b) If a filed financing statement that is effective under subsection (a) is seriously misleading with respect to the name of the new debtor:

(1) the financing statement 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 under Section 9-203(c); 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 under Section 9-203(c) unless an amendment that renders the financing statement not seriously misleading is filed before the expiration of that time.

(c) This section does not apply to collateral as to which a filed financing statement remains effective against the new debtor under Section 9-507(b).

SECTION 9-511. TERMINATION STATEMENT. [former draft § 9-404]

(a) A termination statement for a financing statement is a record that ~~is signed by the secured party of record,~~ identifies the financing statement by file number and date of filing or by another method prescribed by rule, and states either that it is a termination statement or that the identified financing statement is no longer effective.

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

(c) If a financing statement covers [consumer goods], within one month, or within 10 days after the secured party receives a [signed] ~~written~~ demand by the debtor, and if ~~after~~ there is no outstanding secured obligation and no commitment to make an advance, incur an obligation, or otherwise give value, the secured party of record shall file with the filing office a termination statement for the financing statement. In other cases, if there is no outstanding secured obligation and no commitment to make an advance, incur an obligation, or otherwise give value, or if a financing statement covers accounts, chattel paper, or payment intangibles that have been sold but as to which the account debtor other person obligated has discharged its obligation, the secured party of record for a financing

statement, within 10 days after the secured party receives a [signed] written demand by the debtor, shall send the debtor a termination statement for the financing statement or file the termination statement with the filing office. ~~A secured party of record that fails to file or send a termination statement as required by this subsection is liable to the debtor for \$500 and any loss thereby sustained by the debtor.~~

(d) Subject to Section 9-513, upon the filing of a termination statement with the filing office under subsection (b), the financing statement to which the termination statement relates becomes ineffective.

Changes from Prior Draft

The last sentence of subsection (c) is now included in § 9-624.

SECTION 9-512. ASSIGNMENT OF RIGHTS UNDER FINANCING STATEMENT. [former draft § 9-405(a)-(c)]

(a) Except as otherwise provided in subsection (c), an initial financing statement may reflect an assignment of all of the secured party's rights under the financing statement with respect to some or all of the collateral by giving in the financing statement the name and mailing address of the assignee. Upon filing, the assignee named in an assignment filed under this subsection is a secured party of record for the financing statement. An assignment in an initial financing statement 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

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

(b) Except as otherwise provided in subsection (c), a secured party of record may assign of record all or part of the secured party's rights under a financing statement by filing in the filing office an amendment that identifies the initial financing statement by file number and the date of filing or by another method prescribed by rule and states ~~gives~~ the names of the secured party of record and the debtor and the name and mailing address of the assignee. Upon filing, the assignee named in an amendment filed under this subsection is a secured party of record for the financing statement.

(c) An assignment of record of a security interest in a fixture covered by a real estate mortgage that is effective as a fixture filing under Section 9-502(b) may be made only by an assignment of record of the mortgage in the manner provided by other law of this State.

SECTION 9-513. MULTIPLE SECURED PARTIES OF RECORD. [former draft § 9-406]

(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, or termination statement concerning its rights under 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.

SECTION 9-514. SUCCESSOR OF SECURED PARTY. [former draft § 9-406A] A person that succeeds to substantially all of the rights of a secured party by operation of law and itself becomes a secured party may act under this part without disclosing its status as a successor or may act in its own name as the disclosed successor of a secured party.

SECTION 9-515. WHAT CONSTITUTES FILING A RECORD; EFFECTIVENESS OF FILING. [former draft § 9-403(a)-(b), (e), (g)]

(a) Except as otherwise provided in subsection (b), presentation of a record to a filing office and tender of the filing fee or acceptance of the record by the filing office constitutes filing.

(b) Filing does not occur with respect to a record that a filing office refuses to accept because:

(1) the record is not communicated by a method or medium of communication authorized by the filing office;

(2) an amount equal to or greater than the applicable filing fee is not tendered;

(3) the filing office is unable to index the record because:

(A) in the case of an initial financing statement, the record states ~~gives~~ no name for a debtor or the filing office is unable to read or decipher the names stated ~~given~~; or

(B) in other cases, the record does not identify the initial financing statement as required by this part

or the filing office is unable to read or decipher the identification;

(4) the filing office is unable to determine the secured party of record because the record does not state ~~give~~ a name for the secured party of record or the filing office is unable to read or decipher the name stated ~~given~~;

(5) in the case of an initial financing statement, the statement does not:

(A) indicate whether the debtor is an individual or an organization; or

(B) if the financing statement indicates that the debtor is an organization, state ~~indicate~~ the type of organization, state ~~give~~ a ~~jurisdiction~~ State of organization for the debtor, or state ~~give~~ an organizational identification number for the debtor or state ~~indicate~~ that the debtor has none; or

(6) in the case of an assignment in an initial financing statement under Section 9-512(a) or an amendment filed under Section 9-512(b), the record does not state ~~give~~ a name for the assignee.

(c) Except as otherwise provided in Section 9-335, a filed financing statement complying with Section 9-502(a) is effective, even if some or all of the information described in subsection (b) (5) is not stated ~~given~~ or is incorrect.

(d) A record that is presented to the filing office with tender of the filing fee but which the filing office refuses to accept for a reason other than one set forth in subsection (b) is effective as a filed record except as against a purchaser of

the collateral which gives value in reliance upon the absence of the record in the files.

SECTION 9-516. DURATION AND EFFECTIVENESS OF FINANCING STATEMENT; EFFECT OF LAPSED FINANCING STATEMENT. [former draft § 9-403(j)-(k), (l) (2d & 3d sentences), (m)]

(a) Except as otherwise provided in subsections (c) and (d), a filed financing statement is effective for a period of five years after the date of filing. The effectiveness of a filed financing statement lapses on the expiration of the five-year period unless before the lapse a continuation statement is filed pursuant to subsection (b) [, notwithstanding the commencement of insolvency proceedings by or against the debtor]. Upon lapse, a financing statement becomes ineffective and any security interest or statutory agricultural lien that was perfected by the financing statement becomes unperfected, unless the security interest [or statutory agricultural lien] is perfected without filing. If the security interest or an agricultural lien becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

(b) A continuation statement may be filed by a secured party of record for a financing statement only within six months before the expiration of the five-year period specified in subsection (a).

(c) Subject to Section 9-513, upon timely filing of a continuation statement, the effectiveness of the initial financing statement is continued for five years after the last

date on which the financing statement was effective, whereupon the financing statement lapses in the same manner as provided in subsection (a) unless before the lapse another continuation statement is filed pursuant to this subsection. Succeeding continuation statements may be filed in the same manner to continue the effectiveness of the initial financing statement.

(d) If a debtor is a transmitting utility and a filed financing statement so states, the financing statement is effective until a termination statement is filed. A real estate mortgage that is effective as a fixture filing under Section 9-502(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.

SECTION 9-517. CONTENTS OF CONTINUATION STATEMENT. [former draft § 9-403(1) (1st sentence)] A continuation statement must identify the initial financing statement by file number and the date of filing or by another method prescribed by rule and state that it is a continuation statement or that it is filed to continue the effectiveness of the financing statement.

SECTION 9-518. EFFECT OF INDEXING ERRORS. [former draft § 9-403(q) - (r)]

(a) Except as otherwise provided in subsection (b), the failure of the filing office to index a record correctly does not affect the effectiveness of the record.

(b) A filed but improperly indexed record is ineffective against a purchaser of the collateral that gives

value in reliance upon the apparent absence of the record in the files.

SECTION 9-519. CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD; FAILURE TO SEND OR FILE TERMINATION STATEMENT.

[former draft § 9-415]

(a) If a person believes [in good faith] that a record indexed under the person's name with the filing office is inaccurate or was wrongfully filed, the person may file with the filing office a correction statement with respect to the record or financing statement.

(b) If a person believes [in good faith] that the secured party of record for a financing statement indexed under the person's name has failed to comply with its duty to file or send to the person a termination statement for the financing statement under Section 9-511, the person may file with the filing office a termination request with respect to the financing statement.

(c) A correction statement or termination request must identify the record or the initial financing statement to which it relates by the date of filing and the file number assigned under Section 9-520(a) or by another method prescribed by rule. A correction statement must state ~~give~~ the basis for the person's belief that a record is inaccurate or was wrongfully filed and the manner in which the record should be amended in order to cure any inaccuracy. A termination request must state ~~give~~ the basis for the person's belief that the secured party of record for a financing statement indexed under the person's name has failed to

comply with its duty to file or send to the person a termination statement for the financing statement.

(d) Upon filing, a correction statement or a termination request becomes a part of the record or financing statement to which it relates, but neither the correction statement nor the termination request otherwise affects the record or financing statement.

 (e) If, within [XX] days after communicating [the information contained in a termination request] [the fact that a termination request has been filed with the filing office] to a secured party of record under Section 9-520(a), the filing office receives from the secured party of record an objection statement relating to the termination request, the objection statement becomes a part of the [record or] financing statement to which it relates, but the objection statement does not otherwise affect the [record or] financing statement and does not preclude any judicial relief to which the debtor may be entitled.

 (f) An objection statement must identify the [record or] initial financing statement to which it relates by the date of filing and the file number assigned under Section 9-403(n) or by another method prescribed by rule and must state that the secured party does not believe that it has failed to comply with its duty to file or send to the debtor a termination statement as stated by the debtor in the termination request.

 (g) If, within [XX] days after communicating [the information contained in a termination request] [the fact that a termination request has been filed with the filing office] to a

secured party of record under Section 9-520(a), the filing office does not receive from the secured party of record an objection statement relating to the termination request, the filing office shall note that fact in a filing office termination statement and shall file the filing office termination statement in the filing office.

(h) Upon filing, a filing office termination statement becomes a part of the [record or] financing statement to which it relates and the financing statement becomes ineffective.

Changes from Prior Draft

Subsections (e), (f), (g), and (h) respond to the Drafting Committee's decision taken at the November, 1996, meeting. They are similar to provisions included in § 9-415 of the February, 1996, draft. Unlike § 9-415, however, these subsections provide only for the filing office's termination of a financing statement and not for the correction of records generally.

[SUBPART 2. DUTIES AND OPERATION OF FILING OFFICE]

SECTION 9-520. NUMBERING, MAINTAINING, AND INDEXING RECORDS; COMMUNICATING INFORMATION CONTAINED IN RECORDS. [former draft §§ 9-403(n) - (p), 9-405(d) - (e)]

(a) Except as otherwise provided in subsections (b) and (d), for each record filed with the filing office, the filing office shall:

- (1) assign a file number to the record;
- (2) create a record that bears the file number and the date and time of filing;
- (3) maintain the filed record for public inspection;
- (4) index the filed record according to the name of the debtor in such a manner that each initial financing statement

is interrelated to all filed records relating to it] [maintain a storage and retrieval capability that allows for retrieval of records by debtor name and associates with each initial financing statement all filed records relating to that financing statement;
~~and~~

(5) note in the index the file number and the date and time of filing; and

_____ [(6) communicate the [information contained in the record] [the fact that the record has been filed with the filing office] to each debtor and secured party of record named in the financing statement to which the record relates and to the person that filed the record with the filing office].

(b) If a financing statement covers timber to be cut or covers minerals or the like, including oil and gas, or accounts subject to Section 9-306, or is filed as a fixture filing, [it must be filed for record and] the filing office shall index it under the names of the debtor and any owner of record shown on the financing statement as if they were the mortgagors under 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 the secured party were the mortgagee thereunder, or, if indexing is by description, as if the financing statement were a mortgage of the real estate described.

(c) In the case of a fixture filing, or a financing statement covering timber to be cut, or covering minerals or the like, including oil and gas, or accounts subject to Section

9-306, the filing office shall index an assignment filed under Section 9-512(a) or an amendment filed under Section 9-512(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 real estate mortgage under the name of the assignee, the filing office shall index the assignment or the amendment under the name of the assignee.

(d) The filing office shall perform the acts required by subsections (a), (b), and (c) at the time and in the manner prescribed by rule, but not later than two business days after the filing office receives the record in question.

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

Changes from Prior Draft

1. Subsection (a) has been revised in conformity with the Drafting Committee's vote at its November, 1996, meeting to add a requirement that the filing office send a copy of each record filed to each affected person. The draft does not undertake to specify or define which persons would be "affected" by a record; in effect, it deems all debtors and secured parties of record to be affected. Although it would be possible to specify in the statute the parties who might be adversely affected by each type of record, doing so would add substantial complexity.

2. The draft contains two alternatives for the information that the filing office is to communicate. The first requires the filing office to communicate all of the information contained in the record. For example, a photocopy of a written record would satisfy that requirement. The second alternative is less burdensome, but nevertheless might be adequate to accomplish the purpose of policing unauthorized filings. It would require the filing office to communicate only the fact that the record had been filed. For example, the second alternative would be satisfied by the following statement:

[INSERT FINANCING STATEMENT FORM]

[INSERT ADDENDUM FORM]

(d) The filing office may not refuse to accept a written record in the following form except for a reason set forth in Section 9-515(b):

[INSERT ["CHANGE"] FORM]

SECTION 9-522. LAPSED FINANCING STATEMENTS. [former draft § 9-403(1) (last 3 sentences)] The filing office may cause the files to reflect the fact that a financing statement has lapsed under Section 9-516(a) or has become ineffective under Section 9-511. Except to the extent that a statute governing disposition of public records provides otherwise, if a financing statement lapses under Section 9-516(a), immediately upon lapse the filing office immediately may destroy any written record evidencing the financing statement. If the filing office destroys a written record evidencing a financing statement, it shall maintain another record of the financing statement which is recoverable by using the file number of the destroyed record.

Changes from Prior Draft

This section has been revised to clarify that the filing office may destroy written records evidencing a financing statement only if it has lapsed under § 9-516(a). This revision and the revisions to § 9-523, below, give effect to the "open drawer" approach approved by the Drafting Committee during its November, 1996, meeting. Under this approach, until a financing statement lapses under § 9-516(a), the filing office remains responsible to maintain the written records and to provide information under § 9-523, even though the financing statement has been terminated under § 9-511.

SECTION 9-523. INFORMATION FROM FILING OFFICE; SALE OR LICENSE OF RECORDS. [former draft § 9-407]

(a) If a person filing a written record furnishes a copy to the filing office, the filing office upon request shall note upon the copy the file number and date and time of the filing of the original and deliver or send the copy to the person.

(b) The filing office shall communicate the following information to any person who requests it:

(1) whether there is on file on a date and time specified by the filing office, but not a date earlier than three business days before the filing office receives the request, any financing statement that designates a particular debtor or, if the request so states, designates a particular debtor at the address specified in the request, and has not ~~neither~~ lapsed under Section 9-516(a) ~~nor become ineffective under Section 9-511~~;

(2) the date and time of filing of each financing statement; and

(3) the information contained in each financing statement.

(c) In complying with its duty under subsection (b), the filing office may communicate the information in any medium. However, if requested, the filing office shall communicate the information by issuing its written certificate.

(d) The filing office shall perform the acts required by subsections (a) and (b) at the time and in the manner prescribed by rule, but not later than two business days after the filing office receives the request.

(e) At least weekly, the [insert appropriate official or governmental agency] [filing office] shall sell or license to the public on a nonexclusive basis, in bulk, copies of all records filed with it under this part, in every medium from time to time available to the filing office.

Changes from Prior Draft

The revision to subsection (b) (1) embraces the "open drawer" policy under which only lapsed, as opposed to terminated, financing statements will be removed from the searchable records. See the note following § 9-522, above.

SECTION 9-524. DELAY BY FILING OFFICE. [former draft § 9-411] Delay by the filing office beyond the time limits prescribed in this part is excused if:

(1) the delay is caused by interruption of communication or computer facilities, war, emergency conditions, failure of equipment, or other circumstances beyond control of the filing office; and

(2) the filing office exercises reasonable diligence under the circumstances.

[SECTION 9-525. REGISTERED AGENT. [former draft § 9-409]]

[Intentionally omitted]

SECTION 9-526. ASSIGNMENT OF FUNCTIONS TO PRIVATE CONTRACTOR. [former draft § 9-410] The [insert appropriate official or governmental agency] [filing office] may contract with a private person to perform some or all of its functions under this part, other than the adoption of rules under Section 9-528. A contract under this section is subject to [insert reference to any applicable statute that regulates government contracting and procurement].

SECTION 9-527. FEES. [former draft § 9-412]

(a) The fee for filing and indexing a [record under this part] [financing statement, amendment, continuation statement, or termination statement] [and for marking a written

copy furnished by the secured party to show the time and place of filing] is \$ _____ if the record is communicated in writing and \$ _____ if the record is communicated by another medium authorized by rule, [plus in each case, if the financing statement is subject to the second sentence of Section 9-502(a), \$ _____]. The fee for each name more than one required to be indexed is \$ _____. [The fee for filing a written record in a form other than as set forth in Sections 9-521(c) and (d) may not be less than the fee charged for filing a written record of the same kind in the form set forth in those sections.] [With reference to a mortgage filed as a financing statement a fee is not required other than the regular recording and satisfaction fees with respect to the mortgage.]

(b) The fee for responding to a request for information from the filing office, including for [issuing a certificate showing] [communicating] whether there is on file any financing statement naming a particular debtor, is \$ _____ if the request is communicated in writing and \$ _____ if the request is communicated by another medium authorized by rule.

SECTION 9-528. ADMINISTRATIVE RULES. [former draft § 9-413]

(a) The [insert appropriate official or governmental agency] [filing office] shall adopt rules to carry out the provisions of this article. The rules [must be adopted in accordance with the [insert any applicable state administrative procedure act] and] must be consistent with this article.

(b) To keep the rules and practices of the filing office in harmony with the rules and practices of filing offices in other jurisdictions that enact substantially this part, and to keep the technology used by the filing office compatible with the technology used by filing offices in other jurisdictions that enact substantially this part, the filing office, so far as is consistent with the purposes, policies, and provisions of this article, shall:

(1) before adopting, amending, and repealing rules, consult with filing offices in other jurisdictions that enact substantially this part and consult the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization; and

(2) in adopting, amending, and repealing rules, take into consideration the rules and practices of, and the technology used by, filing offices in other jurisdictions that enact substantially this part.

SECTION 9-529. DUTY TO REPORT. [former draft § 9-414] The [insert appropriate official or governmental agency] [filing office] shall report [annually on or before _____] to the [Governor and Legislature] on the operation of the filing office. The report must contain a statement of the extent to which the filing office has complied with the time limits prescribed in this part and the reasons for any noncompliance, a statement of the extent to which the rules are not in harmony with the rules of filing offices in other jurisdictions that enact substantially this part and the reasons for these variations, and a statement

of the extent to which the rules are not in harmony with the most recent version of the Model Rules promulgated by the International Association of Corporate Administrators or any successor organization and the reasons for these variations.

PART 6

DEFAULT

Reporters' Prefatory Notes to Part 6

1. Consistent with the Drafting Committee's division of views on the subject, this draft offers two alternative approaches for dealing with dispositions of collateral that are in all respects commercially reasonable as a procedural matter but which produce proceeds of a very low amount.

2. Under either approach, the Drafting Committee must answer one common question: Will the special rules apply in all cases of very low amounts of proceeds or only when, in addition, the purchaser is the secured party, an affiliate of the secured party, or a secondary obligor. If applicable only in the latter set of circumstances, it will be necessary to provide a definition of "affiliate." In this regard, consider the Bankruptcy Code's definition of "affiliate," in 11 U.S.C. § 101(2):

(A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities--

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities--

(i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or

(ii) solely to secure a debt, if such entity has not in fact exercised such power to vote;

(C) person whose business is operated under a lease or operating agreement by a debtor, or person substantially all of whose property is operated under an operating agreement with the debtor; or

(D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement.

3. One approach is reflected in the bracketed revisions to § 9-610(b). Under these revisions, the amount of proceeds received by a secured party in a disposition would be a term of the disposition that must be commercially reasonable. If the secured party's receipt of a very low amount of proceeds is not commercially reasonable, the provisions dealing with the effect of the secured party's noncompliance with part 6 (primarily, § 9-625) would apply. However, bracketed revisions to §§ 9-624 and 9-625 (Alternative A) would make the statutory damages and absolute bar provisions in consumer secured transactions inapplicable when the only noncompliance is a low amount of proceeds.

4. The other approach is reflected in the bracketed revisions to § 9-614, which deals with the calculation of a surplus and a deficiency. Under these revisions, if the secured party receives an unreasonably low amount in a disposition, the surplus and deficiency would not be calculated based on the actual proceeds received but would be recalculated based on an amount of proceeds that is not unreasonably low. This approach would not raise the need for adjustments to §§ 9-624 and 9-625 inasmuch as the low price would not, of itself, constitute noncompliance with the statute.

[SUBPART 1. DEFAULT AND ENFORCEMENT OF SECURITY INTEREST]

SECTION 9-601. RIGHTS AND REMEDIES AFTER DEFAULT; JUDICIAL ENFORCEMENT; CONSIGNOR OR BUYER OF ACCOUNTS, CHATTEL PAPER, OR PAYMENT INTANGIBLES; CERTAIN STATUTORY LIENS. [former draft § 9-501(a)-(b), (h), (j)]

(a) After default, a secured party has the rights and remedies provided in this part and, except as otherwise provided in Section 9-602(a), those provided by agreement of the parties. A secured party may reduce the claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure. If the collateral is documents, a secured party may proceed either as to the documents or as to the goods they cover. [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) Except as otherwise provided in subsection (d) and Section 9-605, after default, a debtor and an obligor have the rights and remedies provided in this part [and] [,] by agreement of the parties[, and in Section 9-207].

(c) If a secured party has reduced its claim to judgment, the lien of any levy which may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of the date of perfection of the security interest or agricultural lien in the collateral, the date of filing a financing statement covering the collateral, or any date specified in a statute under which the agricultural lien was created. A sale pursuant to the execution is a foreclosure of the security interest or agricultural lien by judicial procedure within the meaning of this section. A secured party may purchase at the sale and thereafter hold the collateral free of any other requirements of this article.

(d) Except as otherwise provided in Sections 9-607(d), 9-608(b), and 9-614(d), the duties of a secured party under this part do not apply to a secured party that is a consignor or is a buyer of accounts, chattel paper, or payment intangibles.

(e) This part does not apply to a statutory lien other than an agricultural lien.

SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND DUTIES.

[former draft § 9-501(c)-(d)]

(a) To the extent that they give rights to a debtor or an obligor and impose duties on a secured party, the rules stated in the sections referred to below may not be waived or varied by a debtor or by a consumer obligor, except as specifically provided in Section 9-623:

(1) Section 9-607(c), which deals with collection and enforcement of collateral;

(2) Sections 9-610(b), 9-611, and 9-613, which deal with disposition of collateral;

(3) Section 9-609 insofar as it imposes upon a secured party that takes possession of collateral without judicial process the duty to do so without breach of the peace;

(4) Sections 9-607(d) and 9-614(c) insofar as they deal with application or payment of noncash proceeds of collection, enforcement, or disposition;

(5) Sections 9-607(d), 9-608(a), and 9-614(d) insofar as they require accounting for or payment of surplus proceeds of collateral;

(6) Sections 9-618, 9-619, or 9-290, which deal with acceptance of collateral in satisfaction of obligation;

(7) Section 9-621, which deals with redemption of collateral;

(8) Section 9-622, which deals with reinstatement of obligations;

(9) Sections 9-624, 9-625, and 9-628, which deal with the secured party's liability for failure to comply with this article;

(10) Section 9-404(f)(3), which deals with an account debtor's right to ignore certain notifications; and

(11) Section 9-209, which deals with requests for an accounting, list of collateral, and statement of account.

(b) Notwithstanding Section 1-102(3), an obligor other than a consumer obligor may waive or vary the rules referred to in subsection (a) to the extent and in the manner provided by other law.

SECTION 9-603. AGREEMENT ON STANDARDS CONCERNING RIGHTS AND DUTIES. [former draft § 9-501(e)] The parties may determine by agreement 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 breach of the peace under Section 9-609, 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.

**SECTION 9-604. PROCEDURE IF SECURITY AGREEMENT COVERS REAL
[ESTATE] [PROPERTY] OR FIXTURES. [former draft § 9-501(f)-(g)]**

(a) If a security agreement covers both real [estate] and personal property, a secured party may proceed:

(1) under this part as to the personal property without prejudicing any rights and remedies with respect to the real [estate] [property]; or

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

(b) If a security agreement covers goods that are or become fixtures, a secured party, subject to subsection (c), may proceed under this part or in accordance with the rights and remedies with respect to real [estate] [property], in which case the other provisions of this part do not apply.

(c) If a secured party with a security interest in fixtures has priority over all owners and encumbrancers of the real estate, the secured party may, on default, subject to the other provisions of this part, remove the collateral from the real estate. The secured party shall reimburse any encumbrancer or owner of the real estate that is not the debtor and that has not otherwise agreed for the cost of repair of any physical injury, but not for any diminution in value of the real estate caused by the absence of the goods removed or by any necessity of replacing them. A person entitled to reimbursement may refuse permission to remove until the secured party gives adequate

[security] [assurance] for the performance of the obligation to reimburse.

SECTION 9-605. UNKNOWN DEBTOR OR SECONDARY OBLIGOR.

[former draft § 9-501(i)] Unless a secured party knows that a person is a debtor or a secondary obligor, knows the identity of the person, and knows how to communicate with the person, the secured party owes no duty under this article to the person or to a secured party or lienholder that has filed a financing statement against the person.

SECTION 9-606. TIME OF DEFAULT FOR AGRICULTURAL LIEN.

[former draft § 9-501(k)] For purposes of this part, a default occurs in connection with an agricultural lien at the earlier of the time provided by agreement of the parties and the time at which the secured party becomes entitled to enforce the lien in accordance with the statute under which it was created.

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

[former draft § 9-502(a)-(d)]

(a) If so agreed, and in any event on default, a secured party may:

(1) notify an account debtor or other person obligated on collateral to make payment or otherwise render performance to or for the benefit of the secured party, whether or not a debtor had been making collections on or enforcing the collateral;

(2) take any proceeds to which the secured party is entitled under Section 9-313; and

(3) enforce the obligations of an account debtor or other person obligated on collateral[, including by exercising the rights and remedies of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral].

[(b) In order to exercise under subsection (a) (3) the rights of a debtor to enforce nonjudicially any [mortgage/deed of trust] covering real [estate] [property], a secured party may [file/record] in the office in which the [mortgage/deed of trust] is [filed/recorded] a copy of the security agreement that entitles the secured party to exercise those rights and 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].]

(c) If so agreed, and in any event on default:

(1) a secured party that holds a security interest in a deposit account perfected by control under Section 9-109(a) (1) may apply the funds in the account to the obligation secured by the deposit account, and

(2) a secured party that holds a security interest in a deposit account perfected by control under Section 9-109(a) (2) or (a) (3) may instruct the depository institution to pay the funds in the account to or for the benefit of the secured party.

(d) A secured party that is entitled [by agreement] to charge back uncollected collateral or otherwise to full or limited recourse against the debtor or against a secondary obligor and that undertakes to collect from or enforce an obligation of an account debtor or other person obligated on collateral shall proceed in a commercially reasonable manner. The secured party may deduct from the collections reasonable expenses of collection and enforcement, including reasonable attorney's fees and legal expenses incurred by the secured party.

SECTION 9-608. APPLICATION OF PROCEEDS OF COLLECTION OR ENFORCEMENT; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS.

[former draft § 9-502(e), (g)]

(a) If a security interest or agricultural lien secures payment or performance of an obligation the following rules apply:

(1) A secured party shall apply or pay over for application the cash proceeds (Section 9-313) of collection or enforcement under this section in the following order to:

(A) the reasonable expenses of collection and enforcement and, to the extent provided for by agreement and not prohibited by law, reasonable attorney's fees and legal expenses incurred by the secured party;

(B) the satisfaction of obligations secured by the security interest or agricultural lien under which the collection or enforcement is made; and

(C) the satisfaction of obligations secured by any subordinate security interest in or other lien on the

collateral subject to the security interest or agricultural lien under which the collection or enforcement is made if the secured party receives a signed ~~written notification~~ of demand for proceeds before distribution of the proceeds is completed.

(2) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under paragraph (1)(C).

(3) A secured party need not apply or pay over for application the noncash proceeds (Section 9-313) of collection and enforcement under this section. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(4) A secured party shall account to and pay a debtor for any surplus notwithstanding any agreement to the contrary, and, unless otherwise agreed, the obligor is liable for any deficiency. Recovery of a deficiency under this subsection is subject to Section 9-625.

(b) If the underlying transaction is a sale of accounts, chattel paper, or payment intangibles, the debtor is entitled to any surplus, and the obligor is liable for any deficiency, only if its agreement so provides. Recovery of a deficiency under this subsection is subject to Section 9-625.

SECTION 9-609. SECURED PARTY'S RIGHT TO TAKE POSSESSION AFTER DEFAULT. [MINOR STYLE CHANGES ONLY] [**former draft § 9-503**] Unless otherwise agreed, a secured party has the right on

default to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if the taking can be done without breach of the peace or may proceed by action. If a security agreement so provides, a secured party may require a debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal, a secured party may render equipment unusable, and may dispose of collateral on a debtor's premises under Section 9-610.

SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.

[former draft § 9-504(a), (f)]

(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] [disclaimed] or modified, a contract for sale, lease, license, or other disposition includes the warranties relating to title, possession, quiet enjoyment, and the like which by operation of law accompany a voluntary disposition of property of the kind subject to the contract. A secured party may [exclude] [disclaim] or modify warranties under this section in the contract for disposition by giving a purchaser a signed ~~written~~ statement that contains specific language [excluding] [disclaiming] or modifying the warranties. Language in a signed ~~written~~ statement is sufficient to [exclude] [disclaim] warranties under this section if it states "There is no warranty

relating to title, possession, quiet enjoyment, or the like in this disposition," or words of similar import.

(b) Every aspect of a disposition of collateral, including the method, manner, time, place, [amount of proceeds,] and [other] terms, must be commercially reasonable. [In addition, if the purchaser is the secured party, an affiliate of the secured party, or a secondary obligor, the amount of proceeds must be commercially reasonable.] If commercially reasonable, a secured party may dispose of collateral by public or private proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on any terms. A secured party may buy at a public sale. A secured party may buy at a private sale only if the collateral is of a kind customarily sold on a recognized market or is of a kind that is the subject of widely distributed standard price quotations.

Changes from Prior Draft

1. The revisions to subsection (b) appear in brackets to reflect the Drafting Committee's division over whether the amount of proceeds received in a disposition (e.g., the cash price if the disposition is by way of sale) is a term that must be commercially reasonable. The revisions suggest two alternative. One would require the amount of the proceeds received to be commercially reasonable in all cases; the other would impose that requirement only the case of dispositions in which the purchaser is the secured party, an affiliate of the secured party, or a secondary obligor (i.e., cases in which the secured party may lack incentive to recover a commercially reasonable amount of proceeds).

2. If the Drafting Committee takes the approach reflected by the revisions to subsection (b), the official comments to this section should explain the concept of a commercially unreasonable amount of proceeds. Following is an initial effort:

The requirement that the proceeds received in a disposition be commercially reasonable does not affect the basic method of calculating a deficiency or surplus under §

9-614, which uses the actual proceeds received, and not the "value" of collateral, as the basis for the calculation. However, determining whether the amount of proceeds received is commercially reasonable requires consideration of the range of amounts of proceeds received in commercially reasonable dispositions of similar collateral under similar circumstances. If the amount of proceeds is within that range, it is commercially reasonable. If the amount of proceeds received is materially below the low end of that range, it is not commercially reasonable.

**SECTION 9-611. PERSONS ENTITLED TO NOTIFICATION BEFORE
DISPOSITION OF COLLATERAL. [former draft § 9-504(g)-(h)]**

(a) The "notification date" is the earlier of the date on which a secured party sends to the debtor and any secondary obligor a signed ~~written~~ notification of a disposition and the date on which the debtor and any secondary obligor waive the right to notification.

(b) A secured party shall send to a debtor and any secondary obligor a reasonable signed ~~written~~ notification of disposition under Section 9-613, 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, another notification need not be sent. In other cases a secured party shall send a signed ~~written~~ notification of disposition to:

(1) any other person from whom the secured party has received, before the notification date, a signed ~~written~~ notification of a claim of an interest in the collateral;

(2) any other secured party that, [XX] days before the notification date, held a security interest or agricultural lien in the collateral perfected by the filing of a financing

statement that identified the collateral, was indexed under the debtor's name as of that date, and was filed in the office in which to file a financing statement against the debtor covering the collateral as of that date (Sections 9-301 through 9-307 and 9-501); and

(3) any other secured party that, [XX] days before the notification date, held a security interest in the collateral perfected by compliance with a statute or treaty described in Section 9-309(c).

(c) A secured party complies with the notification requirement specified in subsection (b) (2) if:

(1) not later than [XX] days before the notification date, the secured party requests, in a commercially reasonable manner, information concerning financing statements indexed under the debtor's name in the office indicated in subsection (b) (2); and

(2) before the notification date, either the secured party did not receive a response to the request for information or the secured party received a response to the request for information and the secured party sent a signed written notification of disposition to each secured party named in that response and whose financing statement covered the collateral.

SECTION 9-612. TIMELINESS OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL. [former draft § 9-504(j)] Unless otherwise agreed, a notification of disposition sent after default and, in a consumer secured transaction, [21] days or

more, and, in other transactions, 10 days or more, before the earliest time of disposition set forth in the notification is sent within a reasonable time before the disposition. Whether a notification sent less than [21] or 10 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.

SECTION 9-613. CONTENTS AND FORM OF NOTIFICATION PRIOR TO DISPOSITION OF COLLATERAL. [former draft § 9-504(k)-(1)]

(a) Except in a consumer secured transaction, the following rules apply:

(1) Unless otherwise agreed, the contents of a notification of disposition are sufficient if the notification:

(A) describes the debtor and the secured party;

(B) describes the collateral that is the subject of the intended disposition;

(C) states the method of intended disposition;

(D) states that the debtor [or secondary obligor] is entitled to an accounting of the unpaid indebtedness (Section 9-209) and states the charge, if any for an accounting; and

(E) states the time and place of a 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) is nevertheless sufficient is a question of fact in each case.

(3) A particular phrasing of the notification is not required. A notification substantially complying with the requirements of this subsection is sufficient, even if it contains minor errors that are not seriously misleading.

(4) The following form of notification, when completed, contains sufficient information:

Notification of Disposition of Collateral

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].

You are entitled to an accounting of the unpaid indebtedness secured by the property that we intend to sell [or lease or license, as applicable] [for a charge of \$ _____]. You may request an accounting by calling us at _____ [telephone number]

[End of Form]

(b) In a consumer secured transaction, the following rules apply:

(1) A notification of disposition must contain the following information:

(A) the information specified in Section 9-613(a) (1);

(B) a description of any liability for a deficiency of the person to which the notification is sent;

(C) the amount that must be paid to the secured party to redeem the obligation secured under Section 9-621;

(D) the amount that must be paid to the secured party to reinstate the obligation secured under Section 9-622; and

(E) a telephone number or mailing address from which additional information concerning the disposition and the obligation secured is available.

(2) A particular phrasing of the notification is not required. A notification substantially complying with the requirements of this subsection is sufficient, even if it contains minor errors that are not seriously misleading.

(3) The following form of 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.] 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:

[Alternative A]

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, and all late charges. 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.

[Alternative B]

Pay us the full amount of the debt plus our costs before the sale. Then [You] [name of obligor, if different] will not owe us any more money. To learn the exact amount you must pay, call us at [telephone number] . ;

[add the following paragraph if applicable] OR

Pay us our costs of retaking the property, all regular payments that are overdue, and all late charges. To learn the exact amount you must pay, 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.

If you want us to explain to you in writing how we have figured the amount that you owe us, you may call us at [telephone number] . [We will charge you \$] for the explanation.]

[End of Form]

**SECTION 9-614. APPLICATION OF PROCEEDS OF DISPOSITION;
LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS. [former draft §
9-504 (b) - (e)]**

(a) A secured party shall apply or pay over for application the cash proceeds (Section 9-313) of disposition in the following order to:

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

(2) the satisfaction of obligations secured by the security interest or agricultural lien under which the disposition is made;

(3) the satisfaction of obligations secured by any subordinate security interest in or other lien on the collateral if the secured party receives a signed ~~written~~ ~~notification~~ of demand for proceeds before distribution of the proceeds is completed.

(b) If requested by a secured party, a holder of a subordinate security interest or other lien shall furnish reasonable proof of the interest or lien within a reasonable time. Unless the holder does so, the secured party need not comply with the holder's demand under subsection (a)(1).

(c) A secured party need not apply or pay over for application noncash proceeds (Section 9-313) of disposition under this section. A secured party that applies or pays over for application noncash proceeds shall do so in a commercially reasonable manner.

(d) If the security interest under which a disposition is made secures payment or performance of an obligation, after making the payments and applications required by subsection (a) the secured party shall account to and pay a debtor for any

surplus, and, unless otherwise agreed, the obligor is liable for any deficiency. If the underlying transaction is a sale of accounts, chattel paper, or payment intangibles, the debtor is entitled to any surplus, and the obligor is liable for any deficiency, only if its agreement so provides. Recovery of any deficiency under this subsection is subject to Section 9-625.

Alternative A

[(e) If the amount of proceeds received by the secured party in a disposition is unreasonably low and the purchaser in the disposition is the secured party, an affiliate of the secured party, or a secondary obligor, the surplus or deficiency under subsection (d) is calculated based on the proceeds that would have been realized in a commercially reasonable disposition to a purchaser other than the secured party, an affiliate of the secured party, or a secondary obligor.]

Alternative B

[(e) If the amount of proceeds received by the secured party in a disposition is unreasonably low [and the purchaser in the disposition is the secured party, an affiliate of the secured party, or a secondary obligor], the surplus or deficiency under subsection (d) is calculated based on the proceeds that would have been realized in a disposition in which the proceeds received were not unreasonably low.]

(f) 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 other lien that is not subordinate to the security interest or

agricultural lien under which the collection or enforcement is made:

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

(2) is not obligated to apply the proceeds of disposition to the satisfaction of obligations secured by the security interest or other lien; and

(3) is not obligated to account to or pay the holder of the security interest or other lien for any surplus.

Changes from Prior Draft

1. The two alternative versions of new subsection (e) address the "low-price" but procedurally regular (commercially reasonable) foreclosure sale problem. They represent an alternative approach to requiring, in § 9-610, that the amount of proceeds received be commercially reasonable. Each alternative subsection (e) contemplates that if the amount of proceeds received in a disposition is "unreasonably low," then the surplus or deficiency is to be calculated on a basis other than the actual proceeds received. But the secured party's receipt of an unreasonably low amount would not constitute noncompliance with part 6.

2. Alternative A provides a method of calculation that would require a determination of the amount that would have been received in a commercially reasonable disposition to a purchaser other than the secured party, an affiliate, or a secondary obligor. The calculation under Alternative B would require a determination of an amount that is not unreasonably low. Alternative 2 could be made applicable only to purchases by the secured party, an affiliate, or a secondary obligor, or to all dispositions.

3. If the Drafting Committee wishes to pursue the approach suggested by these revisions, the official comment should explain the concept of an "unreasonably low" amount of proceeds and, if applicable, the determination of an alternative amount under Alternative 2. We assume that the comment would be similar to the analogous one set forth in note 2, following § 9-610, above.

4. The Drafting Committee may wish to consider whether the statute or the official comments should expressly address the situation in which a secured party gives credit against the

secured obligation, for purposes of calculating a deficiency, in an amount that exceeds the net proceeds of a disposition.

SECTION 9-615. RIGHTS OF TRANSFEREE OF COLLATERAL. [former draft § 9-504(n) - (o)]

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

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

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

(b) If a transferee does not take free of the rights and interests described in subsection (a), the transferee takes the collateral subject to the debtor's rights in the collateral and subject to any security interest or agricultural lien under which the disposition is made and any subordinate security interest or other lien. Except as otherwise provided in this

subsection or elsewhere in this article, the disposition does not discharge any security interest or other lien.

SECTION 9-616. RIGHTS AND DUTIES OF CERTAIN PERSONS LIABLE TO SECURED PARTY. [former draft § 9-504(p)]

(a) A person that is liable to a secured party under a guaranty, indorsement, repurchase agreement, or the like acquires the rights and [assumes] [becomes obligated to perform] the duties of the secured party if the person:

(1) receives an assignment of a secured obligation from the secured party;

(2) receives a transfer of collateral from the secured party [and agrees to accept the rights and assume the duties of the secured party]; or

(3) is subrogated to the rights of a secured party.

(b) An assignment, transfer, or subrogation described subsection (a) is not a disposition of collateral under this article and does not relieve the secured party of its duties under this article.

SECTION 9-617. TRANSFER OF RECORD OR LEGAL TILE. [former draft § 9-504(q)]

(a) In this section, "transfer statement" means a ~~written statement~~ record signed by a secured party stating:

(1) that the debtor has defaulted in connection with an obligation secured by specified collateral;

(2) that the secured party has exercised its post-default remedies with respect to the collateral;

(3) that by reason of the exercise a transferee has acquired the rights of the debtor in the collateral; and

(4) the name and mailing address of the secured party, the debtor, and the transferee.

(b) A transfer statement entitles the transferee to the transfer of record of all rights of the debtor in the collateral specified in the statement in any official filing, recording, registration, or certificate-of-title system covering the collateral. If a transfer statement is presented with the applicable fee and request form to the official or office responsible for maintaining the system, the official or office must accept the transfer statement, promptly amend its records to reflect the transfer, and, if applicable, issue a new appropriate certificate of title in the name of transferee.

(c) A transfer of the record or legal title to collateral to a secured party is not of itself a disposition of collateral under this article and does not of itself relieve the secured party of its duties under this article.

SECTION 9-618. ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION OF OBLIGATION; COMPULSORY DISPOSITION OF COLLATERAL.
[former draft § 9-505(a)-(e), (k)-(l)]

(a) In this section and in Section 9-619, "proposal" means a ~~written~~ statement signed by a secured party containing the terms on 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 under subsection (d);

(2) the secured party does not receive, within the time set forth in subsection (e), a ~~written~~ notification of objection to the proposal signed by ~~from~~ a person to whom the secured party was required to send a proposal under Section 9-619 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 a consumer secured transaction in which collateral is of a type in which a security interest can be perfected by possession under Section 9-311, the collateral is in the possession of the secured party when the debtor consents to the acceptance.

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

(d) For purposes of this section:

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

(2) a debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor so agrees in a record ~~writing~~ signed after default or the secured party:

(A) sends to the debtor after default 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;

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

(C) does not receive a ~~written~~ notification of objection signed by ~~from~~ the debtor within 20 days after the proposal is sent.

(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 the proposal has been sent pursuant to Section 9-619, within 20 days after notification is sent to that person; and

(2) in other cases, within 20 days after the last notification is sent pursuant to 9-619 or, if a notification is not sent, before the debtor consents to the acceptance under subsection (d).

(f) If 60 percent of the cash price has been paid in the case of a purchase money security interest in consumer goods or 60 percent of the principal amount of the obligation secured has been paid in the case of another security interest in consumer goods, and the debtor has not consented to an

acceptance, a secured party that has taken possession of collateral shall dispose of the collateral pursuant to Section 9-610 within 90 days after taking possession or within any extended period to which all secondary obligors have agreed by signing a statement to that effect after default.

(g) In a consumer secured transaction, a secured party may accept collateral only in full satisfaction, and not in partial satisfaction, of the obligation it secures.

SECTION 9-619. NOTIFICATION OF PROPOSAL TO ACCEPT COLLATERAL. [former draft § 9-505(f)-(g)]

(a) Except in a consumer secured transaction, a secured party that wishes to accept collateral in partial satisfaction of the obligation it secures shall send ~~written notification of~~ its proposal to any secondary obligor, and a secured party that wishes to accept collateral in full or partial satisfaction of the obligation it secures shall send ~~written notification of~~ its proposal also to:

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

(2) any other secured party or lienholder that, [XX] days before the debtor consented to the acceptance, held a security interest in or other lien on the collateral perfected [or evidenced] by the filing of a financing statement that identified the collateral, was indexed under the debtor's name as of that date, and was filed in the office or offices in which to file a financing statement against the debtor covering the

collateral as of that date (Sections 9-301 through 9-307 and 9-501); and

(3) any other secured party [or lienholder] that, [21] days before the debtor consented to the acceptance, held a security interest in [or other lien on] the collateral perfected [or evidenced] by compliance with a statute or treaty described in Section 9-309(c).

(b) In a consumer secured transaction, a secured party that wishes to accept collateral in satisfaction of the obligation it secures shall send ~~[written notification of]~~ its proposal to any person from whom the secured party has received, before the debtor consented to the acceptance, a signed ~~written~~ notification of a claim of an interest in the collateral.

SECTION 9-620. EFFECT OF ACCEPTANCE OF COLLATERAL. [former draft § 9-505(h)-(i)]

(a) 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, but recovery of a deficiency is subject to Section 9-625;

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

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

(4) terminates any other subordinate interest.

(b) A subordinate interest is discharged or terminated under subsection (a) whether or not 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 Section 9-624(b).

SECTION 9-621. RIGHT TO REDEEM COLLATERAL. [former draft § 9-506(a)] At any time before a secured party has collected collateral under Section 9-607, disposed of collateral or entered into a contract for its disposition under Section 9-610, or accepted collateral in full or partial satisfaction of the obligation it secures under Section 9-618, the debtor, any secondary obligor, or any other secured party or lienholder may redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the reasonable expenses and attorney's fees of the type described in Section 9-614(a)(1).

SECTION 9-622. REINSTATEMENT OF OBLIGATION SECURED WITHOUT ACCELERATION. [former draft § 9-506(b)-(e)]

(a) If 60 percent of the cash price has been paid in the case of a purchase money security interest in consumer goods or 60 percent of the principal amount of the obligation secured has been paid in the case of another consumer secured transaction, a debtor or a secondary 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 the unpaid amount of the secured obligation due at the time of tender, without

acceleration, including charges for delinquency, default, or deferral, and reasonable expenses and attorney's fees of the type described in Section 9-614(a)(1).

(b) A tender of payment under subsection (a) is ineffective to cure a default or reinstate a secured obligation unless made before the later of:

(1) 21 days after the secured party sends a notification of disposition under Section 9-611(b) to the debtor and any consumer obligor who is a secondary obligor; and

(2) the time the secured party disposes of collateral or enters into a contract for its disposition under Section 9-610 or accepts collateral in full satisfaction of the obligation it secures under Section 9-618.

(c) A tender of payment under subsection (a) restores to the debtor and a consumer obligor who is a secondary 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.

(d) A secured obligation may be reinstated under subsection (a) only once.

(e) [The debtor's rights under this subsection may not be waived or varied by agreement.]

SECTION 9-623. WAIVER OR AGREEMENT BY CONSUMER DEBTOR OR OBLIGOR. [former draft §§ 9-504(i), 9-505(j), (m), 9-506(f)]

(a) Subject to subsection (c), a debtor or a consumer obligor may waive the right to notification of disposition of collateral under Section 9-611, the right to redeem the collateral under Section 9-621, or the right to reinstate a secured obligation under Section 9-622 only by signing a record containing a statement to that effect after default.

(b) Subject to subsection (c), a consumer obligor may waive the obligor's rights and the secured party's duties under Section 9-618 or 9-619 only by signing a record containing a statement to that effect after default.

[(c) In a consumer secured transaction, a statement signed by the debtor or a consumer obligor is ineffective under subsection (a) or (b) unless the secured party establishes by clear and affirmative evidence that the debtor or consumer obligor expressly agreed to its terms.]

[SUBPART 2. NONCOMPLIANCE WITH THIS ARTICLE.]

SECTION 9-624. REMEDIES FOR SECURED PARTY'S FAILURE TO COMPLY WITH THIS ARTICLE. [former draft § 9-507(a)-(b), (g)]

(a) If it is established that a secured party is not proceeding in accordance with this article, a court may order or restrain collection, enforcement, or disposition of collateral on appropriate terms and conditions.

(b) A secured party is liable for damages in the amount of any loss caused by a failure to comply with this

article. Except as otherwise provided in Section 9-627, a person that, at the time of the failure, was a debtor, was a secondary obligor, or held a security interest in or other lien on the collateral has a right to recover damages for its loss under this subsection. A debtor whose deficiency is eliminated under Section 9-625 may recover damages for the loss of any surplus, but a debtor or consumer obligor whose deficiency is eliminated or reduced under Section 9-625 may not otherwise recover under this subsection for noncompliance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614] [the provisions of this part relating to collection, enforcement, disposition, or acceptance].

(c) Except as otherwise provided in subsection (d) and in Section 9-627, in a consumer secured transaction, a person that was a debtor at the time a secured party failed to comply with this part has a right to recover from the noncomplying secured party an amount equal to the interest or finance charges plus 10 percent of the principal amount of the obligation, less the sum of any amount by which any consumer obligor's personal liability for a deficiency is eliminated or reduced under Section 9-625 and any amount for which the secured party is liable under subsection (b).

[(d) Subsection (c) does not apply if the only noncompliance with this part is that the amount of proceeds of disposition is not commercially reasonable.]

(e) A secured party that fails to comply with Section 9-208(a), a person that files an initial financing statement or

an amendment in violation of Section 9-508(a), a person that fails to send the information contained in a financing statement or amendment to the debtor in accordance with Section 9-508(c), or a secured party of record that fails to file or send a termination statement as required by Section 9-511(c) is liable to the debtor in each case for \$500 and, in addition, for any damages under subsection (b).

(f) A person that fails to comply with a request under Section 9-209, without reasonable excuse, is liable to the debtor for \$500, for damages in the amount of any loss resulting from the debtor's inability to obtain, or increased costs of, alternative financing, and, in addition, for any damages under subsection (b). A recipient of a request under Section 9-209 that never claimed an interest in the collateral or obligations that are the subject of a request under that section has a reasonable excuse for failure to comply with the request.

(g) As against a person reasonably misled by a secured party's failure to comply with a request for a list of collateral or a statement of account under Section 9-209, the secured party may claim a security interest only as shown in the statement contained in the request.

Changes from Prior Draft

1. Under new subsection (d), the statutory damages are not available if the only noncompliance consisted of the secured party's receipt of proceeds of a disposition in an amount that is commercially unreasonable. The brackets around the subsection indicate the Drafting Committee's division over whether the proceeds received should be an aspect of a disposition that must be commercially reasonable under § 9-610(b) and, accordingly, whether receipt of a commercially unreasonable amount of proceeds

should constitute noncompliance if all other aspects were commercially reasonable. See also § 9-625 (Alternative A).

2. New subsections (e), (f), and (g) respond to the Drafting Committee's decision, in its November, 1996, meeting, to consolidate all of the statutory damages provisions in Part 6.

[SECTION 9-625--ALTERNATIVE A

("Absolute Bar" Rule for Consumer Secured Transactions;
"Rebuttable Presumption" Rule for Other Transactions)]

SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS IN ISSUE. [former draft § 9-507(c)] In an action in which the amount of a deficiency or surplus is in issue the following rules apply:

(1) A secured party need not establish compliance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614] [the provisions of this part relating to collection, enforcement, disposition, or acceptance] unless the debtor or a secondary obligor places the secured party's compliance in issue, in which case the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614, as applicable] [the applicable provisions of this part].

(2) Except as otherwise provided [in subsection (3) and] in Section 9-627, if a secured party fails to meet the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-

614] [the provisions of this part relating to collection, enforcement, disposition, or acceptance]:

(A) In a consumer secured transaction for which no other collateral remains to secure the obligation, neither the debtor nor a secondary obligor is liable for a deficiency.

(B) In other cases, the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of the [actual] proceeds of the collection, enforcement, disposition, or acceptance or the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614] [the provisions of this part relating to collection, enforcement, disposition, or acceptance]. However, the amount that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party meets the burden of establishing that the amount is less than that sum.

(C) In a consumer secured transaction, any liability under paragraph (B) is not a personal liability of a consumer obligor but may be satisfied only by enforcing a security interest or other consensual lien against property securing the obligation.

[(3) Paragraphs (2) (A) and (2) (C) do not apply if the only noncompliance with this part is that the amount of proceeds of disposition is not commercially reasonable.]

Changes from Prior Draft

Under new subsection (3), the absolute bar rule would not apply if the only noncompliance consisted of the secured party's receipt of proceeds of a disposition in an amount that is commercially unreasonable. The brackets around the subsection indicate the Drafting Committee's division over whether the amount of proceeds received or applied should be an aspect of a disposition that must be commercially reasonable under § 9-610(b) and, accordingly, whether proceeds in a commercially unreasonable amount should constitute noncompliance if all other aspects were commercially reasonable. See also § 9-624.

[SECTION 9-625 --ALTERNATIVE B

("Rebuttable Presumption" Rule for All Transactions)]

SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS IN ISSUE. [former draft § 9-507(c)] In an action in which the amount of a deficiency or surplus is in issue the following rules apply:

(1) A secured party need not establish compliance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614] [the provisions of this part relating to collection, enforcement, disposition, or acceptance] unless the debtor or a secondary obligor places the secured party's compliance in issue, in which case the secured party has the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614, as applicable] [the applicable provisions of this part].

(2) Except as otherwise provided in Section 9-627, if a secured party fails to meet the burden of establishing that the collection, enforcement, disposition, or acceptance was conducted in accordance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-

612, 9-613, or 9-614,] [the provisions of this part relating to collection, enforcement, disposition, or acceptance,] the liability of a debtor or a secondary obligor for a deficiency is limited to an amount by which the sum of the secured obligation, expenses, and attorney's fees exceeds the greater of the [actual] proceeds of the collection, enforcement, disposition, or acceptance or the amount of proceeds that would have been realized had the noncomplying secured party proceeded in accordance with [Section 9-607, 9-608, 9-609, 9-610, 9-611, 9-612, 9-613, or 9-614] [the provisions of this part relating to collection, enforcement, disposition, or acceptance]. However, the amount that would have been realized is equal to the sum of the secured obligation, expenses, and attorney's fees unless the secured party meets the burden of establishing that the amount is less than that sum.

**SECTION 9-626. DETERMINATION OF WHETHER CONDUCT WAS
COMMERCIALY REASONABLE. [former draft § 9-507(d)-(f)]**

(a) The fact that a greater amount could have been obtained by a collection, enforcement, disposition, or acceptance 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, disposition, or acceptance was made in a commercially reasonable manner.

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

(1) in the usual manner on any recognized market therefor;

(2) at the price current in any recognized 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.

(c) A collection, enforcement, disposition, or acceptance that has been approved in any judicial proceeding or by any [court appointed] bona fide creditors' committee[,] [or] [court appointed] representative of creditors[, or assignee for the benefit of creditors] is commercially reasonable. However, approval need not be obtained, and lack of approval does not mean that the collection, enforcement, disposition, or acceptance is not commercially reasonable.

SECTION 9-627. NONLIABILITY OF SECURED PARTY IN CERTAIN CIRCUMSTANCES; LIABILITY OF SECONDARY OBLIGOR. [former draft § 9-507 (i) - (k)]

(a) Unless a secured party knows that a person is a debtor or a secondary obligor, knows the identity of the person, and knows how to communicate with the person:

(1) the secured party is not liable to the person or to a secured party or lienholder that has filed a financing statement against the person for failure to comply with this article; and

(2) the secured party's failure to comply with this article does not affect the liability of the person for a deficiency.

(b) A secured party is not liable to any person and a person's liability for a deficiency is not affected because of any act or omission, other than the failure to send a notification required by Section 9-611(b)(2), that occurs before the secured party knows that the person is a debtor or a secondary obligor or knows that the person has a security interest or other lien in the collateral.

(c) A secured party is not liable to any person and a person's liability for a deficiency is not affected because of any act or omission arising out of the secured party's reasonable belief that a transaction is not a consumer secured transaction [or that goods are not consumer goods] if the secured party's belief is based on its reasonable reliance on a debtor's representation concerning the purpose for which collateral was to be used, acquired, or held, or an obligor's representation concerning the purpose for which a secured obligation was incurred.

(d) A secured party is not liable to any person under Section 9-624(c) if the secured party meets the burden of establishing that its failure to comply with this ~~part~~ ~~article~~ was not intentional and resulted from a good-faith error notwithstanding the secured party's maintenance of procedures reasonably adapted to avoid the failure. [Examples of a good-faith error include clerical, calculation, computer

malfunction and programing, and printing errors, except that an] [An] error of legal judgment concerning the secured party's rights and duties under this [part] [article] is not a good faith error.

Changes from Prior Draft

The official comments will reflect that the standard for "intentional" under subsection (d) is whether the secured party actually intended to fail to comply with the article, as is the case with Truth in Lending Act § 130(c). For example, if a secured party "intentionally" sends a notice that, as it turns out, did not comply with an applicable standard, sending the notice would not be an "intentional" noncompliance unless the secured party intended that the notice to be noncomplying.

SECTION 9-628. ATTORNEY'S FEES IN CONSUMER SECURED TRANSACTIONS. [former draft § 9-507(h)] If the secured party's compliance with this article is placed in issue in an action with respect to a consumer secured transaction, the following rules apply:

(1) If the secured party would have been entitled to attorney's fees as the prevailing party, the court shall award to a consumer debtor or consumer obligor prevailing on the issue the costs of the action and reasonable attorney's fees.

(2) In other cases, the court may award to a consumer debtor or consumer obligor prevailing on that issue the costs of the action and reasonable attorney's fees.

(3) In determining the attorney's fees, the amount of the recovery on behalf of the prevailing consumer debtor or consumer obligor is not a controlling factor.

PART 7

TRANSITION PROVISIONS

SECTION 9-701. EFFECTIVE DATE.

This Act takes effect

SECTION 9-702. SAVINGS CLAUSE.

[To be added]

APPENDIX

SECTION 1-201. GENERAL DEFINITIONS. Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

* * *

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells minerals or the like, including oil and gas, at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Section [2-XXX] may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is not a buyer in ordinary course of business.

* * *

(32) "Purchase" includes taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift, or any other voluntary transaction creating an interest in property.

* * *

(37) "Security interest" means . . . The term also includes any interest of a consignor and a buyer of accounts, chattel paper, or a payment intangible in a transaction that is subject to Article 9. The special property interest of a buyer of goods on identification of those goods to a contract for sale under Section 2-401 is not a "security interest", but a buyer may also acquire a "security interest" by complying with Article 9.

* * *

SECTION [2-102]. DEFINITIONS.

(a) In this article:

* * *

(x) "Consignee" means a person to which goods are delivered in a consignment.

(y) "Consignment" means a transaction, regardless of its form, in which a person delivers goods to a merchant for the purpose of sale if the merchant deals in goods of that kind under a name other than the name of the person making delivery.

However, a transaction is not a "consignment" if:

(A) the value of the goods is \$[1,000] or less at the time of delivery;

(B) the goods are consumer goods immediately prior to delivery;

(C) the person to which the goods are delivered is an auctioneer or is generally known by its creditors to be substantially engaged in selling the goods of others; or

(D) the transaction, regardless of its form, creates a security interest that secures an obligation.

(z) "Consignor" means a person that delivers goods to a consignee in a consignment.

* * *

**SECTION [2-406]. SALE ON APPROVAL AND SALE OR RETURN;
SPECIAL INCIDENTS.**

(a) If delivered goods conform to the contract and may be returned by the buyer, the transaction is:

(1) a "sale on approval" if the goods are delivered primarily for use; or

(2) a "sale or return" if the goods are delivered primarily for resale.

* * *

(e) Goods held on approval are not subject to claims of a buyer's creditors until acceptance.

(f) [Goods held on sale or return are subject to claims of a buyer's creditors while in the buyer's possession.

(g)] While goods are in the possession of a consignee, the rights of creditors of, and purchasers of the goods from, the consignee are governed by Article 9.

**SECTION 5-118. SECURITY INTEREST IN DOCUMENTS, INSTRUMENTS,
AND CERTIFICATED SECURITIES ACCOMPANYING PRESENTATION AND
PROCEEDS.**

(a) An issuer or a nominated person has a security interest in a negotiable document, instrument, or certificated security and its proceeds:

(1) if the document, instrument, or security certificate representing the certificated security is delivered to the issuer or nominated person and delivery is a requirement of a presentation under the letter of credit; and

(2) to the extent that the issuer has given value by honoring a presentation or nominated person has given value in connection with the letter of credit.

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

(1) no security agreement is necessary to make the security interest enforceable under Section 9-203(a)(1);

(2) if the security interest is perfected it has priority over conflicting perfected security interests in the collateral or its proceeds.

SECTION 8-106. CONTROL.

* * *

[Revised] Official Comment

[marked to show changes from Official Comment]

1. The concept of "control" plays a key role in various provisions dealing with the rights of purchasers, including secured parties. See Sections 8-303 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510 (purchasers of security entitlements from entitlement holders); ~~9-115(4)~~ 9-312 (perfection of security interests); ~~9-115(5)~~ 9-324 (priorities among conflicting security interests).

Obtaining "control" means that the purchaser has taken whatever steps are necessary, given the manner in which the securities are held, to place itself in a position where it can have the securities sold, without further action by the owner.

* * *

Example 8. Able & Co. a securities dealer, holds a wide range of securities through its account at Clearing Corporation. Able enters into an arrangement with Alpha Bank pursuant to which Alpha provides financing to Able secured by securities identified as the collateral on lists provided by Able to Alpha on a daily or other periodic basis. Able, Alpha, and Clearing Corporation enter into an agreement under which Clearing Corporation agrees that if at any time Alpha directs Clearing Corporation to do so, Clearing Corporation will transfer any securities from Able's account at Alpha's instructions. Because Clearing Corporation has agreed to act on Alpha's instructions with respect to any securities carried in Able's account, at the moment that Alpha's security interest attaches to securities listed by Able, Alpha obtains control of those securities under subsection (d)(2). There is no requirement that Clearing Corporation be informed of which securities Able has pledged to Alpha.

* * *

7. The term "control" is used in a particular defined sense. The requirements for obtaining control are set out in this section. The concept is not to be interpreted by reference to similar concepts in other bodies of law. In particular, the requirements for "possession" derived from the common law of pledge are not to be used as a basis for interpreting subsection (c)(2) or (d)(2). Those provisions are designed to supplant the concepts of "constructive possession" and the like. A principal

purpose of the "control" concept is to eliminate the uncertainty and confusion that results from attempting to apply common law possession concepts to modern securities holding practices.

The key to the control concept is that the purchaser has the ~~present~~ ability to have the securities sold or transferred without further action by the transferor. There is no requirement that the powers held by the purchaser be exclusive. For example, in a secured lending arrangement, if the secured party wishes, it can allow the debtor to retain the right to make substitutions, or to direct the disposition of the uncertificated security or security entitlement. Subsection (f) is included to make clear the general point stated in subsection (c) that the test of control is whether the purchaser has obtained the requisite power, not whether the debtor has retained other powers. There is no implication that retention by the debtor of powers other than those mentioned in subsection (f) is inconsistent with the purchaser having control. Moreover, the purchaser's right to direct the intermediary may be subject to conditions. For example, a purchaser may have present control of a security entitlement even though the purchaser's right to give entitlement orders to the securities intermediary is conditioned on the entitlement holder's default or the purchaser's informing the securities intermediary that the entitlement holder is in default. Better practice for both the intermediary and the purchaser would be to insist that any conditions be effective only as between the purchaser and the entitlement holder. That would avoid the risk that the intermediary could be caught between conflicting assertions of the entitlement holder and the purchaser as to whether the conditions in fact have been met. Nonetheless, the existence of unfulfilled conditions effective against the intermediary would not preclude the purchaser from having control.

SECTION 8-110. APPLICABILITY; CHOICE OF LAW.

* * *

(e) The following rules determine a "securities intermediary's jurisdiction" for purposes of this section:

(1) If an agreement between the securities intermediary and its entitlement holder expressly specifies that it is governed by the law of a particular jurisdiction, the securities intermediary's jurisdiction for purposes of this part,

this article, or this act, that jurisdiction is the securities intermediary's jurisdiction.

(2) If an agreement between the securities intermediary and its entitlement holder does not specify the ~~governing law~~ securities intermediary's jurisdiction as provided in paragraph (1), but expressly specifies that the securities account is maintained at an office in a particular jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

(3) If an agreement between the securities intermediary and its entitlement holder does not specify a jurisdiction as provided in paragraph (1) or (2), the securities intermediary's jurisdiction is the jurisdiction in which is located the office identified in an account statement as the office serving the entitlement holder's account.

(4) If an agreement between the securities intermediary and its entitlement holder does not specify a jurisdiction as provided in paragraph (1) or (2) and an account statement does not identify an office serving the entitlement holder's account as provided in paragraph (3), the securities intermediary's jurisdiction is the jurisdiction in which is located the chief executive office of the securities intermediary.

(f) A securities intermediary's jurisdiction is not determined by the physical location of certificates representing financial assets, or by the jurisdiction in which is organized the issuer of the financial asset with respect to which an entitlement holder has a security entitlement, or by the location

of facilities for data processing or other record keeping concerning the account.