

D R A F T  
FOR DISCUSSION ONLY

**REVISION OF UNIFORM COMMERCIAL CODE  
ARTICLE 9 – SECURED TRANSACTIONS;  
SALES OF ACCOUNTS AND CHATTEL PAPER**

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NATIONAL CONFERENCE OF COMMISSIONERS  
ON UNIFORM STATE LAWS

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REPORTERS' INTERIM DRAFT

AUGUST 7, 1997

**REVISION OF UNIFORM COMMERCIAL CODE  
ARTICLE 9 – SECURED TRANSACTIONS;  
SALES OF ACCOUNTS AND CHATTEL PAPER**

*WITH PREFATORY NOTE AND COMMENTS*

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

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**REVISION OF UNIFORM COMMERCIAL CODE  
ARTICLE 9 – SECURED TRANSACTIONS;  
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1                   **REVISION OF UNIFORM COMMERCIAL CODE**  
2                   **ARTICLE 9 – SECURED TRANSACTIONS;**  
3                   **SALES OF ACCOUNTS AND CHATTEL PAPER**

4                   REPORTERS' INTRODUCTORY NOTE

5                   This interim draft reflects the Reporters' responses to a variety of issues that  
6                   have been raised by members of the Drafting Committee and other interested  
7                   persons. It is marked to reflect changes from the draft prepared for the 1997  
8                   Annual Meeting of the National Conference of Commissioners on Uniform State  
9                   Laws. Additions are underlined and deletions appear in ~~strikeout~~.

10                   REPORTERS' PREFATORY COMMENTS  
11                   AND STATEMENT OF POLICY ISSUES

12                   NOTE: The following Prefatory Comments have not been revised to reflect  
13                   changes from the 1997 Annual Meeting Draft for which they were prepared. We  
14                   have retained them because, for the most part, they give an accurate overview of the  
15                   current draft.

16                   **1. Background and History of Article 9 Revisions**

17                   In 1990, the Permanent Editorial Board for the Uniform Commercial Code  
18                   ("PEB"), with the support of its sponsors, the American Law Institute ("ALI") and  
19                   the National Conference of Commissioners on Uniform State Laws ("NCCUSL"),  
20                   established a committee ("Study Committee") to study Article 9 of the Uniform  
21                   Commercial Code ("UCC"). The PEB charged the Study Committee to consider  
22                   whether Article 9 and related provisions of the UCC are in need of revision. The  
23                   PEB also requested the Study Committee to recommend the nature and the  
24                   substance of any revisions that it thought desirable. The Study Committee issued  
25                   its report as of December 1, 1992 ("Report").

26                   The principal recommendation of the Report called for the creation of a  
27                   drafting committee ("Drafting Committee") for the revision of Article 9. The  
28                   Report also recommended numerous specific changes to Article 9. The ALI and  
29                   NCCUSL acted favorably upon the Report's principal recommendation. The  
30                   Drafting Committee was organized in 1993.



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**2. Status and Schedule**

The Drafting Committee has met eleven times (November, 1993; March, 1994; September-October, 1994; December, 1994; March, 1995; June, 1995; December, 1995; March, 1996; June, 1996; November, 1996; March, 1997). Meetings of the ALI Members Consultative Group on Article 9 were held on December 16-17, 1994, November 17, 1995, and October 31, 1996. NCCUSL considered the 1995 Annual Meeting Draft of revised Article 9 at its Annual Meeting in August, 1995, and the 1996 Annual Meeting Draft of revised Article 9 at its Annual Meeting in July, 1996. The ALI Council reviewed Council Draft No. 1 (November 15, 1995) at its meeting on December 8, 1995, and reviewed Council Draft No. 2 (November 15, 1996) at its meeting on December 13, 1996. The Chair of the Drafting Committee and the Reporters made informational reports to the membership of the ALI during its Annual Meetings in May, 1995, and May, 1996. Future meetings of the Drafting Committee are scheduled for November, 1997, and February, 1998. We expect the Article 9 revisions to be substantially completed in 1997 and presented to the sponsors for approval in 1998.

**3. Reorganization and Renumbering**

The 1996 NCCUSL Annual Meeting Draft was the last draft to follow the organization and numbering of current Article 9. The drafts subsequent to the 1996 NCCUSL Annual Meeting, including this one, reflect a material reorganization and renumbering. The restructuring was necessitated in part by the NCCUSL Style Committee's conclusion that the earlier drafts contained sections that were too long and included too many diverse provisions. (For example, Sections 9-312 and 9-402 of the 1996 Annual Meeting Draft each contained 17 subsections and Section 9-504 contained 19 subsections.) Accordingly, the number of sections has increased substantially, requiring most sections to be renumbered. Since the reorganization and renumbering first occurred, it became necessary to add a few sections. In order to limit the number of substantial renumberings, the additional sections were designated with an uppercase A (e.g., Section 9-308A). This usage is temporary and will not appear in the draft presented for the second reading.

The reorganization achieves more than a reduction of the length and scope of sections. It also arranges the substantive provisions in a more coherent structure and order. New Subpart 1 of Part 1 contains the required "short title. New Subpart 2 includes the definitions. Subpart 3 then addresses issues of scope and applicability. Part 2 is divided into Subpart 1, provisions relating to the validity and attachment of security interests, and Subpart 2, provisions that address various rights and duties of the parties. Part 3 of this draft, like Part 3 of earlier drafts and of current Article 9, deals with perfection and priority. Subpart 2 deals with perfection; Subpart 3, priority. Subpart 4 covers certain rights of depositary institutions with respect to deposit accounts. These subparts are preceded by Subpart 1, which contains the choice-of-law rules applicable to those topics (formerly found in Section 9-103). A new Part 4 covers other third-party issues. Part 4 of the 1996 Annual Meeting draft, dealing with filing, is Part 5 of this draft, and consists of two subparts. Subpart 1 covers the filing rules, and Subpart 2 deals with the duties and operation of the filing office. Finally, the former Part 5, dealing with default, is Part 6 of this draft. It also is divided into two subparts. Subpart 1

1 addresses default and enforcement generally, and Subpart 2 covers noncompliance  
2 with the provisions of Article 9.

3 The coherent structure of this draft will make it easier for both practitioners  
4 and judges to find and understand the rules. Of course, transition costs will  
5 accompany the benefits of the changes. But, judging from the consistently  
6 favorable responses we have received to the restructuring of Article 9, the benefits  
7 will vastly outweigh the costs.

#### 8 **4. Summary of Revisions**

9 Following is a brief summary of some of the more significant proposed  
10 revisions that are included in the draft.

##### 11 **a. Scope of Article 9.**

12 The draft expands the scope of Article 9 in several respects.

13 *Deposit accounts.* The draft includes within Article 9's scope deposit  
14 accounts as original collateral, except in consumer secured transactions. Current  
15 Article 9 deals with deposit accounts only as proceeds of other collateral.

16 *Payment intangibles.* The draft also includes within the scope of Article 9  
17 most sales of "payment intangibles, defined as general intangibles under which an  
18 account debtor's principal obligation is to pay money. Current Article 9 includes  
19 sales of accounts and chattel paper, but not sales of payment intangibles. The draft  
20 continues the drafting convention found in current Article 9, which provides that  
21 the sale of accounts, chattel paper, or payment intangibles creates a "security  
22 interest.

23 *Commercial tort claims.* The draft expands the scope of Article 9 to include  
24 commercial tort claims. However, the draft continues to exclude tort claims for  
25 bodily injury or other non-business tort claims of a natural person, as well as tort  
26 claims that are not generally assignable under other law. A security agreement  
27 must describe commercial tort claims with specificity. An after-acquired property  
28 clause does not reach after-acquired commercial tort claims.

29 *Transfers by governmental entities.* The draft narrows the exclusion of  
30 transfers by governmental entities. It excludes only transfers covered by another  
31 statute (other than a statute generally applicable to security interests), to the extent  
32 the statute governs the creation, perfection, priority, or enforcement of security  
33 interests.

34 *Nonpossessory statutory agricultural liens.* The draft brings nonpossessory  
35 statutory agricultural liens within the scope of Article 9. In doing so, it relies  
36 heavily upon the report and recommendations of the Article 9 Task Force of the  
37 Subcommittee on Agricultural and Agri-Business Financing, Committee on  
38 Commercial Financial Services, Section of Business Law, American Bar  
39 Association ("Agricultural Financing Task Force").

1           *Other nonpossessory statutory liens.* The draft also includes in Article 9's  
2 scope other, non-agricultural statutory liens, but in a more limited fashion than for  
3 agricultural liens. These other statutory liens are subject to Article 9's perfection  
4 (filing) rules, but the priority rules address only the relative priorities between a  
5 statutory lien and a security interest. Other priority contests are left to other law.

6           *Consignments.* The draft provides that "true consignments—bailments for  
7 the purpose of sale by the bailee—are security interests covered by Article 9, with  
8 certain exceptions. Currently, many consignments are subject to Article 9's filing  
9 requirements by operation of Section 2-326 and are governed by the priority rules in  
10 Section 9-114.

11           *Support obligations.* The draft also addresses explicitly obligations, such as  
12 guaranties and letters of credit, that support payment or performance of collateral  
13 such as accounts, chattel paper, and payment intangibles.

14           *Nonassignable general intangibles.* Finally, the draft enables a security  
15 interest to attach to general intangibles, including a contract, permit, license, or  
16 franchise, notwithstanding a contractual or statutory prohibition against or  
17 limitation on assignment. The draft explicitly protects third parties against any  
18 adverse effect of the creation or attempted enforcement of the security interest.

#### 19           **b. Choice of Law.**

20           *Where to file: Location of debtor.* The draft changes the choice-of-law rule  
21 governing perfection (i.e., where to file) for most collateral to the law of the  
22 jurisdiction where the debtor is located. Under current law, the jurisdiction of the  
23 debtor's location governs only accounts, general intangibles, mobile goods, and, for  
24 purposes of perfection by filing, chattel paper and investment property.

25           *Determining debtor's location.* As a general matter, the draft follows  
26 current law, under which the location of the debtor is the debtor's place of business  
27 (or chief executive office, if the debtor has more than one place of business). There  
28 are three exceptions. First, a "registered entity, such as a corporation or limited  
29 liability company, is located in the jurisdiction under whose law the debtor is  
30 organized, e.g., a corporate debtor's State of incorporation. Second, an individual  
31 debtor (i.e., human being) is located at his or her principal residence. Third, the  
32 United States and its governmental entities are located in the District of Columbia.

33           *Location of non-U.S. debtors.* If, using the foregoing rules, a debtor is  
34 located in a jurisdiction whose laws do not require public notice as a condition of  
35 perfection of a security interest, the entity is deemed located in the District of  
36 Columbia. Thus, to the extent that revised Article 9 applies to non-U.S. debtors,  
37 perfection could be accomplished in many cases by a domestic filing.

38           *Priority.* For tangible collateral such as goods and instruments, the law  
39 applicable to priority and the effect of perfection or nonperfection remains the law  
40 of the jurisdiction where the collateral is located, as under current law. For  
41 intangible collateral, such as accounts, the applicable law will be that of the  
42 jurisdiction in which the debtor is located.

1           *Goods covered by certificates of title; deposit accounts.* The draft includes  
2 several refinements to the treatment of choice-of-law matters for goods covered by  
3 certificates of title. It also provides special rules for deposit accounts similar to  
4 those for investment property under current law.

5           **c. Duties of Secured Party.**

6           The draft provides for expanded duties of secured parties.

7           *Release of control.* The draft imposes upon a secured party with control  
8 over a deposit account, investment property, or a letter of credit the duty to release  
9 control when there is no secured obligation and no commitment to give value.

10          *Release of account debtors.* Under the draft, a secured party that has  
11 notified account debtors to make payments to it must release the account debtors  
12 from that obligation when there is no secured obligation and no commitment to  
13 give value.

14          *Information.* The draft expands a secured party's duties to provide the  
15 debtor with information concerning the collateral and the obligations it secures.

1                   **d. Perfection.**

2                   *Deposit accounts and letters of credit: Control.* With certain exceptions,  
3 the draft provides that a security interest in a deposit account or a letter of credit  
4 may be perfected *only* by the secured party's acquiring "control" over the deposit  
5 account or letter of credit. A secured party has "control" of a deposit account when,  
6 with the consent of the debtor, the secured party obtains the depository institution's  
7 agreement to act on the secured party's instructions (including when the secured  
8 party becomes the account holder) or when the secured party is itself the depository  
9 institution. "Control" of a letter of credit occurs when the issuer and nominated  
10 party consent to an assignment of proceeds or the letter of credit is transferred to the  
11 secured party.

12                   *Instruments, statutory liens, and commercial tort claims: Filing.* The draft  
13 expands the types of collateral in which a security interest may be perfected by  
14 filing to include instruments. Agricultural liens, other statutory liens, and security  
15 interests in commercial tort claims also are perfected by filing, under the draft.

16                   *Sales of payment intangibles: Automatic perfection.* Current Article 9  
17 covers the outright sale of accounts and chattel paper. The Drafting Committee  
18 recognizes that sales of most other types of receivables likewise are financing  
19 transactions to which Article 9 should apply. Accordingly, the draft expands the  
20 definition of "account" to include many types of receivables that Article 9 currently  
21 classifies as "general intangibles." It thereby subjects to Article 9's filing system  
22 sales of more types of receivables than does current law. Certain sales of payment  
23 intangibles—primarily bank loan participation transactions—should not be subject to  
24 the Article 9 filing rules. These transactions fall in a residual category of collateral,  
25 "payment intangibles" (general intangibles under which the account debtor's  
26 principal obligation is the payment of money), the sale of which is exempt from the  
27 filing requirements of Article 9.

28                   *Possessory security interests.* Several provisions of the draft address  
29 aspects of security interests when the secured party or a third party is in possession  
30 of the collateral. In particular, the draft resolves a number of uncertainties under  
31 current law. It provides that a security interest in collateral in the possession of a  
32 third party is perfected when the third party acknowledges that it holds for the  
33 secured party's benefit. However, the draft also provides that a third party need not  
34 give such an acknowledgment and that its acknowledgment does not impose any  
35 duties on it, unless it agrees otherwise. The draft also clarifies the circumstances  
36 under which a security interest in goods covered by a certificate of title may be  
37 perfected by the secured party's taking possession.

38                   *Automatic perfection.* The draft lists in a separate section the types of  
39 security interests as to which no public-notice step is required for perfection (e.g.,  
40 purchase money security interests in consumer goods other than automobiles). The  
41 draft also provides that a perfected security interest in collateral supported by a  
42 "support obligation" (such as an account supported by a guaranty) also is a  
43 perfected security interest in the support obligation, and that a perfected security  
44 interest in an obligation secured by a real property mortgage also is a perfected  
45 security interest in the mortgage.

1                   **e. Priority.**

2                   The draft includes several new priority rules.

3                   *Deposit accounts.* The draft's rules applicable to deposit accounts are  
4 similar to those incorporated in Article 9 for investment property in conjunction  
5 with the recently-revised Article 8. If a secured party has control over a deposit  
6 account, its security interest is senior to a security interest perfected in another  
7 manner (e.g., as cash proceeds). Security interests perfected by control generally  
8 rank equally, but as between a depository institution's security interest and one held  
9 by another secured party, the depository institution's security interest is senior. A  
10 corresponding rule makes a depository institution's right of setoff generally senior  
11 to a security interest held by another secured party.

12                  *Letters of credit.* The draft includes priority rules for security interests in  
13 letters of credit that are somewhat analogous to those for deposit accounts. A  
14 security interest perfected by control has priority over one perfected in another  
15 manner (i.e., as a support obligation for the collateral in which a security interest is  
16 perfected). Security interests in letters of credit perfected by control generally rank  
17 equally, but one held by a transferee beneficiary has priority over other security  
18 interests. The Drafting Committee has asked the Reporters to reconsider whether  
19 the control priority may intrude unnecessarily on the priority of a financier of an  
20 underlying receivable supported by a letter of credit. The Drafting Committee  
21 plans to revisit this issue.

22                  *Purchase money security interests.* The draft substantially rewrites the  
23 definition of purchase money security interest (PMSI). It makes clear that a  
24 security interest in collateral may be (to some extent) both a PMSI as well as a non-  
25 PMSI, in accord with the "dual status" rule applied by some courts under current  
26 law. It provides an even broader definition of a PMSI in inventory, yielding a result  
27 that accords with private agreements entered into in response to the uncertainty of  
28 current law. The draft also revises the PMSI priority rules, but generally without  
29 material change in substance. It clarifies the priority rules for competing PMSIs in  
30 the same collateral. The draft treats consignments as if they were purchase money  
31 security interests in inventory.

32                  *Purchase money security interests in livestock; production money security*  
33 *interests.* The draft follows the Agricultural Financing Task Force's  
34 recommendation to provide a special PMSI priority for livestock. The draft also  
35 follows the Task Force's recommendations on special priority rules for agricultural  
36 liens. It also includes, in brackets, a new priority rule for "production money  
37 security interests" for secured parties that give new value used in the production of  
38 crops. No consensus has emerged on this issue within the Task Force, the Drafting  
39 Committee, or the agricultural financing community. For this reason, the Drafting  
40 Committee is inclined to include this priority rule, with certain refinements, as an  
41 optional provision that each State could consider during the legislative enactment  
42 process. Under this approach, the UCC sponsors would make no recommendation  
43 one way or the other.

44                  *Chattel paper and instruments.* The draft continues to afford priority to  
45 certain purchasers of chattel paper or instruments who take possession of the



collateral. For chattel paper, it maintains the distinction between priority over a security interest in chattel paper claimed merely as proceeds of a competing security interest and priority over a security interest in chattel paper claimed other than merely as proceeds. With respect to the former, a purchaser of chattel paper that takes possession in the ordinary course of its business takes priority over a competing security interest unless the chattel paper indicates that it has been assigned to an identified secured party. With respect to the latter, a purchaser of chattel paper that takes possession in the ordinary course of its business takes priority over a competing security interest 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. The Drafting Committee agrees that Article 9 should continue to afford priority to purchasers of instruments who take possession; however, it has not reached agreement as to the substance of the rule.

*Miscellaneous.* The draft also includes (i) revised priority rules for security interests in goods covered by a certificate of title, (ii) clarifications of selected good-faith-purchase issues, (iii) a special priority rule under which a senior security interest in receivables takes priority in a check constituting proceeds of the receivables even if the junior secured party is a holder in due course of the check, (iv) provisions designed to ensure that security interests in deposit accounts will not extend to most transferees of funds on deposit or payees from deposit accounts and will not otherwise “clog the payments system, (v) a provision enabling most transferees of money to take free of a security interest, (vi) new priority rules to deal with the “double debtor” problem arising when a debtor creates a security interest in collateral acquired subject to a security interest created by another person, (vii) new priority rules to deal with the problems created when a change in corporate structure or the like results in a new entity that has become bound by the original debtor’s after-acquired property agreement, and (viii) substantially rewritten and refined priority rules dealing with accessions and commingled goods.

#### **f. Proceeds.**

The draft expands the definition of “proceeds” of collateral to include additional rights and property that arise out of collateral, including distributions on account of collateral and claims arising out of the loss or nonconformity of, defects in, or damage to collateral. The term also includes collections on account of “support obligations, such as guarantees.

#### **g. Filing.**

Part 5 (formerly Part 4) of Article 9 has been substantially rewritten to simplify the statutory text and to deal with numerous problems of interpretation and implementation that have arisen over the years.

*Medium-neutrality.* The draft is “medium-neutral”; that is, it makes clear that parties may file and otherwise communicate with a filing office by means of records communicated and stored in media other than on paper.

*Financing statement formal requisites.* The draft provides that a super-generic description (e.g., “all assets” or “all personal property”) in a financing



1 statement is a sufficient indication of the collateral. (Note, however, that the draft  
2 retains the requirement that a security agreement contain a description of collateral  
3 that reasonably identifies it.) It also contains provisions clarifying when a debtor's  
4 name is correct and when an incorrect name is insufficient. To facilitate electronic  
5 filing, the draft does not require that the debtor's signature appear on a financing  
6 statement. Instead, it prohibits the filing of unauthorized financing statements and  
7 imposes liability upon those who violate the prohibition.

8       *"Open drawer."* The draft incorporates what has come to be known as the  
9 "open drawer" approach. This convention encompasses several aspects of filing  
10 office operations. First, the filing office may not reject a financing statement or  
11 other record for a reason other than one of the few set forth in the draft. Second,  
12 the filing office is obliged to link all subsequent records (e.g., amendments adding  
13 collateral, assignments, etc.) to the initial financing statement to which they relate.  
14 Third, the filing office may delete a financing statement and related records from  
15 the files only upon lapse (i.e., five years after the filing date), and then only if a  
16 continuation statement has not been filed. Thus, a financing statement and related  
17 records would be discovered by a search of the files even after the filing of a  
18 termination statement. This approach helps eliminate filing office discretion and  
19 also eases problems associated with multiple secured parties and multiple partial  
20 assignments.

21       *Correction of Records: Missing secured parties and fraudulent filings.* In  
22 some areas of the country, serious problems have arisen from fraudulent financing  
23 statements that are filed against public officials and other prominent persons. To  
24 deter fraudulent filings of all kinds, the draft adds a requirement that the filing  
25 office communicate to each debtor and secured party of record on a financing  
26 statement the information contained in the financing statement and in each related  
27 record. The draft also affords a statutory method by which a debtor who believes  
28 that a filed record is inaccurate or was wrongfully filed may indicate that fact in the  
29 files without affecting the efficacy, if any, of the challenged record. In addition, the  
30 draft permits the debtor to file a request for termination of a financing statement. If  
31 a secured party fails to object to a debtor's filed request within a specified period  
32 following the filing office's communication of the request to the secured party, the  
33 financing statement will terminate. Although this last provision remains  
34 controversial within and outside the Drafting Committee, it represents the Drafting  
35 Committee's attempt to address both the problem of fraudulent filings and the  
36 problem of secured parties that simply disappear through mergers or liquidations.  
37

38       *Filing office operations.* The draft mandates performance standards for  
39 filing offices and requires filing offices to sell filing data to the public. It provides  
40 as well for the promulgation of administrative rules to deal with details best left out  
41 of the statute.

## 42       **h. Default and Enforcement.**

43       Part 6 (formerly Part 5) of Article 9 has been extensively revised. Some of  
44 the draft provisions described below are affected by or subject to special draft  
45 consumer-protection provisions discussed in the next section.

1           *Debtor, secondary obligor; waiver.* The draft clarifies the identity of  
2 persons who have rights and persons to whom a secured party owes duties under  
3 Part 6. Under the draft the rights and duties are enjoyed by and run to the “debtor,  
4 defined to mean any person with a non-lien property interest in collateral, and to  
5 any “secondary obligor. The latter is a new term defined to include one who is  
6 secondarily obligated on the secured obligation, e.g., a guarantor. However, the  
7 secured party is relieved from any duty or liability to any person unless the secured  
8 party knows that the person is a debtor or a secondary obligor. A non-debtor  
9 obligor, whether primary or secondary, may effectively waive its rights and the  
10 secured party’s duties to the extent and in the manner provided by other law, e.g.,  
11 the law of suretyship.

12           *Rights of collection and enforcement of collateral.* The draft explains in  
13 greater detail the rights of a secured party that seeks to collect or enforce collateral,  
14 including accounts, chattel paper, and payment intangibles. It also sets forth the  
15 enforcement rights of a depository institution holding a security interest in a deposit  
16 account maintained with the institution.

17           *Disposition of collateral: Warranties of title.* The draft imposes on a  
18 secured party that disposes of collateral the warranties of title, quiet possession, and  
19 the like that are otherwise applicable under other law, and it provides rules for the  
20 exclusion or modification of those warranties.

21           *Disposition of collateral: Notification and effects.* The draft also requires a  
22 secured party to give notification of a disposition of collateral to other secured  
23 parties and lien holders who have filed financing statements against the debtor  
24 which cover the collateral. (That duty was eliminated by the 1972 revisions to  
25 Article 9.) However, the draft relieves the secured party from that duty when the  
26 secured party undertakes a search of the records and a report of the search is  
27 unreasonably delayed. The draft specifies the contents of a sufficient notification of  
28 disposition and provides that a notification sent 10 days or more before the earliest  
29 time for disposition is sent within a reasonable time. The draft also clarifies the  
30 effects of a disposition by a secured party, including the rights of transferees of the  
31 collateral.

32           *Transfer of record or legal title.* The draft contains a new provision making  
33 clear that a transfer of record or legal title to a secured party is not of itself a  
34 disposition under Part 6. This rule applies regardless of the circumstances under  
35 which the transfer of title occurs.

36           *Strict foreclosure.* The draft permits a secured party to accept collateral in  
37 partial satisfaction, as well as full satisfaction, of the obligations secured. This  
38 right of strict foreclosure extends to intangible as well as tangible property. The  
39 draft also clarifies the effects of an acceptance of collateral on the rights of junior  
40 claimants. The draft rejects the approach taken by some courts—deeming a secured  
41 party to have constructively retained collateral in satisfaction of the secured  
42 obligations—in the case of a secured party’s unreasonable delay in the disposition of  
43 collateral. Instead, unreasonable delay is relevant when determining whether a  
44 disposition is commercially reasonable.

1           *Effect of noncompliance: “Rebuttable presumption” test.* The draft adopts  
2 the “rebuttable presumption” test for the failure of a secured party to proceed in  
3 accordance with certain provisions of Part 6. Under this approach, the deficiency  
4 claim of a noncomplying secured party is calculated by crediting the obligor with  
5 the greater of the actual net proceeds of a disposition and the amount of net  
6 proceeds that would have been realized if the disposition had been conducted in  
7 accordance with Part 6, e.g., in a commercially reasonable manner. The draft  
8 rejects the “absolute bar” test that some courts have imposed; that approach bars a  
9 noncomplying secured party from recovering any deficiency, regardless of the loss  
10 (if any) the debtor suffered as a consequence of the noncompliance.

11           *“Low-price” dispositions: Calculation of deficiency and surplus.* The draft  
12 provides a special method for calculating a deficiency if the proceeds of a  
13 disposition of collateral to a secured party, an affiliate of the secured party, or a  
14 secondary obligor are “unreasonably low.” Instead of calculating a deficiency (or  
15 surplus) based on the actual net proceeds, the deficiency (or surplus) is calculated  
16 based on the proceeds that would have been received in a disposition to an  
17 unrelated person.

#### 18           **i. Consumer Transactions.**

19           The draft includes several new and revised provisions applicable only to  
20 consumer transactions. Many, but not all, of these provisions deal with the  
21 enforcement of a security interest. In formulating these provisions, the Drafting  
22 Committee and the Reporters relied to a considerable extent on the work of a  
23 Subcommittee on Consumer Transactions. This subcommittee, which was  
24 established in 1995, made recommendations that the Drafting Committee  
25 considered at its June, 1996, November, 1996, and March, 1997, meetings. A  
26 summary of the principal provisions follows. Many of these provisions remain  
27 highly controversial.

28           *Definition of “consumer secured transaction” and “consumer goods*  
29 *secured transaction.”* Nearly all the consumer-protection rules apply to “consumer  
30 goods secured transactions.” These are transactions in which individual incurs an  
31 obligation primarily for personal, family, or household purposes and a security  
32 interest in consumer goods secures the obligation. A few provisions apply more  
33 broadly to “consumer secured transactions.” These are transactions in which an  
34 individual incurs an obligation primarily for personal, family, or household  
35 purposes and the obligation is secured by collateral held or acquired primarily for  
36 personal, family, or household purposes.

37           *Description of investment property.* The draft provides that, in consumer  
38 secured transactions, a security agreement must describe a security entitlement,  
39 securities account, or commodity account with specificity. A description by type  
40 alone (e.g., “all my security entitlements”) is not sufficient. If a specific securities  
41 account is described, after-acquired securities entitlements with respect to the  
42 account are covered.

43           *Allocations of payments for determination of purchase money status.* The  
44 draft contains alternative allocation rules for purposes of determining the portion of  
45 purchase money and non-purchase money obligations included in consolidated

obligations. If a State has a non-Article 9 allocation formula, that formula applies. If a State lacks an otherwise applicable allocation formula, payments are applied to the obligations in the order in which they were incurred.

*Notification of disposition of collateral.* The draft contains a safe-harbor form of notification, in “plain English, for consumer goods secured transactions.

*Notification of calculation of deficiency.* The draft requires a secured party to provide a debtor with a notification of how it calculated a deficiency at or before the time it first undertakes to collect the deficiency in a consumer goods secured transaction.

*Acceptance of collateral in satisfaction of obligation; “strict foreclosure.”* Strict foreclosure in a consumer goods secured transaction is conditioned on the debtor’s having been dispossessed of the collateral. Partial strict foreclosure is not permitted, however, when a disposition is mandatory (i.e., after the debtor has paid 60 percent or more of the secured debt).

*Reinstatement of secured obligation without acceleration.* For payment defaults, the draft provides a one-time right of reinstatement of an accelerated obligation if a debtor has paid 60 percent or more of the secured debt and if the debtor cures the default.

*Noncompliance: Absolute bar versus rebuttable presumption.* The draft provides for application of the absolute bar rule for a secured party’s noncompliance with Part 6 as an alternative to the rebuttable presumption rule. Each State would be expected to select one or the other during the enactment process.

*Noncompliance: Minimum damages; good faith error defense; limits on damages in class actions.* The draft provides for the imposition of minimum damages in the event of a secured party’s noncompliance with Part 6 in a consumer goods secured transaction. No damages can be recovered in the case of unintentional, good faith errors, such as clerical and calculation errors. The draft limits the statutory minimum damages in a class action to the lesser of \$500,000 or one percent of the secured party’s net worth.

#### **j. Good Faith.**

The draft contains a new definition of “good faith” that includes not only “honesty in fact” but also “the observance of reasonable commercial standards of fair dealing.” The definition is similar to the ones adopted in connection with other, recently completed revisions of the UCC.

### **5. Style and Citation Conventions**

#### **a. Unresolved Substantive Issues.**

The Drafting Committee has not reached a consensus on several matters, some of which are reflected in the draft by statutory text that appears in brackets and by bracketed alternative formulations. Contrary to the usual style for drafts of

1 Uniform Acts, the brackets in the draft do not necessarily indicate that the  
2 provisions are optional or that the States are to choose one of the alternatives.  
3 Brackets that do indicate optional or alternative text are noted in the draft or the  
4 Reporters' Comments.

5 **b. Minor Style Changes.**

6 A few sections have been changed to reflect NCCUSL's currently  
7 applicable style requirements, but have not been changed substantively. These  
8 sections contain the following notation in their captions: *[MINOR STYLE*  
9 *CHANGES ONLY]*.

10 **c. Unresolved Style Issues.**

11 The Drafting Committee thinks that certain style conventions may not be  
12 well suited for an Act of the length and complexity of revised Article 9. In  
13 particular, a few contemporary style conventions conflict with certain features of  
14 current Article 9 which have proven their utility over the past decades. For  
15 example, current Article 9 contains several sections of definitions, each of which  
16 contains related terms. See, e.g., Section 9-109 (definitions of the four types of  
17 goods). This approach enables a user whose collateral is, say, goods an easy way to  
18 find all the classification possibilities for the collateral and to choose among them.  
19 The Drafting Committee prefers this approach, which several recently promulgated  
20 articles of the Uniform Commercial Code adopt, to one in which the types of goods  
21 are scattered among more than 60 definitions in a single section.

22 The draft retains this and other style conventions pending resolution of these  
23 issues. In some cases, the draft uses brackets to indicate disagreement over style  
24 issues and notes the disagreement in the Reporters' Comments.

25 **d. Reference to Current Law.**

26 The Reporters' Comments refer to current Article 9 as "former Article 9.

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## 6. Statement of Policy Issues

Following is a listing of some of the more important questions of policy raised by the draft with respect to non-consumer secured transactions.

a. Should the revised Article 9 include additional provisions designed to protect consumers? Are the new provisions included in the draft appropriate?

b. Should the revised Article 9 change the choice-of-law rule for perfection to the location of the debtor? If so, should the location of the debtor be changed to the jurisdiction where an individual debtor resides and where certain other debtors are organized? Is the draft's distinction between law governing perfection and law governing priority appropriate?

c. Should the revised Article 9 include within its scope security interests in deposit accounts as original collateral? Are the perfection and priority rules for security interests in deposit accounts included in the draft appropriate?

d. Should the revised Article 9 include within its scope sales of payment intangibles, i.e., general intangibles for money due or to become due? If so, should the sales be automatically perfected?

e. Should the revised Article 9 include within its scope security interests in existing, specifically described, commercial tort claims?

f. Should the revised Article 9 narrow the exclusion of security interests created by governmental debtors?

g. Should the revised Article 9 include provisions governing the relative priority of security interests and statutory liens? If so, are the draft provisions appropriate?

h. Should the revised Article 9 include special rules for security interests in instruments secured by real property mortgages?

i. Should the revised Article 9 adopt the "open drawer" policy, which limits the discretion of filing offices to reject and delete filed records?

j. Should the revised Article 9 afford a nonjudicial means by which a debtor can cause a disputed financing statement to become ineffective?



## 7. Source Table

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.

| 1996 Annual Meeting Draft             | 1997 Annual Meeting Draft       |
|---------------------------------------|---------------------------------|
| § 9-101. Short Title.                 | § 9-101                         |
| § 9-102. Scope of Article.            | § 9-112(a), (b)                 |
| § 9-103. Multiple State Transactions. |                                 |
| (a)(1)-(3) (non-possessory)           | § 9-301                         |
| (a)(4)-(5)                            | § 9-307                         |
| (a)(6)                                | § 9-314(a)                      |
| (b)(1)-(2) (possessory)               | § 9-301                         |
| (b)(3)-(4) (agricultural lien)        | § 9-302                         |
| (b)(5)                                | § 9-314(b)                      |
| (c)(1)-(4) (cert. of title)           | § 9-303                         |
| (c)(5)                                | § 9-314(c)                      |
| (c)(6)                                | § 9-334                         |
| (d)(1)-(2) (deposit accounts)         | § 9-304                         |
| (d)(3)                                | § 9-314(d)                      |
| (e) (minerals)                        | § <del>9-306</del> <u>9-301</u> |
| (f) (investment property)             | § 9-305                         |
| § 9-104. Exclusions.                  | § 9-112(c)                      |
| § 9-105. Definitions.                 | § 9-102                         |
| § 9-106. Definitions: “Account, etc.  | § 9-103                         |
| § 9-107. Definitions: “PMSI, etc.     | § 9-104                         |
| § 9-107A. Definitions: “PrMSI, etc.   | § 9-105                         |
| § 9-108. Antecedent Debt.             | [Deleted]                       |
| § 9-109. Classification of Goods.     | § 9-106                         |
| § 9-110. Sufficiency of Description.  | § 9-111                         |
| § 9-111. Applicability of Article 6.  | [Deleted]                       |



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|----|---|-------------|
| 1  | § 9-112. Collateral Owned by Nondebtor. | [Deleted]   |
| 2  | § 9-113. S/I Under Article 2 or 2A.     | § 9-116     |
| 3  | § 9-114. Rights of Consignee and        |             |
| 4  | Receivables Seller.                     | § 9-315A    |
| 5  | § 9-115. Investment Property.           |             |
| 6  | (a) (definitions)                       | § 9-107     |
| 7  | (b) (attachment)                        | § 9-203(e)  |
| 8  | (perfection)                            | § 9-308(e)  |
| 9  | (c) (description)                       | § 9-111(c)  |
| 10 | (d)(1) (perfection by control)          | § 9-312     |
| 11 | (d)(2) (perfection by filing)           | § 9-310(a)  |
| 12 | (d)(3)-(4) (automatic perfection)       | § 9-308A(6) |
| 13 | (e) (priority)                          | § 9-324     |
| 14 | (f) (certificate in reg form)           |             |
| 15 | (attachment)                            | § 9-203(a)  |
| 16 | (perfection)                            | § 9-311(a)  |
| 17 | (priority)                              | § 9-324     |
| 18 | § 9-116. Security Interest in Financial |             |
| 19 | Asset.                                  | § 9-206     |
| 20 | rules re: automatic perfection          | § 9-308A(5) |

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|----|--|------------|
| 1  | § 9-117. “Control (Deposit Account).     |            |
| 2  | (a)-(b) (definition)                     | § 9-109    |
| 3  | (c) (no obligation to disclose)          | § 9-339    |
| 4  | (d) (obligation to release)              | § 9-208    |
| 5  | (e) (failure to release)                 | § 9-624(d) |
| 6  | § 9-118. “Control (Investment Property). | § 9-108    |
| 7  | § 9-119. “Control (Letter of Credit).    | § 9-110    |
| 8  | § 9-201. General Validity.               | § 9-201    |
| 9  | § 9-202. Title to Collateral.            | § 9-202    |
| 10 | § 9-203. Attachment.                     | § 9-203    |
| 11 | (e) (conflict with other statute)        | § 9-115    |
| 12 | § 9-204. After-Acq’d Property; Future    |            |
| 13 | Adv.                                     | § 9-204    |
| 14 | § 9-205. Anti-Benedict v. Ratner.        | § 9-205    |
| 15 | § 9-206. Waiver of Defenses.             | § 9-403    |
| 16 | § 9-207. Collateral in SP’s Possession.  | § 9-207    |
| 17 | § 9-208. Statement of Account.           | § 9-209    |
| 18 | (b) (estoppel rule)                      | § 9-624(f) |
| 19 | § 9-209. SP/DI’s Right of Set-Off.       | § 9-337(b) |
| 20 | § 9-301. Unperfected S/I.                |            |
| 21 | (a)-(b) (basic priority rules)           | § 9-315    |
| 22 | (d) (future advances)                    | § 9-320(b) |

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|----|---|------------|
| 1  | § 9-302. Perfection by Filing.              | § 9-309    |
| 2  | automatic perfection                        | § 9-308A   |
| 3  | (c)-(d) (certificates of title; treaties)   | § 9-309A   |
| 4  | § 9-303. When Security Interest Is          |            |
| 5  | Perfected.                                  | § 9-308    |
| 6  | § 9-304. Perfection (Instr., Chattel Paper, |            |
| 7  | etc.)                                       | § 9-310    |
| 8  | § 9-305. Perfection by Possession.          | § 9-311    |
| 9  | § 9-305A. Perfection by Control.            | § 9-312    |
| 10 | § 9-306. Proceeds.                          | § 9-313    |
| 11 | § 9-307. Buyers of Goods.                   |            |
| 12 | (a)-(c) (basic rules)                       | § 9-316    |
| 13 | (d) (future advances)                       | § 9-320(c) |
| 14 | § 9-308. Purchase of Chattel Paper          |            |
| 15 | and Instr.                                  | § 9-327    |
| 16 | § 9-308A. Transfer of Money and Funds.      | § 9-329    |
| 17 | § 9-309. Purchasers of Instrument, etc.     | § 9-328    |
| 18 | § 9-310. Liens Arising by Law.              | § 9-330    |
| 19 | § 9-311. Alienability of Debtor's Rights.   | § 9-401    |
| 20 | § 9-312. Conflicting Security Interest.     |            |
| 21 | (a), (m)-(n) (first-to-file rule)           | § 9-319    |
| 22 | (b), (f), (l) (PrMSI)                       | § 9-321    |
| 23 | (k) (ag lien)                               | § 9-319(c) |
| 24 | (c)-(e), (g) (PMSI)                         | § 9-322    |
| 25 | (h) (collateral transferred to 2d debtor)   | § 9-323    |
| 26 | (i) (after-acquired property of new         |            |
| 27 | debtor)                                     | § 9-323A   |
| 28 | (j) (deposit accounts)                      | § 9-325    |

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| 1  | (o) (future advances)                  | § 9-320(a) |
| 2  | (p) (letters of credit)                | § 9-326    |
| 3  | § 9-312A. Set-Off Against Deposit      |            |
| 4  | Account.                               | § 9-337    |
| 5  | § 9-313. Fixtures.                     |            |
| 6  | (a)-(g) (priority)                     | § 9-331    |
| 7  | (h) (enforcement)                      | § 9-604(c) |
| 8  | § 9-314. Accessions.                   | § 9-332    |
| 9  | § 9-315. Commingled & Processed Goods. | § 9-333    |
| 10 | § 9-316. Subordination.                | § 9-336    |
| 11 | § 9-317. SP Not Obligated on D's       |            |
| 12 | Contract.                              | § 9-402    |
| 13 | § 9-318. Rights Acquired by Assignee.  | § 9-404    |
| 14 | § 9-318A. DI's Disposition of Funds.   | § 9-338    |
| 15 | § 9-318B. Restrictions on Assignment.  | § 9-406    |
| 16 | § 9-401. Place of Filing.              | § 9-501    |
| 17 | § 9-402. Financing Statement.          |            |
| 18 | (a)-(b), (m) (contents)                | § 9-502    |
| 19 | (c)-(f) (name of debtor & secured      |            |
| 20 | party)                                 | § 9-503    |
| 21 | (g) (indication of collateral)         | § 9-504    |
| 22 | (h) (minor errors)                     | § 9-506    |
| 23 | (i)-(k) (name & other changes)         | § 9-507    |
| 24 | (l) (amendment)                        | § 9-509    |
| 25 | (n)-(o) (authorization)                | § 9-508    |
| 26 | (p) (remedy for violation of secured   |            |
| 27 | party's duty)                          | § 9-624(d) |
| 28 | § 9-402A. New Debtor.                  | § 9-510    |

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| 1  | § 9-403. Filing.                         |                     |
| 2  | (a)-(b), (e), (g) (effectiveness)        | § 9-515             |
| 3  | (c)-(d), (h)-(i) (refusal)               | § 9-521             |
| 4  | (f) (incorrect “optional information)    | § 9-335             |
| 5  | (j)-(k), (l) (2d & 3d sent.),            |                     |
| 6  | (m) (duration and lapse)                 | § 9-516             |
| 7  | (l) (1st sent.) (continuation)           | § 9-517             |
| 8  | (l) (last 3 sent.) (lapsed financing)    | § 9-522             |
| 9  | (n)-(p) (indexing)                       | § 9-520(a)-(c), (e) |
| 10 | (q)-(r) (indexing errors)                | § 9-518             |
| 11 | § 9-404. Termination Statement.          | § 9-511             |
| 12 | (c) (remedy for violation)               | § 9-624(d)          |
| 13 | § 9-405. Assignment.                     |                     |
| 14 | (a)-(c) (how to)                         | § 9-512             |
| 15 | (d)-(e) (indexing)                       | § 9-520(d), (e)     |
| 16 | § 9-406. Multiple Secured Parties.       | § 9-513             |
| 17 | § 9-406A. Successor of Secured Party.    | § 9-514             |
| 18 | § 9-407. Information From Filing Office. | § 9-523             |
| 19 | § 9-408. Filing for Leases, etc.         | § 9-505             |
| 20 | § 9-409. Registered Agent.               | § 9-525             |
| 21 | § 9-410. Assignment of Functions.        | § 9-526             |
| 22 | § 9-411. Delay by Filing Office.         | § 9-524             |
| 23 | § 9-412. Fees.                           | § 9-527             |
| 24 | § 9-413. Administrative Rules.           | § 9-528             |
| 25 | § 9-414. Duty to Report.                 | § 9-529             |
| 26 | § 9-415. Claim re: Inaccurate Record.    | § 9-519             |

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| 1  | § 9-501. Secured Party's Rights & Duties; |           |
| 2  | Waiver, etc.                              |           |
| 3  | (a)-(b), (h), (j) (rights & remedies)     | § 9-601   |
| 4  | (c), (d) (waiver)                         | § 9-602   |
| 5  | (e) (standards re: duties)                | § 9-603   |
| 6  | (f)-(g) (real estate)                     | § 9-604   |
| 7  | (i) (unknown debtor or secondary          |           |
| 8  | obligor)                                  | § 9-605   |
| 9  | (k) (time of default for ag lien)         | § 9-606   |
| 10 | § 9-502. Collection and Enforcement.      |           |
| 11 | (a)-(d) (generally)                       | § 9-607   |
| 12 | (e), (g) (application of proceeds)        | § 9-608   |
| 13 | (f) (jr's right to proceeds)              | [Deleted] |
| 14 | § 9-503. Right to Take Possession.        | § 9-609   |
| 15 | § 9-504. Disposition of Collateral.       |           |
| 16 | (a), (f) (general; commercial             |           |
| 17 | reasonableness)                           | § 9-610   |
| 18 | (b)-(e) (application of proceeds)         | § 9-614   |
| 19 | (g)-(h) (whom to notify)                  | § 9-611   |
| 20 | (i) (waiver)                              | § 9-623   |
| 21 | (j) (timeliness of notice)                | § 9-612   |
| 22 | (k)-(l) (contents of notice)              | § 9-613   |
| 23 | (m) (pre-collection accounting)           | [Deleted] |
| 24 | (n)-(o) (rights of transferee)            | § 9-615   |
| 25 | (p) (rights of guarantor, etc.)           | § 9-616   |
| 26 | (q) (title clearing)                      | § 9-617   |
| 27 | § 9-504A. Limitation on Deficiency.       | [Deleted] |

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|----|--------------------------------------|---------|
| 1  | § 9-505. Acceptance of Collateral.   |         |
| 2  | (a)-(e), (k), (l) (general)          | § 9-618 |
| 3  | (f)-(g) (notification)               | § 9-619 |
| 4  | (h)-(i) (effect of acceptance)       | § 9-620 |
| 5  | (j), (m) (waiver)                    | § 9-623 |
| 6  | § 9-506. Redemption; Reinstatement.  |         |
| 7  | (a) (redemption)                     | § 9-621 |
| 8  | (b)-(e) (reinstatement)              | § 9-622 |
| 9  | (f) (waiver)                         | § 9-623 |
| 10 | § 9-507. Non-compliance with Part 5. |         |
| 11 | (a)-(b), (g) (damages)               | § 9-624 |
| 12 | (c) (deficiency actions)             | § 9-625 |
| 13 | (d)-(f) (commercial reasonableness)  | § 9-626 |
| 14 | (h) (attorney's fees)                | § 9-628 |
| 15 | (i)-(k) (no liability)               | § 9-627 |



1                   **REVISION OF UNIFORM COMMERCIAL CODE**  
2                   **ARTICLE 9 – SECURED TRANSACTIONS;**  
3                   **SALES OF ACCOUNTS AND CHATTEL PAPER**

4                                   **PART 1**  
5                                   **GENERAL PROVISIONS**

6                   [SUBPART 1. SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS]

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

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

9                                   ~~[SUBPART 2. DEFINITIONS AND CONCEPTS]~~

10                   **SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.**

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

12                                   (1) “Account debtor” means a person obligated on an account, chattel  
13                   paper, [instrument other than a negotiable instrument,] or general intangible. The  
14                   term does not include a person obligated to pay a negotiable instrument even if the  
15                   instrument constitutes part of chattel paper.

16                                   (2) “Accounting” means a record authenticated by a secured party  
17                   which indicates ~~indicating~~ the aggregate unpaid secured obligations as of a date not  
18                   more than [ ] days earlier than the date of the record and reasonably identifies the  
19                   components of the obligations.

20                                   (3) “Agricultural lien” means a statutory lien in favor of a person that in  
21                   the ordinary course of its business furnishes goods or services to a debtor engaged  
22                   in a farming operation.

23                                   (3A) “As-extracted collateral” means:

1                   (A) oil, gas, or other minerals that are subject to a security interest  
2                   that is created by a debtor having an interest in the minerals before extraction and  
3                   which attaches to the minerals as extracted; and

4                   (B) accounts arising out of the sale at the wellhead or minehead of  
5                   [oil, gas, or other] minerals in which the debtor had an interest before extraction.

6                   (4) “Authenticate” means to:

7                         (A) sign; or

8                         (B) to execute or adopt a symbol, including a digital identifier, or  
9                   encrypt a record in whole or in part, with present intent to:

10                                 (i) identify the authenticating party;

11                                 (ii) adopt or accept a record or term; or

12                                 (iii) establish the authenticity ~~adopt, establish the authenticity of,~~  
13                   ~~or signify a party’s acceptance~~ of a record or term that contains the authentication  
14                   or to which a record containing the authentication refers.

15                   (5) “Certificate of title” means a certificate of title with respect to which  
16                   a statute provides for the security interest in question to be indicated on the  
17                   certificate as a condition or result of the security interest’s obtaining priority over  
18                   the rights of a lien creditor with respect to the collateral.

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

25                   (7) “Collateral” means the property subject to a security interest or  
26                   statutory lien. The term includes proceeds to which a security interest attaches

1 under Section 9-313, proceeds as to which a statutory lien becomes effective, and  
2 accounts, chattel paper, and payment intangibles that have been sold.

3 (8) “Commercial tort claim means a claim arising in tort if the claim is  
4 generally assignable under applicable law and:

5 (A) the claimant is an organization; or

6 (B) the claimant is an individual, the claim does not include  
7 damages arising out of [bodily] [personal] injury to or the death of an individual,  
8 and the claim arose in the course of the claimant’s business or profession.

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

13 (9A) “Consignee means a person to which goods are delivered in a  
14 consignment.

15 (9B) “Consignment means a transaction, regardless of its form, in  
16 which a person delivers goods to a merchant for the purpose of sale if the merchant  
17 deals in goods of that kind under a name other than the name of the person making  
18 delivery. However, a transaction is not a “consignment if:

19 (A) the value of the goods is \$[1,000] or less at the time of delivery;

20 (B) the goods are consumer goods immediately prior to delivery;

21 (C) the person to which the goods are delivered is an auctioneer or is  
22 generally known by its creditors to be substantially engaged in selling the goods of  
23 others; or

24 (D) the transaction, regardless of its form, creates a security interest  
25 that secures an obligation.

1                   (9C) “Consignor means a person that delivers goods to a consignee in  
2                   a consignment.

3                   (10) “Consumer debtor means a debtor in a consumer secured  
4                   transaction.

5                   (11) “Consumer goods secured transaction means a transaction in  
6                   which an individual incurs an obligation primarily for personal, family, or  
7                   household purposes, and a security interest in consumer goods secures the  
8                   obligation.

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

12                  (13) “Consumer secured transaction means a transaction in which an  
13                  individual incurs an obligation primarily for personal, family, or household  
14                  purposes, a security interest secures the obligation, and the collateral is held or  
15                  acquired primarily for personal, family, or household purposes.

16                  (14) “Debtor means:

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

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

20                         (C) a consignee.

21                  (15) “Deposit account means a demand, time, savings, passbook, or  
22                  like account maintained with a depository institution. The term does not include  
23                  investment property or an account evidenced by an instrument.

24                  (16) “Depository institution means an organization that is engaged in  
25                  the business of banking. The term includes a bank, savings bank, savings and loan  
26                  association, credit union, and trust company.

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

3                   (18) “Encumbrance” includes a real property mortgage, other lien on  
4 real property, and any other right in real property other than an ownership interest.

5                   (19) “Filing office” means an office designated in Section 9-501 as the  
6 place to file a financing statement. [The term includes the filing officer and other  
7 personnel of the office.]

8                   (20) “Financing statement” means an initial financing statement and  
9 any record on file relating to the initial financing statement.

10                  (21) “Fixture filing” means a filing in the office where a mortgage on  
11 the real property [is] [would be] filed or recorded of a financing statement covering  
12 goods that are or are to become fixtures and which satisfies the requirements of  
13 Section 9-502(a).

14                  (22) “Fixtures” means goods that have become so related to particular  
15 real property that an interest in them arises under real property law.

16                  (23) “Good faith” means honesty in fact and the observance of  
17 reasonable commercial standards of fair dealing.

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

26                  (25) “Governmental entity” means:

1 (A) the United States, a State, a foreign country; or

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

5 (26) "Instrument" means a negotiable instrument or any other writing  
6 that evidences a right to the payment of money and is not itself a security agreement  
7 or lease and is of a type that in ordinary course of business is transferred by delivery  
8 with any necessary indorsement or assignment. The term does not include  
9 investment property or a writing that evidences a right to payment arising out of the  
10 use of a credit or charge card or information contained on or for use with the card.

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

16 (28) "Manufactured home" means [to come].

17 (29) "Manufactured home transaction" means a transaction [in which  
18 the collateral includes a manufactured home].

19 (30) "Mortgage" means a consensual interest created by a real property  
20 mortgage, a trust deed on real property, or the like.

21 (31) "New debtor" means a person that becomes bound as debtor under  
22 Section 9-203(c) by a security agreement previously entered into by another person.

23 (32) "New value" means money or money's worth in property, services,  
24 or new credit, or release by a transferee of an interest in property previously  
25 transferred to the transferee. The term does not include an obligation substituted  
26 for another obligation.

1                   (33) “Obligor means a person that owes, has provided property other  
2                   than the collateral to secure, or is otherwise accountable in whole or in part for,  
3                   payment or other performance of an obligation secured by a security interest in or a  
4                   statutory lien on the collateral. The term does not include an issuer or a nominated  
5                   person [with respect to] [of] a letter of credit.

6                   (34) “Original debtor means a person that, as debtor, entered into a  
7                   security agreement to which a new debtor has become bound under Section  
8                   9-203(c).

9                   (35) “Public finance transaction means [to come].

10                  (36) “Pursuant to commitment, with respect to an advance made or  
11                  other value given by a secured party, means pursuant to the secured party’s  
12                  obligation, whether or not a subsequent event of default or other event not within  
13                  the secured party's control has relieved or may relieve the secured party from its  
14                  obligation.

15                  (37) “Record means information that is inscribed on a tangible  
16                  medium or that is stored in an electronic or other medium and is retrievable in  
17                  perceivable form.

18                  [(38) “Registered agent means a registered agent of a debtor  
19                  designated under Section 9-525.]

20                  (39) “Registered entity means an organization organized under the law  
21                  of a State and as to which the State maintains a public record showing the  
22                  organization to have been organized.

23                  (40) “Rule means a rule adopted pursuant to Section 9-528.

24                  (41) “Secondary obligor means an obligor any portion of whose  
25                  obligation is secondary.



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

6                   [(43) “Secured party of record means a person stated to be the secured  
7                   party or a representative of the secured party in a financing statement that has been  
8                   filed ~~in~~ with the filing office.]

9                   (44) “Security agreement means an agreement that creates or provides  
10                  for a security interest.

11                  (45) “State means a State of the United States, the District of  
12                  Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, or  
13                  any territory or insular possession subject to the jurisdiction of the United States.

14                  (46) “State of organization, with respect to a registered entity, means  
15                  the State under whose law the entity is organized.

16                  (47) “Statutory lien means an interest in personal property which  
17                  secures payment or performance of an obligation, which is created by statute [in  
18                  favor of a person that in the ordinary course of its business furnishes goods or  
19                  services,] and [whose effectiveness] [the effectiveness of which] does not depend  
20                  on the person’s possession of the personal property. The term does not include a  
21                  security interest.

22                  (48) “Support obligation means a secondary obligation or letter of  
23                  credit that supports the payment or performance of an account, chattel paper,  
24                  general intangible, document, [insurance policy,] instrument, or investment  
25                  property.

1                   (49) “Transmitting utility means a person primarily engaged in the  
2 business of operating a railroad, subway, street railway, or trolley bus; transmitting  
3 electric or electronic communications; transmitting goods by pipeline or sewer; or  
4 transmitting or producing and transmitting electricity, steam, gas, or water.

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

|    |                                |                       |
|----|--------------------------------|-----------------------|
| 7  | “Account                       | Section 9-103.        |
| 8  | <u>“Applicant</u>              | <u>Section 5-102.</u> |
| 9  | “Attach                        | Section 9-203.        |
| 10 | “Becomes Bound                 | Section 9-203.        |
| 11 | <u>“Beneficiary</u>            | <u>Section 5-102.</u> |
| 12 | “Cash proceeds                 | Section 9-313.        |
| 13 | “Commodity account             | Section 9-107.        |
| 14 | “Commodity contract            | Section 9-107.        |
| 15 | “Commodity customer            | Section 9-107.        |
| 16 | “Commodity intermediary        | Section 9-107.        |
| 17 | “Construction mortgage         | Section 9-331.        |
| 18 | “Consumer goods                | Section 9-106.        |
| 19 | “Control (deposit account)     | Section 9-109.        |
| 20 | “Control (investment property) | Section 9-108.        |
| 21 | “Control (letter of credit)    | Section 9-110.        |
| 22 | “Crops                         | Section 9-106.        |
| 23 | “Equipment                     | Section 9-106.        |
| 24 | “Farm products                 | Section 9-106.        |
| 25 | “General intangibles           | Section 9-103.        |
| 26 | “Inventory                     | Section 9-106.        |

|    |  |                             |
|----|--|-----------------------------|
| 1  | “Investment property   | Section 9-107.              |
| 2  | <u>“Issuer</u>   | <u>Section 5-102.</u>       |
| 3  | “Livestock   | Section 9-106.              |
| 4  | <u>“Nominated Person</u>   | <u>Section 5-102.</u>       |
| 5  | “Noncash proceeds  | Section 9-313.              |
| 6  | “Payment intangible  | Section 9-103.              |
| 7  | “Proceeds  | Section 9-313.              |
| 8  | [“Production money crops   | Section 9-105.]             |
| 9  | [“Production money obligation  | Section 9-105.]             |
| 10 | [“Production money security interest                                   | Section 9-105.]             |
| 11 | [ Production of crops  | Section 9-105.]             |
| 12 | “Purchase money security interest                                      | Section 9-104.              |
| 13 | “Purchase money collateral   | Section 9-104.              |
| 14 | “Purchase money obligation   | Section 9-104.              |
| 15 | “Request for an accounting   | Section 9-209.              |
| 16 | “Request regarding a list of collateral                                | Section 9-209.              |
| 17 | “Request regarding a statement of                                      |                             |
| 18 | account  | Section 9-209.              |
| 19 | “Transfer statement  | Section 9-617.              |
| 20 | (c) The following definitions in other articles apply to this article: |                             |
| 21 | “Broker  | Section 8-102.              |
| 22 | “Certificated security   | Section 8-102.              |
| 23 | “Check   | Section 3-104.              |
| 24 | “Clearing corporation  | Section 8-102.              |
| 25 | <del>“Consignee</del>  | <del>Section [2-102].</del> |
| 26 | <del>“Consignment</del>  | <del>Section [2-102].</del> |

|    |  |                             |
|----|--|-----------------------------|
| 1  | <del>“Consignor</del>                  | <del>Section [2-102].</del> |
| 2  | “Contract for sale                     | Section 2-106.              |
| 3  | “Customer                              | Section 4-104.              |
| 4  | “Delivery                              | Section 8-301.              |
| 5  | “Entitlement holder                    | Section 8-102.              |
| 6  | “Financial asset                       | Section 8-102.              |
| 7  | “Holder in due course                  | Section 3-302.              |
| 8  | “Issuer                                | Section 5-102.              |
| 9  | “Lease                                 | Section 2A-103.             |
| 10 | “Lease agreement                       | Section 2A-103.             |
| 11 | “Lease contract                        | Section 2A-103.             |
| 12 | “Leasehold interest                    | Section 2A-103.             |
| 13 | “Lessee                                | Section 2A-103.             |
| 14 | “Lessee in ordinary course of business | Section 2A-103.             |
| 15 | “Lessor                                | Section 2A-103.             |
| 16 | “Lessor’s residual interest            | Section 2A-103.             |
| 17 | “Letter of credit                      | Section 5-102.              |
| 18 | “Negotiable instrument                 | Section 3-104.              |
| 19 | “Nominated person                      | Section 5-102.              |
| 20 | “Note                                  | Section 3-104.              |
| 21 | “Proceeds of a letter of credit        | Section 5-114.              |
| 22 | <u>“Prove</u>                          | <u>Section 3-103.</u>       |
| 23 | “Sale                                  | Section 2-106.              |
| 24 | “Securities intermediary               | Section 8-102.              |
| 25 | “Security                              | Section 8-102.              |
| 26 | “Security certificate                  | Section 8-102.              |



1 granting Lender an interest in the oil. Although Lender may acquire an interest in  
2 the oil under other law, Lender does not acquire a security interest under this  
3 Article until the oil becomes personal property, i.e., until is extracted and becomes  
4 “goods” to which this Article applies. Because the debtor had an interest in the oil  
5 before extraction and Lender’s security interest attached to the oil as extracted, the  
6 oil is “as-extracted collateral.”

7 **Example 2:** Debtor owns an interest in oil that is to be extracted and  
8 contracts to sell the oil to Buyer at the wellhead. In an authenticated agreement,  
9 Debtor agrees to sell to Lender the right to payment from Buyer. This right to  
10 payment is an account that constitutes “as-extracted collateral. If Lender then  
11 resells the account to Financer, Financer’s acquires a security interest. However,  
12 inasmuch as the debtor-seller in that transaction, Lender, had no interest in the oil  
13 before extraction, Financer’s collateral (the account it owns) is not “as-extracted  
14 collateral.”

15 **Example 3:** Under the facts of Example 2, before extraction, Buyer grants a  
16 security interest in the oil to Bank. Although Bank’s security interest attaches when  
17 the oil is extracted, Bank’s security interest is not in “as-extracted collateral,  
18 inasmuch as its debtor, Buyer, did not have an interest in the oil before extraction.

19 4. **“Authenticate.”** This definition is new. It replaces and broadens the  
20 former definition of “sign” to encompass authentication of all records, not just  
21 writings.

22 5. **“Collateral.”** The revised definition of “collateral” includes property  
23 subject to a statutory lien. It also makes clear that “collateral” includes proceeds.

24 6. **“Commercial Tort Claim.”** This term is new. Only commercial tort  
25 claims may serve as collateral under this Article. See Section ~~9-113(12)~~ 9-  
26 112(c)(15).

27 7. **“Communicate.”** The definition of “communicate” includes the act of  
28 transmitting both tangible and intangible records.

29 7A. **“Consignment.”** The definition of “consignment” is drawn in part  
30 from the October 1, 1995, draft of Article 2. The definition excludes, in paragraphs  
31 (A), (B), and (C), transactions for which filing would be inappropriate or of  
32 insufficient benefit to justify the costs. The definition also excludes, in paragraph  
33 (D), what have been called “consignments intended for security. These  
34 “consignments” are not bailments but secured transactions. Accordingly, all of  
35 Article 9 should apply to them. The Official Comments could afford guidance in  
36 distinguishing between true and security consignments.

37 8. **Consumer-related Definitions.** The definitions of “consumer debtor,  
38 “consumer obligor, “consumer goods secured transaction, and “consumer secured  
39 transaction” have been added in connection with various new (and old) consumer-  
40 protection rules. For the most part, the rules appear in Part 6 and apply to  
41 “consumer goods secured transactions, i.e., to consumer transactions in which the  
42 some or all of the collateral consists of consumer goods. However, certain rules

1 apply to consumer secured transactions, in which the collateral may be of any type.  
2 See, e.g., Sections 9-111(d); 9-112(b)(17).

3 9. **“Debtor”; “Obligor”; “Secondary Obligor.”** Determining whether a  
4 person is a “debtor” under the definition in former Section 9-105(1)(d) requires a  
5 close examination of the context in which the word is used. To reduce the need for  
6 this examination, this Article redefines “debtor” and adds new defined terms,  
7 “secondary obligor” and “obligor.” In the context of Part 6, these definitions  
8 distinguish among three classes of persons: (1) those persons who may have a  
9 stake in the proper enforcement of a security interest by virtue of their non-lien  
10 property interest (typically, an ownership interest) in the collateral, (2) those  
11 persons who may have a stake in the proper enforcement of the security interest  
12 because of their obligation to pay the secured debt, and (3) those persons who have  
13 an obligation to pay the secured debt but have no stake in the proper enforcement of  
14 the security interest. Persons in the first class are debtors. Persons in the second  
15 class are secondary obligors if any portion of the obligation is secondary. One must  
16 consult the law of suretyship to determine whether an obligation is secondary. The  
17 Restatement (3d), Suretyship and Guaranty § 1 (1996), contains a useful  
18 explanation of the concept. Persons in the third class are neither debtors nor  
19 secondary obligors.

20 The revised definition of “debtor” renders unnecessary former Section  
21 9-112, governing situations in which collateral is not owned by the debtor.

22 As revised, the definition of “debtor” includes a “consignee,” as defined in  
23 this section. ~~A new definition of the term appears in the Appendix, Section~~  
24 ~~[2-102].~~

25 The definition of “debtor” includes transferees of collateral, whether or not  
26 the secured party knows of the transfer or the transferee’s identity. Rather than  
27 making adjustments in the definition to allow for the secured party’s lack of  
28 knowledge, exculpatory provisions in Part 6 protect the secured party in that  
29 circumstance. See Sections 9-605 and 9-627.

30 Consider the following examples:

31 **Example 1:** Mooney borrows money and grants a security interest in his  
32 Miata to secure the debt. Mooney is a debtor and an obligor.

33 **Example 2:** Mooney borrows money and grants a security interest in his  
34 Miata to secure the debt. Harris co-signs the note. As before, Mooney is the debtor  
35 and an obligor. Because Harris’s obligation as a co-maker is secondary, Harris is a  
36 secondary obligor.

37 **Example 3:** Mooney borrows money on an unsecured basis. Harris co-  
38 signs the note and grants a security interest in his Honda to secure his obligation.  
39 Inasmuch as Mooney does not have a property interest in the Honda, Mooney is not  
40 a debtor. Having granted the security interest, Harris is the debtor. Because  
41 Mooney is a principal obligor, he is not a secondary obligor. Whatever the outcome  
42 of enforcement of the security interest against the Honda or Harris’s secondary



obligation, Harris will look to Mooney for his losses. The enforcement will not affect Mooney's aggregate obligations.

When the principal obligor (borrower) and the secondary obligor (surety) each has granted a security interest in different collateral, the status of each is determined by the collateral involved.

**Example 4:** Mooney borrows money and grants a security interest in his Miata to secure the debt. Harris co-signs the note and grants a security interest in his Honda to secure his obligation. When the secured party enforces the security interest in Mooney's Miata, Mooney is the debtor, and Harris is a secondary obligor. When the secured party enforces the security interest in the Honda, Harris is the "debtor. As in Example 3, Mooney is an obligor, but not a secondary obligor.

**10. "Deposit Account"; "Depository Institution."** The revised definition of "deposit account" incorporates the definition of "depository institution," which is new. The definition derives from the definitions of "bank" in Sections 4-105(1) and 4A-105(a)(2), which focus on whether the organization is "engaged in the business of banking." The Drafting Committee will consider whether the term "depository institution" should be replaced in the draft by the term "bank."

All accounts evidenced by Article 9 "instruments" are excluded from the scope of "deposit account." In contrast, the former version excludes from the "deposit account" definition "an account evidenced by a certificate of deposit [CD]." The change clarifies the proper treatment of non-negotiable or uncertificated CD's issued to reflect a deposit. Under this Article, the latter would be a deposit account (assuming there is no writing evidencing the depository institution's obligation to pay) whereas the former would be a deposit account only if it is not an "instrument" as defined in this section (a question that turns on whether the non-negotiable CD is "of a type which is in ordinary course of business transferred by delivery with any necessary indorsement or assignment. ")

A deposit account evidenced by an instrument is subject to the rules applicable to instruments generally. As a consequence, a security interest in such a deposit account cannot be perfected by "control" (see Section 9-109), and the special priority rules applicable to deposit accounts (see Sections 9-325 and 9-337) do not apply.

The term "deposit account" does not include "investment property," such as securities and securities entitlements. Thus, the term does not include, e.g., shares in a money market mutual fund that are redeemable by check.

**11. Filing-related Definitions.** Several of the definitions in this section are used exclusively or primarily in the filing-related provisions in Part 5. These include "filing office," "financing statement," "original debtor," "new debtor," and "rule." Most of these definitions are self-explanatory, and many are discussed in the Comments to Part 5.

**12. "Good Faith."** This Article expands the definition of "good faith" to include "the observance of reasonable commercial standards of fair dealing." The

1 definition in this section applies when the term is used in this Article, and the same  
2 concept applies for purposes of the obligation of good faith imposed by Section  
3 1-203. See subsection (d).

4 13. **“Governmental Entity.”** This new term is used in Section ~~9-113~~ 9-  
5 112(c), dealing with excluded transactions, and in Part 3, Subpart 1, dealing with  
6 choice of law. The definition derives from New York’s nonuniform amendment to  
7 former Section 9-104(e). The term “governmental unit, which appears in the  
8 definition, is not used there in the same sense as in the Bankruptcy Code.

9 14. **“Instrument.”** The definition of “instrument” has been modified to  
10 make clear that it does not include rights to payment arising out of credit card  
11 transactions. The bracketed phrase refers to transactions in which the card itself is  
12 not used, e.g., purchases on credit over the telephone. The Drafting Committee has  
13 yet to consider whether the language is necessary.

14 15. **“Manufactured Home; Manufactured Home Transaction.”** A  
15 financing statement filed in a manufactured home transaction may remain effective  
16 for a longer period of time than other financing statements. We have not yet  
17 formulated a definition of “manufactured home” and we expect to receive input  
18 from the manufactured home industry.

19 16. **“New Value.”** This Article deletes former Section 9-108. Its broad  
20 formulation of new value, which embraces the taking of after-acquired collateral for  
21 a pre-existing claim, is unnecessary, counterintuitive, and ineffective for its original  
22 purpose of sheltering after-acquired collateral from attack as a voidable preference  
23 in bankruptcy. The new definition of “new value” derives from § 547(a) of the  
24 Bankruptcy Code. The term is used in with respect to temporary perfection of  
25 security interests in instruments, certificated securities, or negotiable documents  
26 under Section 9-310(d), with respect to chattel paper priority in Section 9-327, and  
27 with respect to production money security interests in Sections 9-105(a) and  
28 9-321(a) and (b).

29 17. **“Public Finance Transaction.”** A financing statement filed in a  
30 public finance transaction may remain effective for a longer period of time than  
31 other financing statements. We have not yet formulated a definition of “public  
32 finance transaction. However, municipal bond and industrial revenue bond  
33 transactions are examples of transactions that should be included.

34 18. **“Record.”** A “record” includes information that is in intangible form  
35 (e.g., electronically stored) as well as tangible form (e.g., written on paper).  
36 Whatever is filed in the Article 9 filing system, including financing statements,  
37 termination statements, and amendments, whether transmitted in tangible or  
38 intangible form, would fall within the definition.

39 The term embraces all means of communicating or storing information  
40 except human memory. Given the rapid development and commercial adoption of  
41 modern communication and storage technologies, requirements that documents or  
42 communications be “written, “in writing, or otherwise in tangible form do not  
43 necessarily reflect or aid commercial practices. Examples of current technologies  
44 commercially used to communicate or store information include, but are not limited

1 to, magnetic media, optical discs, digital voice messaging systems, electronic mail,  
2 audio tapes, and photographic media, as well as paper. "Record" is an inclusive  
3 term that includes all of these methods of storing or communicating information.  
4 Any "writing" is a record.

5 A "record" need not be permanent or indestructible, but the term does not  
6 include any oral or other communication that is not stored or preserved by any  
7 means. The information must be stored on paper or in some other medium.  
8 Information that has not been retained other than through human memory does not  
9 qualify as a record. A record may be authenticated. See Section 9-102(a)(3). A  
10 record may be created without the knowledge or intent of a particular party.

11 Like the terms "written" or "in writing," the term "record" does not  
12 establish the purposes, permitted uses, or legal effect that a record may have under  
13 any particular provision of law. For example, a record may or may not be in  
14 appropriate form for filing with a filing office. Other provisions of this Act must be  
15 consulted to determine these issues.

16 In some instances, statutes or the rules of filing offices may require that a  
17 paper record be filed. In such cases, even if this Article permits the filing of an  
18 electronic record, compliance with those statutes or rules is necessary. Similarly, a  
19 filer must comply with a statute or rule that requires a particular type of encoding or  
20 formatting for an electronic record.

21 This Article occasionally uses the terms "for record," "real estate records,"  
22 "interest of record," and "record owner." These are terms traditionally used in real  
23 estate law. These contexts "otherwise require[]" that the definition of "record" in  
24 this section is not applicable.

25 19. **"Registered Agent."** This new term is explained in the Comments to  
26 Section 9-501.

27 20. **"Registered Entity."** This new term is explained in the Comments to  
28 Section 9-307.

29 21. **"Secured Party."** The definition of "secured party" clarifies the status  
30 of various types of representatives. The secured party is the person in whose favor  
31 the security interest has been created, as determined by reference to the security  
32 agreement. This definition controls, among other things, which person has the  
33 duties and potential liability that Part 6 imposes upon the secured party.

34 Consider, for example, a multi-bank facility, under which Bank A, Bank B,  
35 and Bank C are lenders and Bank A serves as the collateral agent. If the security  
36 interest is granted to the banks, then they are the secured parties. If the security  
37 interest is granted to Bank A as collateral agent, then Bank A is the secured party.

38 As revised, the definition of "secured party" includes a "consignee," as  
39 newly defined. ~~See the Appendix, Section [2-102].~~

40 22. **"Secured Party of Record."** This new term refers to the person named  
41 in a financing statement as a secured party or a representative. This person is

entitled to take action 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.

The definition of “secured party of record” has been placed in square brackets. New § 9-509A reflects an alternative approach to identifying the secured party of record.

22A. “Security Agreement.” Whether an agreement creates a security interest depends not on whether the parties intend that the law characterize the transaction as a security interest but rather on whether the transaction falls within the definition of “security interest” in Section 1-201. Thus, an agreement that the parties characterize as a “lease” of goods may be a “security agreement,” notwithstanding the parties’ stated intention that the law treat the transaction as a lease.

23. **“State of Organization.”** This new term is explained in the Comments to Section 9-307.

24. **“Statutory Lien.”** The somewhat limited inclusion of statutory liens within the scope of this draft, see the Comment to Section 9-112, 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). The bracketed language in the definition would limit the term to liens in favor of persons who furnish goods and services in the ordinary course of business. The Drafting Committee should consider whether to retain this limitation. “Agricultural lien” is a subset of “statutory lien.”

25. **“Support Obligation.”** This new term covers the most common types of credit enhancements—suretyship obligations (including guarantees) and letters of credit that support one of the specified types of collateral. The phrase “insurance policy” is bracketed for further consideration by the Drafting Committee, in light of the limited inclusion of rights under insurance policies as original collateral.

This Article contains rules explicitly governing attachment and perfection of security interests in support obligations. See Sections 9-203, 9-308, and 9-309. These provisions reflect the principle that a support obligation is an incident of the collateral it supports.

This Article does not contain special priority provisions governing security interests in support obligations. For suretyship obligations, which are included in the definition of “account,” the first-to-file-or-perfect rule normally will apply to both secured parties and buyers, regardless of whether the obligations are taken as independent collateral or as support obligations. Under the special rule governing security interests in letters of credit, an accounts financier’s failure to take a direct interest in the supporting letter of credit may leave its security interest exposed to a priming interest of a party who does take a direct interest. See Section 9-312(p) (security interest in letter of credit perfected by control has priority over a conflicting security interest).

1 Certain types of credit enhancements are not covered by the definition of  
2 “support obligation. Other law determines the competing claims of a person who  
3 takes an outright assignment of these obligations and a person who takes a security  
4 interest in the related collateral. However, the Drafting Committee is considering  
5 whether and, if so, how Article 9 should express the broader common-law principle  
6 that “the collateral follows the obligation.

7 26. **“Transmitting Utility.”** The definition of “transmitting utility” has  
8 been revised. No change in meaning is intended. The term designates a special  
9 class of debtors for whom separate filing rules are provided in Part 5, thereby  
10 obviating the many local fixture filings that would be necessary under the rules of  
11 Section 9-501 for a far-flung public utility debtor. A transmitting utility may not be  
12 regulated or operating as such in a jurisdiction where fixtures are located. For  
13 example, a utility might own transmission lines in a jurisdiction, although the utility  
14 generates no power and has no customers in the jurisdiction.

15 **SECTION 9-103. DEFINITIONS: “ACCOUNT”; “GENERAL**  
16 **INTANGIBLES”; “PAYMENT INTANGIBLE.”**

17 (a) “Account means a right to payment, whether or not earned by  
18 performance, for property other than money that has been or is to be sold, leased,  
19 licensed, assigned, or otherwise disposed of, for services rendered or to be  
20 rendered, for a policy of insurance issued or to be issued, for a suretyship obligation  
21 incurred or to be incurred, for energy provided or to be provided, arising out of the  
22 use of a credit or charge card or information contained on or for use with the card,  
23 or for the use or hire of a vessel under a charter or other contract. The term does  
24 not include a right to payment evidenced by an instrument~~[,]~~~~[or]~~ chattel paper~~[,]~~  
25 [or] a right to payment under a letter of credit[, or a deposit account].

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

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

31 Reporters’ Comments

1           1. **Source.** Subsections (a) and (b) derive from former Section 9-106.  
2       Subsection (c) is new.

3           2. **“Account.”** The definition of “account” has been expanded and  
4       reformulated. Many categories of rights to payment that would have been classified  
5       as general intangibles under former Article 9 are accounts under this Article. Thus,  
6       if they are sold, a financing statement must be filed to perfect the buyer’s interest in  
7       them.

8           3. **“General Intangible.”** The definition in subsection (b) has been revised  
9       to establish deposit accounts and commercial tort claims as separate types of  
10      collateral. One important consequence is that neither the depositary institution nor  
11      the tortfeasor is an “account debtor” having the rights and obligations set forth in  
12      Section 9-404. In particular, neither is obligated to pay an assignee (secured party)  
13      upon receipt of the notification described in Section 9-404(e). Another important  
14      consequence relates to the adequacy of the description in the security agreement.  
15      See Section 9-111.

16           A letter of credit likewise is not a general intangible but rather a separate  
17      type of collateral. Accordingly, except as provided with respect to support  
18      obligations, filing would not be effective to perfect a security interest, and the issuer  
19      would not be an “account debtor.” The reference to a “letter of credit” in the  
20      definition of “general intangible” means, in the typical case in which the beneficiary  
21      of a letter of credit is the debtor, the beneficiary’s right to payment or other  
22      performance.

23           4. **“Payment Intangible.”** Subsection (c) creates a sub-category of general  
24      intangibles the sale of which is subject to this Article. See Section 9-112(a)(3).

25           Virtually any intangible right could give rise to a right to payment of money  
26      once one hypothesizes, for example, that the account debtor is in breach of its  
27      obligation. The term “payment intangible” embraces only those general intangibles  
28      “under which the account debtor’s *principal* obligation is to pay money.  
29      (Emphasis added.) Although there may be difficult cases at the margin, attempting  
30      a more precise statutory line would not be worthwhile. As with any classification  
31      issue, from a planning standpoint it may be necessary for counsel in a sale  
32      transaction to make alternative assumptions (i.e., inclusion and exclusion from  
33      Article 9).

34           In classifying intangible collateral, a court should begin by identifying the  
35      particular rights that have been assigned. The account debtor (promisor) under a  
36      particular contract may owe several types of monetary obligations as well as other,  
37      nonmonetary obligations. If the promisee’s right to payment of money is assigned  
38      separately, the right is an account or payment intangible, depending on how the  
39      account debtor’s obligation arose. When all the promisee’s rights are assigned  
40      together, an account, a payment intangible, and a general intangible all may be  
41      involved, depending on the nature of the rights.

42           A right to the payment of money is frequently buttressed by ancillary  
43      covenants to insure the preservation of collateral, such as covenants in a purchase  
44      agreement, note, or mortgage requiring insurance on the collateral or forbidding



1 removal of the collateral; or covenants to preserve credit-worthiness of the  
2 promisor, such as covenants restricting dividends, etc. It is not the intention of this  
3 Article to treat these ancillary rights separately from the rights to payment to which  
4 they relate. Perfection of an assignment of the right to the payment of money,  
5 whether it be an account or payment intangible, will also carry these ancillary  
6 rights.

7 Every “payment intangible” is also a “general intangible. Accordingly,  
8 except as otherwise provided, statutory provisions applicable to general intangibles  
9 apply to payment intangibles.

10 **SECTION 9-104. DEFINITIONS: “PURCHASE MONEY SECURITY**  
11 **INTEREST”; “PURCHASE MONEY COLLATERAL”; PURCHASE**  
12 **MONEY OBLIGATION”; APPLICATION OF PAYMENTS; BURDEN OF**  
13 **ESTABLISHING PURCHASE MONEY SECURITY INTEREST.**

14 (a) A security interest in goods[, including fixtures,] is a “purchase money  
15 security interest :

16 (1) to the extent that the collateral (“purchase money collateral”) secures  
17 an obligation incurred by an obligor as the price of the collateral or for value given  
18 to enable the debtor to acquire rights in the collateral (“purchase money  
19 obligation”) if the value is in fact so used; and

20 (2) if the security interest is in inventory that is or was purchase money  
21 collateral, also to the extent that the security interest secures a purchase money  
22 obligation incurred with respect to other inventory in which the secured party holds  
23 or held a purchase money security interest.

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

26 (c) Except in a consumer goods secured transaction, if the extent to which a  
27 security interest is a purchase money security interest depends on the application of  
28 a payment to a particular obligation, the payment must be applied:

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

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

6 (3) in the absence of an agreement to a reasonable method and a timely  
7 manifestation of the obligor's intention, first to obligations that are not secured and  
8 then, if more than one obligation is secured, to obligations secured by purchase  
9 money security interests in the order in which those obligations were incurred.

10 **~~Subsection (d)~~ Alternative A**

11 (d) In a consumer goods secured transaction, if the extent to which a  
12 security interest is a purchase money security interest depends on the application of  
13 a payment to a particular obligation, [cite any applicable statute of a State] governs  
14 application of the payment to the extent applicable. To the extent the statute is not  
15 applicable, the payment must be applied to obligations secured by purchase money  
16 security interests in the order in which those obligations were incurred, and any  
17 agreement to the contrary is ineffective [except to the extent that the agreement  
18 relates to the application of a payment to interest or other finance charges].

19 **~~Subsection (d)~~ Alternative B**

20 (d) In a consumer goods secured transaction, if the extent to which a  
21 security interest is a purchase money security interest depends on the application of  
22 a payment to a particular obligation, the payment must be applied to obligations  
23 secured by purchase money security interests in the order in which those obligations  
24 were incurred. This subsection may not be varied by agreement [except to the  
25 extent that the agreement relates to the application of a payment to interest or other  
26 finance charges].



1 [End of Alternatives]

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

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

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

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

10 (f) [If the status of a security interest as a purchase money security interest  
11 or the extent to which it is a purchase money security interest is placed in issue, the]  
12 [A] secured party claiming a purchase money security interest has the burden of  
13 establishing [whether and] the extent to which the security interest is a purchase  
14 money security interest.

15 *Legislative Note: States that have an applicable statute dealing with allocation of*  
16 *payments should enact Alternative A of subsection (d). Other States should enact*  
17 *Alternative B.*

18 Reporters' Comments

19 1. **Source.** Former Section 9-107.

20 2. **“Purchase Money Security Interest.”** Subsection (a) limits purchase  
21 money security interests to goods, including fixtures. Otherwise, no change in  
22 meaning from former Section 9-107 is intended. The second sentence of former  
23 Section 9-115(5)(f) made the purchase money priority rule (former Section  
24 9-312(4)) inapplicable to investment property. This section's limitation makes that  
25 sentence unnecessary.

26 The concept of “purchase money security interest” requires a close nexus  
27 between the acquisition of the collateral and the secured obligation. Thus, a  
28 security interest does not qualify as a purchase money security interest if a debtor  
29 acquires property on unsecured credit and subsequently creates the security interest  
30 to secure the purchase price. Similarly, if a debtor buys property for cash and  
31 subsequently creates the security interest in the property to secure a borrowing of an  
32 amount equivalent to the purchase price, the security interest does not have  
33 purchase-money status.

1 As used in subsection (a)(1), the “price” of collateral includes obligations  
2 for expenses incurred in connection with acquiring rights in the collateral, sales  
3 taxes, finance charges, interest, administrative charges, expenses of collection and  
4 enforcement, attorney’s fees, and other similar obligations.

5 **3. Cross-Collateralization of Purchase Money Security Interests in**  
6 **Inventory.** Subsection (a)(2) deals with the problem of cross-collateralized  
7 purchase money security interests in inventory. Consider a simple example:

8 Seller (S) sells an item of inventory (Item-1) to Debtor (D), retaining  
9 a security interest in Item-1 to secure Item-1’s price and all other  
10 obligations, existing and future, of D to S. S then sells another item  
11 of inventory to D (Item-2), again retaining a security interest in  
12 Item-2 to secure Item-2’s price as well as all other obligations of D  
13 to S. D then pays to S Item-1’s price. D then sells Item-2 to a buyer  
14 in ordinary course of business, who takes Item-2 free of S’s security  
15 interest.

16 Under subsection (a)(2), S’s security interest in *Item-1* securing *Item-2’s unpaid*  
17 *price* would be a purchase money security interest. This is so because S has a  
18 purchase money security interest in Item-1, Item-1 secures the price of (a “purchase  
19 money obligation incurred with respect to”) Item-2 (“other inventory”), and Item-2  
20 itself was subject to a purchase money security interest. Note that, to the extent  
21 Item-1 secures the price of Item-2, S’s security interest in Item-1 would not be a  
22 purchase money security interest under the definition in subsection (a)(1). The  
23 security interest in Item-1 is a purchase money security interest under that  
24 subsection only to the extent that “the collateral” (i.e., Item-1) secures an obligation  
25 incurred as the price of “the collateral” (i.e., Item-1) or for value given to enable the  
26 debtor to acquire rights in “the collateral” (again, Item-1).

27 **4. “Dual-Status” Rule; Allocation of Payments; Burden of Proof.** This  
28 Article approves what some cases have called the “dual-status” rule, under which a  
29 security interest may be a purchase money security interest to some extent and a  
30 non-purchase money security interest to some extent. This rule is implicit in  
31 subsections (a)(1) and (a)(2) (“to the extent”) and is made explicit in subsection (e).  
32 The Article rejects the “transformation” rule adopted by some cases, under which  
33 any cross-collateralization, refinancing, or the like destroys the purchase-money  
34 status entirely.

35 Consider, for example, what happens when a \$10,000 loan secured by a  
36 purchase money security interest is refinanced by the original lender, and, as part of  
37 the transaction, the debtor borrows an additional \$2,000 secured by the collateral.  
38 Subsection (e) resolves any doubt that the security interest remains a purchase  
39 money security interest. Under subsection (a) it enjoys purchase-money status only  
40 to the extent of \$10,000.

41 If the debtor makes a \$1,000 payment on the \$12,000 obligation, then one  
42 must determine the extent to which the security interest remains a purchase money  
43 security interest—\$9,000 or \$10,000. Subsection (c)(1) expresses the overriding  
44 principle for determining the extent to which a security interest is a purchase money  
45 security interest under these circumstances, in cases other than consumer goods

1 secured transactions: freedom of contract, as limited by principle of  
2 reasonableness. An unconscionable method of application is not a reasonable one  
3 and so would not be given effect under subsection (c)(1). In the absence of  
4 agreement, subsection (c)(2) permits the obligor to determine how payments should  
5 be allocated. If the obligor fails to manifest its intention, obligations that are not  
6 secured will be paid first. (As used in this Article, the concept of “obligations that  
7 are not secured” means obligations for which the debtor has not created a security  
8 interest. This concept is different from and should not be confused with the  
9 concept of an “unsecured claim” as it appears in Bankruptcy Code § 506(a).) The  
10 obligor may prefer this approach, because unsecured debt is likely to carry a higher  
11 interest rate than secured debt. A creditor who would prefer to be secured rather  
12 than unsecured also would prefer this approach.

13         After the unsecured debt is paid, payments are to be applied first toward the  
14 obligations secured by purchase money security interests. In the event that there is  
15 more than one such obligation, payments first received are to be applied to  
16 obligations first incurred. See subsection (c)(3). Once these obligations are paid,  
17 there are no purchase money security interests, and so there is no need for  
18 additional allocation rules.

19         The Drafting Committee thinks that freedom of contract with respect to  
20 allocation of payments is likely to be illusory in the consumer setting. Accordingly,  
21 it would adopt a statutory allocation rule that cannot be varied by agreement.  
22 Subsection (d) presents two versions of a mandatory rule. Alternative A enables a  
23 State to incorporate another applicable statutory allocation rule by reference. If the  
24 statutory rule is inapplicable, then payments are to be applied to purchase money  
25 obligations in the order incurred. Under Alternative B, payments are to be applied  
26 to purchase money obligations in the order incurred, regardless of whether a  
27 statutory allocation rule otherwise would apply. States that have adopted a  
28 statutory allocation rule select Alternative A and other States should select  
29 Alternative B. The bracketed language at the end of each alternative raises the  
30 question whether the otherwise mandatory rule should be relaxed to permit an  
31 agreement that payments may be applied first to accrued interest or finance charges.

32         By determining whether a security interest is a “purchase money security  
33 interest,” the dual-status rule and allocation formula affect only issues under this  
34 Article—primarily perfection and priority. See, e.g., Sections 9-309(a)(7); 9-322.  
35 Whether a security interest is a “purchase money security interest” under other law,  
36 however, is determined by that law. For example, decisions under Bankruptcy  
37 Code § 522(f) have applied both the dual-status and the transformation rules. The  
38 Bankruptcy Code does not expressly adopt the state law definition of “purchase  
39 money security interest.” Where federal law does not defer to this Article, this  
40 Article does not, and could not, determine a question of federal law.

41         The statutory terms “renewed,” “refinanced,” and “restructured” are not  
42 defined. Whether the terms encompass a particular transaction depends upon  
43 whether, under the particular facts, the purchase-money character of the security  
44 interest fairly can be said to survive. Each term contemplates that an identifiable  
45 portion of the purchase money obligation could be traced to the new obligation  
46 resulting from a renewal, refinancing, or restructuring. As is the case when the  
47 extent of a security interest is in issue, the secured party claiming a purchase money

1 security interest has the burden of establishing whether the security interest retains  
2 its purchase-money status following a renewal, refinancing, or restructuring. See  
3 subsection (f).

4       5. **Consignments.** Under former Section 9-114, the priority of the  
5 consignor's interest is similar to that of a purchase money security interest.  
6 Subsection (b) achieves this result more directly, by defining the interest of a  
7 ~~consignor~~ "consignor, as defined in Section 9-102, to be a purchase money  
8 security interest in inventory. This approach obviates any need to set forth special  
9 priority rules applicable to the interest of a consignor. Rather, the priority of the  
10 consignor's interest as against the rights of lien creditors of the consignee,  
11 competing secured parties, and purchasers of the goods from the consignee can be  
12 determined by reference to the applicable priority rules generally applicable to  
13 inventory, such as Sections 9-315, 9-316, 9-319, and 9-322.

14       **[SECTION 9-105. DEFINITIONS: "PRODUCTION MONEY**  
15 **SECURITY INTEREST"; "PRODUCTION MONEY CROPS";**  
16 **"PRODUCTION MONEY OBLIGATION"; "PRODUCTION OF CROPS";**  
17 **BURDEN OF ESTABLISHING PRODUCTION MONEY SECURITY**  
18 **INTEREST.**

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

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

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

30       (1) in accordance with any reasonable method of application to which  
31 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 if:

(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] [A] secured party claiming a production money security interest has the burden of establishing [whether and] the extent to which the security interest is a production money security interest.]

*Legislative Note: This section is optional. States that do not enact this section also should not enact Section 9-321.*

## Reporters' Comments

1. **Source.** New.

## 2. Production Money Priority; “Production Money Security Interest.”

There appears to be a general consensus that the former rule affording special priority to those who provide secured credit that enables a debtor to produce crops, found in former Section 9-312(2), is not workable. However, after years of discussion, no consensus concerning the rule has arisen among those who engage in agricultural financing. The issue remains controversial, and opinions differ

1 strongly over whether to replace the rule with one that affords greater protection to  
2 providers of production inputs or whether to eliminate the rule without replacing it.

3           Section 9-321 contains a revised production money priority rule. The  
4 brackets surrounding it reflect the likely division of views among state legislatures  
5 as to the desirability of the rule. In conjunction with the new priority rule, this  
6 section—also bracketed—provides a definition of “production money security  
7 interest. It is patterned closely on Section 9-104, which defines “purchase money  
8 security interest. Subsection (b) makes clear that a security interest can obtain  
9 production-money status only to the extent that it secures value that actually can be  
10 traced to the direct production of crops. To the extent that a security interest  
11 secures indirect costs of production, such as general living expenses, the security  
12 interest is not entitled to production-money treatment.

13           **SECTION 9-106. CLASSIFICATION OF GOODS: “CONSUMER**  
14 **GOODS”; “EQUIPMENT”; “FARM PRODUCTS”; “INVENTORY.”**

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

17           (b) “Equipment means goods [that are used or bought for use primarily in  
18 business, including farming or a profession, or by a debtor that is a nonprofit  
19 organization or a governmental subdivision or agency. The term includes goods]  
20 other than inventory, farm products, or consumer goods.

21           (c)(1) “Farm products, with respect to debtor engaged in raising,  
22 cultivating, propagating, fattening, grazing, or other farming, livestock, or  
23 aquacultural operations, means:

24                   (A) crops grown, growing, or to be grown, including crops produced  
25 on trees, vines, and bushes;

26                   (B) livestock, born or unborn;

27                   (C) supplies used or produced in farming, livestock, or aquacultural  
28 operations; or

29                   (D) products of crops or livestock in their unmanufactured states.

30           (2) The term does not include equipment or inventory.

(3) For purposes of paragraph (1), 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. [The term does not include equipment.]

## Reporters' Comments

**1. Source.** Former Section 9-109.

2. **“Equipment.”** 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.

3. **“Farm Products.”** The primary revision to the definition of “farm products” is to clarify the status of aquaculture.

4. **“Inventory.”** The definition of “inventory” has been revised to make clear that the term includes goods leased by the debtor to others as well as goods held for lease. The same result would obtain under the former definition.



**SECTION 9-107. DEFINITIONS: “COMMODITY ACCOUNT”;  
“COMMODITY CONTRACT”; “COMMODITY CUSTOMER”;  
“COMMODITY INTERMEDIARY”; “INVESTMENT PROPERTY.”**

(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 another 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 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 which 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, security entitlement, securities account, commodity contract, or commodity account.

## Reporters' Comments



1. **Source.** Former Section 9-115(a).

**2. Rules Governing Investment Property.** Section 9-115 was added in conjunction with Revised Article 8 and contains a variety of rules applicable to security interests in investment property. These rules have been relocated to the appropriate sections of Article 9. See, e.g., Sections 9-203(a), (d) (attachment); 9-324 (priority).

**3. Distinguishing Investment Property from Deposit Accounts.** Some types of investment property (e.g., money market funds) appear to function so much like deposit accounts that distinguishing between the two may prove difficult in certain cases. The Drafting Committee is sensitive to the costs that may result from uncertainty over the proper classification of particular collateral. The Drafting Committee attempted to formulate a single set of rules to cover both types of collateral, so that very little will turn on the distinction. However, the provisions applicable to deposit accounts differ from those applicable to investment property in several important respects. For example, a security interest in investment property may be perfected by filing, whereas filing normally is ineffective to perfect a security interest in a deposit account.

## SECTION 9-108. CONTROL OVER INVESTMENT PROPERTY.

(a) A person has control of a certificated security, uncertificated security, or security entitlement as provided in Section 8-106.

(b) A secured party has control over a commodity contract if:

(1) the secured party is the commodity intermediary with which the commodity contract is carried; or

(2) the commodity customer, secured party, and commodity intermediary have agreed that the commodity intermediary will apply any value distributed on account of the commodity contract as directed by the secured party without further consent by the commodity customer.

(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.

## Reporters' Comment

1. **Source.** Former Section 9-115(e).

2. **“Control” under Article 8.** As lawyers have attempted to craft agreements that give secured parties “control” under Section 8-106(d)(2), some uncertainty has arisen concerning the effect of a securities intermediary’s agreement that it will comply with a secured party’s entitlement orders only if certain conditions are met. For a discussion of this issue, see Section 9-109, Comment 3.

**SECTION 9-109. CONTROL OVER DEPOSIT ACCOUNT.**

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

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

(2) the debtor, secured party, and depositary institution have agreed in an authenticated record that that the depositary institution will comply with instructions originated by the secured party directing disposition of the funds in the account without further consent by the debtor; or

(3) the secured party becomes the depository institution's customer 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.

## Reporters' Comments

1. **Source.** New; derived from Section 8-106.

2. **Why “Control” Matters.** This section explains the concept of “control” over a deposit account. “Control” under this section may serve two functions. First, “control by agreement” may substitute for a security agreement as an element of attachment. See Section 9-203(a)(1). Second, when a deposit account is taken as original collateral, the only method of perfection is taking control under this section. See Section 9-310(a)(2).

3. **Requirements for “Control.”** This section derives from Section 8-106 of Revised Article 8, which defines “control” over securities and certain other investment property. Under subsection (a)(1), the depository institution with which the deposit account is maintained has control. The effect of this provision is to afford the depository institution automatic perfection. No other form of public notice is necessary, because all actual and potential creditors of the debtor are always on notice that the depository institution with which the debtor’s deposit account is maintained may assert a claim against the deposit account.

1 Under subsection (a)(2), a secured party may take control by obtaining the  
2 depositary institution's authenticated agreement that it will comply with the secured  
3 party's instructions without further consent by the debtor. The analogous provision  
4 in Section 8-106 does not require that the agreement be authenticated. As the  
5 Comments to Section 9-108 indicate, some uncertainty has arisen concerning the  
6 requirements of Section 8-106(d)(2), particularly when a securities intermediary has  
7 agreed that it will comply with a secured party's entitlement orders only if certain  
8 conditions are met. An agreement to comply with the secured party's instructions  
9 suffices for "control" of a deposit account under this section even if the depositary  
10 institution's agreement is subject to specified conditions, e.g., that the secured  
11 party's instructions are accompanied by a certification that the debtor is in default.  
12 (Of course, if the condition is the debtor's further consent, the statute explicitly  
13 provides that the agreement would not confer control.) The Drafting Committee  
14 may reconsider whether this resolution is appropriate and, if necessary, will adjust  
15 the text of this section and the analogous provision in Section 8-106. For now, a  
16 suggested revision to Official Comment 7 to Section 8-106 appears in the  
17 Appendix.

18 Under subsection (a)(3), a secured party may take control by becoming the  
19 depositary institution's customer. As the customer, the secured party would enjoy  
20 the right to withdraw funds from the deposit account. The Drafting Committee has  
21 yet to resolve all the issues that may arise from the situation in which the secured  
22 party has only a security interest in a deposit account that it appears to own  
23 (because it is maintained in the secured party's name).

24 Perfection by control is not available for accounts evidenced by an  
25 instrument (e.g., certain certificates of deposit), which by definition are not "deposit  
26 accounts.

27 Subsection (b) also derives from Revised Article 8. It makes clear that  
28 "control" need not deprive the debtor of the ability to reach the funds on deposit.

29 **SECTION 9-110. CONTROL OVER LETTER OF CREDIT AND**  
30 **PROCEEDS OF LETTER OF CREDIT.** A secured party has control over a  
31 letter of credit and proceeds of the letter of credit if:

32 **Alternative A**

33 (1) (A) the issuer or ~~and~~ any nominated person has ~~have~~ consented to an  
34 assignment of proceeds of the letter of credit under Section 5-114(c); and ;

35 (B) the secured party has a perfected security interest in the collateral  
36 that the letter of credit supports; or

(2) the secured party is a transferee beneficiary of the letter of credit [and the issuer may not refuse to recognize or carry out the transfer under Section 5-112(b)].

#### **Alternative B**

(1) (A) the issuer or ~~and~~ any nominated person has ~~have~~ consented to an assignment of proceeds of the letter of credit under Section 5-114(c); ~~;~~ or

(B) ~~(2)~~ the secured party is a transferee beneficiary of the letter of credit [and the issuer may not refuse to recognize or carry out the transfer under Section 5-112(b)]; ~~and;~~

(2) the secured party has a perfected security interest in the collateral that the letter of credit supports.

#### Reporters' Comments

##### 1. **Source.** New.

2. **~~Why "Control" Matters.~~ "Control."** Whether a secured party has control over a letter of credit and the method by which the secured party takes control determine the secured party's rights as against competing secured parties. See Section 9-326. This draft provides alternative formulations for determining control. Each alternative affords two ways in which a secured party can acquire control over a letter of credit. This new section provides that a secured party acquires control over a letter of credit in one of two ways. Under paragraph (1), One way to acquire control, which typically will apply when the letter of credit or the proceeds of the letter of credit have been assigned, is for the secured party may acquire control by obtaining to obtain the consent of the issuer and or any nominated person, such as a confirmer or negotiating bank. Acquiring control under in this manner may be of limited utility, inasmuch as one party's consent would not necessarily bind another party. Accordingly, prudence may suggest obtaining consent from more than one person. The details of the consenting issuer's or nominated person's duties to pay or otherwise render performance to the secured party are left to the agreement of the parties. Under paragraph (2), In the alternative, the secured party may acquire control by becoming the transferee beneficiary of the letter of credit. As such, the secured party acquires the right to draw or otherwise demand payment under the letter of credit.

Under Alternative A, an assignee of proceeds of a letter of credit could achieve control only if it also had a perfected security interest in the underlying obligation supported by the letter of credit. Transfer of the letter of credit would always be sufficient for control. Under Alternative B, neither an assignee nor a transferee would achieve control unless the assignee or transferee also had a perfected security interest in the supported obligation. The details of this section, particularly of

paragraph (1)(A), are likely to be refined further to take account of input from letter-of-credit specialists.

3. **“Proceeds of a Letter of Credit.”** Section 5-114 follows traditional banking terminology by referring to a letter of credit beneficiary’s assignment of its right to receive payment thereunder as an assignment of the “proceeds of a letter of credit. Just as the seller of goods can assign its right to receive payment (an “account ) before the goods have been delivered to the buyer, so the beneficiary of a letter of credit can assign its contingent right to payment before the letter of credit has been honored. See Section 5-114(b). If the assignment creates a security interest, the security interest can be perfected at the time it is created. An assignment of, including the creation of a security interest in, proceeds of a letter of credit is identical in effect and legal contemplation to an assignment of or the creation of a security interest in the letter of credit itself.

4. **“Transfer” vs. “Assignment.”** Banking usage distinguishes the “transfer” of a letter of credit from an “assignment. Under a transfer, the transferee itself becomes the beneficiary and acquires the right to draw. Section 5-114(e) provides that the rights of a transferee beneficiary are independent of the beneficiary’s assignment of the proceeds of a letter of credit and are superior to the assignee’s right to the proceeds.

5. **Support Obligation: Automatic Attachment and Perfection.** A letter of credit is a type of support obligation, as defined in Section 9-102. Under Sections 9-203 and 9-308, a security interest in a letter of credit and proceeds of a letter of credit automatically attaches and is automatically perfected if the security interest in the obligation that it supports is perfected. However, unless the secured party has control over the letter of credit and proceeds of the letter of credit, it cannot enforce any rights under the letter of credit against the issuer or a nominated person under Article 5. Consequently, as a practical matter, the secured party would be limited to its ability to locate and identify proceeds distributed by the issuer under the letter of credit.

~~5. **Choice of Law.** A special choice-of-law rule is likely to be necessary for perfection by control of security interests in a letter of credit.~~

## SECTION 9-111. SUFFICIENCY OF DESCRIPTION.

(a) Except as otherwise provided in subsections (c), (d), and (e), a description of personal or real property is sufficient, whether or not it is specific, if it reasonably identifies what is described.

(b) Except as otherwise provided in subsections (c), (d), and (e), a description of collateral reasonably identifies the collateral if it identifies the collateral by specific listing, category, ~~use of~~ a term defined in [the Uniform

1 Commercial Code], ~~this [Act]~~, quantity, a computational or allocational formula or  
2 procedure, or any other method, if the identity of the collateral is objectively  
3 determinable.

4 (c) Subject to subsection (d), a description of a security entitlement,  
5 securities account, or commodity account is sufficient if it describes the collateral  
6 by those terms or as investment property, or if it describes the underlying financial  
7 asset or commodity contract.

8 (d) In a consumer secured transaction, a description of a security  
9 entitlement, securities account, or commodity account is sufficient only if it is  
10 specific. A description by type alone is not sufficient.

11 (e) A description of a commercial tort claim is sufficient only if it is  
12 specific. A description by type alone is not sufficient.

13 Reporters' Comment

14 1. **Source.** Former Sections 9-110; 9-115(3).

15 2. **General Rules; After-acquired Collateral.** Subsection (a) retains  
16 substantially the same formulation as former Section 9-110. In retaining this  
17 formulation, the draft adopts the view that an “all assets” or “all personal property  
18 description for purposes of a *security agreement* is *not* sufficient. Note, however,  
19 that under Section 9-504, a *financing statement* sufficiently indicates the collateral  
20 if it “covers all assets or all personal property.” Subsection (b), which was  
21 applicable only to investment property under former Section 9-115(3), has been  
22 made applicable to all kinds of collateral.

23 Much litigation has arisen over whether a description in a security  
24 agreement is sufficient to include after-acquired collateral if the agreement does not  
25 explicitly so provide. This question is one of contract interpretation and is not  
26 susceptible to a statutory rule (other than a rule to the effect that it is a question of  
27 contract interpretation). Accordingly, this section contains no reference to  
28 descriptions of after-acquired collateral.

29 3. **Investment Property.** Under subsection (c), the use of the wrong  
30 Article 8 terminology does not render a description invalid (e.g., a security  
31 agreement intended to cover a debtor’s “security entitlements” is sufficient if it  
32 refers to the debtor’s “securities”).

33 4. **Consumer Investment Property; Tort Claims.** Subsections (d) and (e)  
34 require greater specificity of description in order to prevent debtors from  
35 inadvertently encumbering property. Subsection (d) requires that a description of a

1 security entitlement, a securities account, or a commodity account be specific. A  
2 description by “type” (e.g., “all existing and after-acquired investment property” or  
3 “all existing and after-acquired security entitlements”) is insufficient. If the  
4 collateral consists of a securities account or a commodity account, a specific  
5 description of the account is sufficient to cover all existing and future security  
6 entitlements or commodity entitlements carried in the account. See Section  
7 9-203(e)(3), (4).

8 Subsection (d) likewise requires a more exacting description of commercial  
9 tort claims than one by “type.” However, under Section 9-204, an after-acquired  
10 collateral provision in a security agreement will not reach future commercial tort  
11 claims. It follows that when an effective security agreement covering a commercial  
12 tort claim is entered into the claim already will exist.

13 [SUBPART 2. ~~3~~. APPLICABILITY OF ARTICLE]

14 **SECTION 9-112. SCOPE.**

15 (a) Except as otherwise provided in subsection (c), this article applies to:

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

18 (2) a statutory lien;

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

20 (4) a consignment.

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

24 (c) This article does not apply to:

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



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

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

9                   (4) a landlord's lien[, other than a statutory lien];

10                  (5) a ~~non-statutory~~ lien, other than a statutory lien, given by rule of law  
11                  for services or materials, except as provided in Section 9-330 with respect to  
12                  priority of the lien;

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

15                  (7) a sale of accounts, chattel paper, or payment intangibles as part of a  
16                  sale of the business out of which they arose;

17                  (8) an assignment of accounts, chattel paper, or payment intangibles  
18                  which is for the purpose of collection only;

19                  (9) an assignment of a right to payment under a contract to an assignee  
20                  that is also obliged to perform under the contract;

21                  (10) an assignment of a single account or payment intangible to an  
22                  assignee in whole or partial satisfaction of a preexisting indebtedness;

23                  (11) a transfer of an interest in or claim under any policy of insurance,  
24                  except[:

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



1 (B)] as provided in Sections 9-313 and 9-319 with respect to  
2 proceeds and priorities in proceeds;  
3 (12) a right represented by a judgment, other than a judgment taken on a  
4 right to payment that was collateral;  
5 (13) a right of recoupment or set-off, except as provided in Section  
6 9-337 with respect to the effectiveness of rights of recoupment or set-off against  
7 deposit accounts and in Section 9-404(a) with respect to defenses or claims of an  
8 account debtor;  
9 (14) the creation or transfer of an interest in or lien on real property,  
10 including a lease or rents thereunder, except to the extent that provision is made for  
11 fixtures in Section 9-331;  
12 (15) a transfer of any claim arising in tort, except:  
13 (A) a transfer of a commercial tort claim; and  
14 (B) as provided in Sections 9-313 and 9-319 with respect to  
15 proceeds and priorities in proceeds;  
16 (16) a transfer of an interest in a deposit account maintained with a  
17 Federal Reserve Bank or maintained by a depositary institution with another  
18 depositary institution; or  
19 (17) a transfer of an interest in a deposit account in a consumer secured  
20 transaction, except as provided in Sections 9-313 and 9-319 with respect to  
21 proceeds and priorities in proceeds.

22 Reporters' Comments

23 1. **Source.** Former Sections 9-102 and 9-104.

24 2. **Basic Scope Provision.** Subsection (a)(1) derives from former Section  
25 9-102(1) and (2). These subsections have been combined and shortened. No  
26 change in meaning is intended.

27 3. **Statutory Liens.** Subsection (a)(2) is new and expands the scope of this  
28 Article to cover statutory liens, as defined in Section 9-102. Certain provisions,

1 such as Section 9-315, relate only to agricultural liens and not to statutory liens  
2 generally. In general, the draft deals with more aspects of agricultural liens than is  
3 the case with other statutory liens. For example, it covers priority contests between  
4 and among *all* statutory liens and security interests, but only those contests between  
5 and among *agricultural* liens and other persons, such as lien creditors and buyers.  
6 Also, part 6 excludes statutory liens (other than agricultural liens) from its scope.  
7 See Section 9-601(e).

8       **4. Sales of Payment Intangibles and Other Receivables.** Subsection  
9 (a)(3) expands the scope of Article 9 by including the sale of a “payment  
10 intangible, defined in Section 9-103(c) as “a general intangible under which the  
11 account debtor’s principal obligation is to pay money. To a considerable extent,  
12 this Article affords these transactions treatment identical to that given sales of  
13 accounts and chattel paper. In some respects, however, sales of payment  
14 intangibles are treated differently from sales of other receivables. See, e.g., Section  
15 9-406. Although this Article occasionally distinguishes between outright sales of  
16 receivables and sales that secure an obligation, neither this Article nor the definition  
17 of “security interest (Section 1-201(37)) delineates how a particular transaction is  
18 to be classified. That issue is left to the courts.

19       **5. Consignments.** Subsection (a)(4) is new. This Article applies to every  
20 “consignment. The term, as defined in Section 9-102, ~~{2-102}~~ (reproduced in the  
21 ~~Appendix~~), includes many “true consignments (i.e., bailments for the purpose of  
22 sale). The term “consignment also includes a “sale or return, as defined in  
23 Section ~~[2-406]~~ (also reproduced in the ~~Appendix~~).

24       Under common law, creditors of a bailee are unable to reach the interest of  
25 the bailor (in the consignment case, the consignor-owner). Like the former Article,  
26 this Article changes the common-law result; however, it does so in a different  
27 manner. For purposes of determining the rights and interests of third-party  
28 creditors of, and purchasers of the goods from, the consignee, but not for other  
29 purposes, such as remedies of the consignor, the consignee acquires under this  
30 Article whatever rights and title the consignor had or had power to transfer. See  
31 Section 9-315A. The interest of a consignor is defined to be a security interest, see  
32 Section 1-201(37) (reproduced in the Appendix), more specifically, a purchase  
33 money security interest in the consignee’s inventory. See Section 9-104(b). Thus,  
34 the rules pertaining to lien creditors, buyers, and attachment, perfection, and  
35 priority of competing security interests apply to consigned goods. The relationship  
36 between the consignor and consignee is left to other law. In particular, consignors  
37 have no duties under Part 6. See Section 9-601(d).

38       Sometimes parties characterize transactions that secure an obligation (other  
39 than the bailee’s obligation to returned bailed goods) as “consignments. These  
40 transactions are not “consignments within the meaning of Section 9-112(a)(4).  
41 See Section ~~{2-102}~~ 9-102 (last clause of the definition of “consignment ). This  
42 Article applies also to these transactions, by virtue of Section 9-112(a)(1). They  
43 create a security interest within the meaning of the first sentence of Section  
44 1-201(37).

45       This Article does not apply to consignments that fall outside the definition  
46 in Section 9-102 and do not create a security interest that secures an obligation.

1           **6. Federal Preemption.** Former Section 9-104(a) excludes from Article 9  
2 “a security interest subject to any statute of the United States, to the extent that such  
3 statute governs the rights of parties to and third parties affected by transactions in  
4 particular types of property. Some may read the former section (erroneously) to  
5 suggest that Article 9 defers to federal law even when federal law does not preempt  
6 Article 9. Subsection (c)(1) recognizes explicitly that the Article defers to federal  
7 law only when and to the extent that it must—i.e., when federal law preempts it.

8           **7. Governmental Debtors.** At the suggestion of the International Secured  
9 Transactions Task Force, the exclusion of former Section 9-104(e), concerning  
10 security interests created by governmental debtors, has been revised and replaced by  
11 the exclusions in new paragraphs (2) and (3) of subsection (c). These paragraphs  
12 reflect the view that Article 9 should apply to security interests created by a  
13 “governmental entity (as defined in Section 9-102) except to the extent that  
14 another statute governs the issue in question. Under paragraph (2), this Article  
15 defers to all statutes of the forum State. (A forum cannot determine whether it  
16 should consult the choice-of-law rules in the forum’s UCC unless it first determines  
17 that its UCC applies to the transaction before it.) Paragraph (3) defers to statutes of  
18 another State or a foreign nation only to the extent that those statutes contain rules  
19 applicable specifically to security interests created by the governmental entity in  
20 question.

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

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

38           The fact that New York law applies does not necessarily mean that  
39 perfection is accomplished by filing in New York. Rather, it means that the court  
40 should apply New York’s Article 9, including its choice-of-law provision. Under  
41 that provision (assuming New York adopts draft Section 9-301), perfection is  
42 governed by the law of the jurisdiction in which the debtor is located. Section  
43 9-307 determines the debtor’s location for choice-of-law purposes.

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

1       **Example:** A Belgian governmental entity grants a security interest in its  
2       equipment to a Swiss secured party. The equipment is located in Belgium.  
3       A dispute arises and, for some reason, an action is brought in a New York  
4       Mexico state court. Inasmuch as the transaction bears no “appropriate  
5       relation to New York, New York’s New Mexico, New Mexico’s UCC,  
6       including its Article 9, is inapplicable. See Section 1-105(1). New York’s  
7       New Mexico’s Section 9-113 9-112(c) on excluded transactions should not  
8       come into play. Even if the parties agreed that New York Mexico law  
9       would govern, the parties’ agreement would not be effective because the  
10      transaction does not bear a “reasonable relation to New York Mexico. See  
11      Section 1-105(1).

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

18       An alternative or supplemental approach, which the Drafting Committee did  
19      not pursue, is to make certain specified parts or provisions of Article 9 (e.g., part 6,  
20      dealing with enforcement; or Section 9-609, dealing with self-help repossession)  
21      inapplicable to governmental entities, regardless of the existence of conflicting law.

22       **8. Sales of Payment Intangibles.** Former Section 9-104(f) excludes  
23      certain sales and assignments of accounts and chattel paper. Subsection (c)(7) adds  
24      to the exclusion similar sales of payment intangibles.

25       **9. Insurance.** Subsection (c)(8) narrows somewhat the broad exclusion of  
26      interests in insurance policies under former Section 9-104(g). This Article now  
27      covers transfers by a healthcare provider of rights to payment arising out of the  
28      furnishing of healthcare goods or services. These rights to payment are the  
29      equivalent of accounts receivable for other types of businesses. The Drafting  
30      Committee recognizes that insurance policies can be important items of collateral in  
31      many other business contexts and that the “cash” or “loan” value of life insurance  
32      policies also can be a useful source of collateral for borrowing by individuals.  
33      Nevertheless, it decided that other law should continue to govern security interests  
34      in insurance policies.

35       **10. Setoffs.** Subsection (c)(10) adds two exceptions to the general  
36      exclusion of setoff rights from Article 9 under former subsection (i). The first takes  
37      account of new Section 9-337, which regulates the effectiveness of a setoff against  
38      a deposit account that stands as collateral. The second recognizes Section 9-404,  
39      which affords the obligor on an account, chattel paper, or general intangible the  
40      right to raise claims and defenses against an assignee/secured party.

41       **11. Tort Claims.** Subsection (c)(12) narrows somewhat former broad  
42      exclusion of transfers of tort claims under former Section 9-104(k). This Article  
43      now applies to transfers of “commercial tort claims,” as defined in Section 9-102,  
44      as well as to security interests in tort claims that constitute proceeds of other  
45      collateral (e.g., a right to payment for negligent destruction of the debtor’s

1 inventory). The Official Comments should make clear that once a claim arising in  
2 tort has been settled and reduced to a contractual obligation to pay, the right to  
3 payment becomes a payment intangible and no longer is a claim arising in tort.

4 The Article contains two special rules governing creation of a security  
5 interest in tort-claim collateral. First, a tort claim must be described with  
6 specificity in a security agreement as a condition of attachment. See Section  
7 9-111(e). Second, no security attaches under an after-acquired property clause to a  
8 tort claim. See Section 9-204(b)(2). In addition, this Article does not determine  
9 whom the tortfeasor must pay to discharge its obligation. Inasmuch as a tortfeasor  
10 is not an “account debtor,” the rules governing waiver of defenses and discharge of  
11 an obligation by an obligor (Sections 9-403; 9-404) are inapplicable to tort-claim  
12 collateral.

13 12. **Deposit Accounts.** With certain exceptions set forth in paragraphs (16)  
14 and (17) of subsection (c), deposit accounts may be taken as original collateral  
15 under this Article. Under the former Article, which excludes deposit accounts as  
16 original collateral, security interests in deposit accounts generally are governed by  
17 the common law. The common law is nonuniform, often difficult to discover and  
18 comprehend, and frequently costly to implement. As a consequence, debtors who  
19 wish to use deposit accounts as collateral sometimes are precluded from doing so as  
20 a practical matter.

21 This Article contains several safeguards to protect debtors against  
22 inadvertently encumbering deposit accounts and to reduce the likelihood that a  
23 secured party will realize a windfall from the debtor’s deposit accounts. For  
24 example, because “deposit accounts” is a separate type of collateral, a security  
25 agreement covering general intangibles will not adequately describe deposit  
26 accounts. Rather, a security agreement must specifically mention reasonably  
27 identify the deposit accounts that are the subject of a security interest, e.g., by using  
28 the term “deposit accounts.” ~~in order for a security interest to attach in the deposit~~  
29 ~~accounts.~~ See Section 9-111. To perfect a security interest in a deposit account as  
30 original collateral, a secured party (other than the depository institution with which  
31 the deposit account is maintained) must take “control” of the account either by  
32 obtaining the depository institution’s written agreement or by putting the funds into  
33 its own account. See Sections 9-310(a)(2); 9-109. Either of these steps requires the  
34 debtor’s consent.

35 This Article also contains new rules that determine which State’s law  
36 governs perfection and priority of a security interest in a deposit account, see  
37 Section 9-304, priority of conflicting security interests in a deposit account, see  
38 Sections 9-325; 9-337, the rights of transferees of funds from an encumbered  
39 deposit account, see Section 9-329, the obligations of the depository institution, see  
40 Section 9-338, and enforcement of security interests in a deposit account. See  
41 Section 9-607(c).

## 42 SECTION 9-113.

43 [deleted]

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Reporters' Comments

1. **Source.** Former Section 9-113.

2. **Status.** The Article 2 Drafting Committee has yet to determine whether any rights arising under Article 2 will be characterized as security interests and, if so, which ones. Once that determination is made, the Article 9 Drafting Committee will consider how to address those security interests, and any security interests arising under revised Article 2A, in this Article.



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**PART 2**  
**VALIDITY OF SECURITY AGREEMENT;  
ATTACHMENT OF SECURITY INTEREST;  
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 in ~~this [Act]~~, [the Uniform Commercial Code], 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 the statute or regulation to a transaction not otherwise subject to it.

Reporters' Comments

**Source.** Former Section 9-201.

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

Reporters' Comments

1. **Source.** Former Section 9-202.

2. **When Title Matters.** This section explicitly acknowledges two circumstances in which the effect of certain Article 9 provisions turns on ownership (title). First, the remedies of a consignor under a true consignment and, for the most part, the remedies of a buyer of accounts, chattel paper, or payment intangibles are determined by other law and not by part 6. See Section 9-601(d). Second, in some respects sales of accounts, chattel paper, and payment intangibles



1 receive special treatment. See, e.g., Sections 9-207(a); 9-209(b); 9-607(b). Buyers  
2 of receivables under the former Article are treated specially, as well. See, e.g.,  
3 former Section 9-502(2).

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

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

13           (1) (A) the collateral is in the possession of the secured party under  
14       Section 9-311 pursuant to the debtor's agreement;<sup>2</sup>

15           (B) the collateral is investment property, a deposit account, or a  
16       letter of credit and proceeds of the letter of credit and the secured party has control  
17       pursuant to the debtor's agreement;<sup>2</sup> or

18           (C) the debtor has authenticated a security agreement that contains a  
19       description of the collateral and ~~in addition~~, if the security interest covers timber to  
20       be cut, a description of the land concerned;

21           (2) value has been given; and

22           (3) the debtor has rights in the collateral or the power to transfer rights  
23       in the collateral to a secured party.

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

1 extent the property is described in the agreement, and another agreement is not  
2 necessary to make a security interest in the property enforceable.

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

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

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

10 (d) A security interest attaches when it becomes enforceable against the  
11 debtor with respect to the collateral. Attachment occurs as soon as all of the events  
12 specified in subsection (a) have occurred unless the time of attaching is postponed  
13 by express agreement.

14 (e) Unless otherwise agreed:

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

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

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

22 (4) attachment of a security interest in a commodity account is also  
23 attachment of a security interest in all commodity contracts carried in the  
24 commodity account; and

1 (5) attachment of a security interest in a right to payment or performance  
2 secured by a [mortgage on real property] [lien on property] gives the secured party a  
3 security interest in the [mortgage] [lien].

4 (f) a security interest does not attach to a letter of credit or proceeds of a  
5 letter of credit unless it has attached to the collateral that the letter of credit  
6 supports.

7 Reporters' Comments

8 1. **Source.** Former Sections 9-203 and 9-115(2), (6).

9 2. **Requirement for Agreement.** Subsection (a)(1) clarifies two points.  
10 First, for purposes of this subsection, the secured party's possession must be  
11 obtained with the debtor's agreement. "Pursuant to agreement" in this subsection  
12 refers to the debtor's agreement to the secured party's possession for the purpose of  
13 creating a security interest. In the unlikely event that possession is obtained without  
14 the debtor's agreement, it would not suffice as a substitute for an authenticated  
15 security agreement. However, once the security interest has become enforceable  
16 and has attached, it is not impaired by the fact that the secured party's possession is  
17 maintained without the agreement of a subsequent debtor (e.g., a transferee).  
18 Second, possession as contemplated by Section 9-311 is possession for purposes of  
19 subsection (a), even though it may not constitute possession "pursuant to the  
20 debtor's agreement" and consequently might not serve as a substitute for an  
21 authenticated security agreement under subsection (a).

22 Subsection (a)(1) also provides that control of investment property, a  
23 deposit account, or a letter of credit and proceeds of a letter of credit pursuant to the  
24 debtor's agreement is sufficient as a substitute for an authenticated security  
25 agreement.

26 3. **Collateral Covered by Other Statute or Treaty.** One purpose of the  
27 formal requisites stated in subsection (a)(1) is evidentiary—to minimize the  
28 possibility of future disputes as to the terms of a security agreement and as to what  
29 property stands as collateral for the obligation secured. One should distinguish the  
30 evidentiary functions of the formal requisites of attachment and enforceability (such  
31 as the requirement that a security agreement contain a description of the collateral)  
32 from the more limited goals of "notice filing" for financing statements under Part 5,  
33 explained in former Section 9-402, Official Comment 3. When perfection is  
34 achieved by compliance with the requirements of a statute or treaty described in  
35 Section 9-309(c), such as a federal recording act or a certificate-of-title act, the  
36 manner of describing the collateral in a registry imposed by the statute or treaty may  
37 or may not be adequate for purposes of this section and Section 9-111. However,  
38 the description contained in the security agreement, not the description in a public  
39 registry or on a certificate of title, controls for purposes of this section.

40 4. **Exception to General Rule.** Section 5-118, mentioned in subsection  
41 (a), is found in the Appendix.

1           **5. Attachment to Limited Rights.** Subsection (a)(3) conditions  
2 attachment on the debtor's having "rights in the collateral or the power to transfer  
3 rights in the collateral to a secured party. A debtor's limited rights in collateral,  
4 short of full ownership, are sufficient for a security interest to attach. However, in  
5 accordance with basic personal property conveyancing principles, the baseline rule  
6 is that a security interest attaches only to whatever rights a debtor may have, broad  
7 or limited as those rights may be.

8           **6. Attachment to Greater Rights than Debtor Has.** Certain exceptions  
9 to this baseline rule enable a debtor to transfer, and a security interest to attach to,  
10 greater rights than the debtor has. The bracketed phrase, "or the power to transfer  
11 rights in the collateral to a secured party, accommodates those exceptions. In  
12 some cases, a debtor may have power to transfer another person's rights to a class  
13 of transferees that excludes secured parties. See, e.g., Section 2-403(2) (giving  
14 certain merchants power to transfer an entruster's rights to a buyer in ordinary  
15 course of business). Under those circumstances, the debtor would not have the  
16 power to create a security interest in the other person's rights.

17           **7. New Debtors.** New subsection (b) makes clear that the enforceability  
18 requirements of subsection (a)(1) are met when a new debtor becomes bound under  
19 an original debtor's security agreement. If a new debtor "becomes bound as  
20 debtor by a security agreement entered into by another person, the security  
21 agreement satisfies the requirement of Section 9-203(a)(1) as to the existing and  
22 after-acquired property of the new debtor to the extent the property is described in  
23 the agreement.

24           Subsection (c) explains when a new debtor "becomes bound. Persons who  
25 "become[] bound under paragraph (2) are limited to those who both become  
26 primarily liable for the original debtor's obligations and succeed to (or acquire) its  
27 assets. Thus, the paragraph excludes sureties and other secondary obligors as well  
28 as persons who become obligated through veil piercing and other non-successorship  
29 doctrines. In many cases, paragraph (2) will exclude successors to the assets and  
30 liabilities of a division of a debtor.

31           This subject is discussed in more detail in the Comments to Section 9-510.

32           **8. Support Obligations.** Under new subsection ~~(d)(2)~~, (e)(2), a security  
33 interest in a "support obligation (defined in Section 9-102) automatically follows  
34 from a security interest in the underlying, supported collateral. We believe this to  
35 be implicit in current law. Subsection (f) provides a related rule. A security  
36 interest can attach to a letter of credit or to proceeds of a letter of credit only if it  
37 also attaches to the underlying obligation for which the letter of credit is a support  
38 obligation. That is, a letter of credit or proceeds of a letter of credit cannot serve  
39 independently as collateral under this Article.

40           **9. Real Estate Mortgages.** Subsection (e)(5) codifies the common-law  
41 rule that a transfer of an obligation secured by a mortgage also transfers the  
42 mortgage. See Restatement of the Law of Property (Mortgages) § 5.4(a), Tent.  
43 Draft No. 5 (March 18, 1996). The Drafting Committee has not yet considered

whether this approach should be extended beyond real estate mortgages to any other “lien on property.

**SECTION 9-204. AFTER-ACQUIRED PROPERTY; FUTURE ADVANCES.**

(a) Except as otherwise provided in subsection (b), a security agreement may create or provide for a security interest in after-acquired collateral.

(b) A security interest does not attach under an after-acquired property clause to:

(1) consumer goods, other than an accession when given as additional security, unless the debtor acquires rights in them within 10 days after the secured party gives value; or

(2) a commercial tort claim.

(c) A security agreement may provide that collateral secures or that accounts, chattel paper, or payment intangibles are sold in connection with future advances or other value, whether or not the advances or value are given pursuant to commitment.

## Reporters' Comments

**1. Source.** Former Section 9-204.

2. **Sales of Receivables.** This Article validates “after-acquired property and “future advance” clauses in security agreements not only when the transaction is for security purposes but also when the transaction is the sale of accounts, chattel paper, or payment intangibles. We understand this to be the case under existing law.

**3. Commercial Tort Claims.** New subsection (b)(2) provides that an after-acquired collateral provision in a security agreement does not reach future commercial tort claims. In order for a security interest in a tort claim to attach, the claim must be in existence when the security agreement is authenticated. In addition, the security agreement must describe the tort claim with specificity. See Section 9-111(e).

1           **SECTION 9-205. USE OR DISPOSITION OF COLLATERAL**  
2           **WITHOUT ACCOUNTING PERMISSIBLE.**

3           (a) A security interest is not invalid or fraudulent against creditors merely  
4 because:

5                   (1) the debtor has the right or ability:

6                           (A) to use, commingle, or dispose of all or part of the collateral,  
7 including returned or repossessed goods;

8                           (B) to collect, compromise, enforce, or otherwise deal with  
9 collateral;

10                          (C) to accept the return of collateral or make repossessions; or

11                          (D) to use, commingle, or dispose of proceeds; or

12                   (2) the secured party fails to require the debtor to account for proceeds  
13 or replace collateral.

14           (b) This section does not relax the requirements of possession for  
15 attachment, perfection, or enforcement of a security interest which depend upon  
16 possession of the collateral by the secured party.

17                                   Reporters' Comments

18           1. **Source.** Former 9-205.

19           2. **Extent of Permissible Freedom for Debtor.** This section recognizes  
20 the broader rights of a debtor to "enforce collateral as well as to "collect and  
21 "compromise collateral. The reference to collecting and compromising  
22 "collateral in lieu of "accounts or chattel paper, used in former Section 9-205,  
23 contemplates the many other types of collateral that a debtor may wish to "collect,  
24 compromise, or enforce : deposit accounts, documents, financial assets, general  
25 intangibles, instruments, insurance policies, investment property, and letters of  
26 credit.

27           **SECTION 9-206. SECURITY INTEREST ARISING IN PURCHASE OR**  
28 **DELIVERY OF FINANCIAL ASSET. [MINOR STYLE CHANGES ONLY]**

1 (a) If a person buys a financial asset through a securities intermediary in a  
2 transaction in which the buyer is obligated to pay the purchase price to the  
3 securities intermediary at the time of the purchase and the securities intermediary  
4 credits the financial asset to the buyer's securities account before the buyer pays the  
5 securities intermediary, the securities intermediary has a security interest in the  
6 buyer's security entitlement securing the buyer's obligation to pay.

7 (b) If a certificated security, or other financial asset represented by a writing  
8 which in the ordinary course of business is transferred by delivery with any  
9 necessary indorsement or assignment, is delivered under an agreement between  
10 persons in the business of dealing with such securities or financial assets and the  
11 agreement calls for delivery versus payment, the person delivering the certificate or  
12 other financial asset has a security interest in the certificated security or other  
13 financial asset securing the seller's right to receive payment.

14 (c) A security agreement is not required for attachment or enforceability of  
15 a security interest arising under this section.

16 Reporters' Comments

17 1. **Source.** Former 9-116.

18 2. **Automatic Perfection.** Security interests arising under this section are  
19 automatically perfected. See Section 9-309(a).

20 [SUBPART 2. RIGHTS AND DUTIES]

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

23 (a) If a security interest secures an obligation or a buyer of accounts, chattel  
24 paper, or payment intangibles is entitled by agreement to charge back uncollected  
25 collateral or otherwise to full or limited recourse against the debtor or 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~~~~previous~~ parties unless otherwise agreed.

(b) Unless otherwise agreed, 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) If a security interest secures an obligation, the secured party may use or operate collateral for the purpose of preserving the collateral or its value or as permitted by 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.

#### Reporters' Comments

1. **Source.** Former Section 9-207.

2. **Statutory Liens.** The revised definitions of “collateral,” “debtor,” and “secured party” in Section 9-102 would make this section applicable to collateral

1 subject to a statutory lien if the collateral is in the statutory lienholder's possession.  
2 The Drafting Committee has not yet considered whether that result is appropriate.

3       **3. Buyers of Chattel Paper and Other Receivables.** This section has  
4 been revised to reflect the fact that a seller of accounts, chattel paper, or payment  
5 intangibles normally retains no interest in the collateral and so is not disadvantaged  
6 by the secured party's noncompliance with the requirements of this section.  
7 Subsection (a) applies only to security interests that secure an obligation and to  
8 sales of receivables in which the buyer has recourse against the debtor. (Of course,  
9 a buyer of accounts or payment intangibles could not have "possession of original  
10 collateral, but might have possession of proceeds, such as promissory notes or  
11 checks.) The meaning of "recourse in this respect is limited to recourse arising out  
12 of the account debtor's failure to pay or other default ~~and not recourse based on the~~  
13 ~~debtor's breach of a warranty to the secured party.~~ The other subsections are  
14 inapplicable to all sales of receivables.

15       **4. "Repledges."** The change to subsection (b)(5) eliminates the  
16 qualification that the terms of a "repledge may not "impair a debtors "right to  
17 redeem collateral. The change is for clarification only.

18       There is no basis on which to draw from subsection (b)(5) any inference  
19 concerning the debtor's right to redeem the collateral. The debtor enjoys that right  
20 under Section 9-621, and this section need not address it. For example, if the  
21 collateral is a negotiable note that the secured party (SP-1) repledges to SP-2,  
22 nothing in this section suggests that the debtor (D) does not retain the right to  
23 redeem the note upon payment to SP-1 of all obligations secured by the note. But,  
24 as explained below, the debtor's unimpaired right to redeem as against the debtor's  
25 original secured party nevertheless may not be enforceable as against the new  
26 secured party.

27       In resolving questions that arise from the creation of a security interest by  
28 SP-1, one must take care to distinguish D's rights against SP-1 from D's rights  
29 against SP-2. Once D discharges the secured obligation, under Section 9-621 or  
30 otherwise, D becomes entitled to the note; SP-1 has no legal basis upon which to  
31 withhold it. If, as a practical matter, SP-1 is unable to return the note because SP-2  
32 holds it as collateral for SP-1's unpaid debt, then SP-1 is liable to D under the law  
33 of conversion.

34       Whether SP-2 would be liable to D depends on the priority of SP-2's  
35 security interest. Normally, the *nemo dat* principle will apply, and SP-2's security  
36 interest, which is a security interest in SP-1's security interest, will be defeated if  
37 the debtor discharges its secured obligations under Section 9-621 or otherwise. If  
38 so, and if SP-2 fails to deliver the note to D, then D will have a right to replevy the  
39 note from SP-2 or recover damages from SP-2 in conversion. In some  
40 circumstances, however, SP-2's security interest will survive discharge of SP-1's  
41 security interest. This will be the case, for example, if SP-2 is a holder in due  
42 course. See Sections 9-328, 3-306. Under these circumstances, D has no right to  
43 recover the note or recover damages from SP-2. Nevertheless, D will have a  
44 damage claim against SP-1.

1           This section does not change existing law in this regard, but rather  
2 eliminates a possible ambiguity. Former Section 9-207(2)(e) permits the secured  
3 party to “repledge the collateral upon terms that do not impair the debtor’s right to  
4 redeem it. This language could be read to override the rule of Section 9-328,  
5 under which a qualifying SP-2 takes its security interest free of D’s interest in the  
6 collateral. This language also could be read to prohibit SP-1 from creating a  
7 security interest to secure a debt owed to SP-2 that is larger than the debt owed by  
8 D to SP-1. Both readings are erroneous. Subsection (b)(5) makes clear that  
9 nothing in this Article, including subsection (a), prohibits or restricts a secured  
10 party from creating, as a debtor, a security interest in collateral in which it holds a  
11 security interest. Subsection (b)(5) does not, by negative implication, prohibit or  
12 render ineffective a security interest created by a secured party in collateral that is  
13 not in the secured party’s possession.

14           **SECTION 9-208. DUTIES OF SECURED PARTY HAVING CONTROL**  
15 **OVER COLLATERAL.**

16           (a) If there is no outstanding secured obligation and the secured party has  
17 no commitment to make advances, incur obligations, or otherwise give value, as  
18 soon as reasonably practicable but not more than 3 three days after receiving an  
19 authenticated demand by the debtor:

20                 (1) a secured party that has control over a investment property under  
21 Section 8-106(d)(2) or 9-108(b) shall send the securities intermediary or  
22 commodity intermediary with which the security entitlement or commodity contract  
23 is maintained an authenticated record that releases the securities intermediary or  
24 commodity intermediary from any further obligation to comply with entitlement  
25 orders or directions originated by the secured party;

26                 (2) a secured party that has control over a deposit account under Section  
27 9-109(a)(2) shall send the depository institution with which the deposit account is  
28 maintained an authenticated statement that releases the depository institution from  
29 any further obligation to comply with instructions originated by the secured party;

30                 [(3) a secured party that has control over a deposit account under  
31 Section 9-109(a)(3) shall pay the debtor all funds on deposit in the account;] and

1 (4) a secured party that has control over a letter of credit and proceeds of  
2 the letter of credit under Section 9-110(1) shall send to any person that has an  
3 unfulfilled obligation to pay or deliver proceeds of the letter of credit to the secured  
4 party ~~the issuer of the letter of credit and to any nominated person~~ an authenticated  
5 release ~~of the issuer~~ from any further obligation to pay or deliver proceeds of the  
6 letter of credit to the secured party.

7 (b) Within [a reasonable time] [10 days] after receiving an authenticated  
8 demand by the debtor pursuant to subsection (a), a secured party that has control  
9 over a letter of credit and proceeds of the letter of credit under Section 9-110(2)  
10 shall take such actions as the debtor may reasonably request with respect to the  
11 letter of credit.

#### 12 Reporters' Comments

13 1. **Source.** New.

14 2. **Scope.** This section imposes duties on a secured party that has control  
15 over investment property, a deposit account, or a letter of credit and proceeds of the  
16 letter of credit. The duty to terminate the secured party's control is analogous to the  
17 duty to file a termination statement, imposed by Section 9-511.

18 The requirements of this section can be varied by agreement under Section  
19 1-102(3). For example, a debtor could by contract agree that the secured party may  
20 release its control over investment property under subsection (a)(1) more than 3  
21 days following demand. Also, these requirements should not be read to conflict  
22 with the terms of the collateral itself. In this connection, subsection (a)(3), which  
23 appears in brackets, may be problematic. If the collateral is a time deposit account,  
24 for example, subsection (a)(3) should not require a secured party with control to  
25 make an early withdrawal of the funds (assuming that is even possible) in order to  
26 pay them over to the debtor. Moreover, we doubt that subsection (a)(3) is  
27 necessary. Once a security interest disappears, the terms of the deposit contract  
28 itself should be adequate to govern the relationship between a former secured  
29 party/depositary institution and the former debtor/depositor.

30 3. **Letters of Credit and Proceeds of Letters of Credit.** Paragraph (5) is  
31 problematic. For example, one cannot safely assume that a letter of credit that has  
32 been transferred to a secured party is (re)transferable by the secured party to the  
33 debtor. Although it is appropriate to place some duties on the secured party-  
34 transferee, the details may best be left to the agreement of the parties.

35 4. **Remedy for Failure to Relinquish Control.** If the secured party fails to  
36 comply with the requirements of subsection (a), the debtor has the remedy set forth

in Section 9-624(d). This remedy is identical to that applicable to failure to provide or file a termination statement under Section 9-511.

**5. Duty to Relinquish Possession.** Although Section 9-207 and former Section 9-207 address directly the duties of a secured party in possession of collateral, neither requires the secured party to relinquish possession when the secured party ceases to hold a security interest. Under common law, absent agreement to the contrary, the failure to relinquish possession of collateral upon satisfaction of the secured obligation would constitute a conversion. This Article could impose an explicit duty to relinquish possession. But inasmuch as problems apparently have not surfaced in the absence of such duties under current law, the common-law duty appears to be sufficient.

6. **Duty to “Send.”** This section and Sections 9-208A and 9-209 impose a duty to “send” certain items or information to the debtor. The Drafting Committee may wish to consider whether that term should be replaced in these sections by the new term “communicate,” as defined in Section 9-102.

**SECTION 9-208A. DUTIES OF SECURED PARTY [WHEN] [IF]  
ACCOUNT DEBTOR HAS BEEN NOTIFIED OF ASSIGNMENT.**

(a) If there is no outstanding secured obligation and the secured party has no commitment to make advances, incur obligations, or otherwise give value, as soon as reasonably practicable but not more than 3 days after the secured party receives an authenticated demand by the debtor, the secured party shall send to an account debtor that has received notification of an assignment to the secured party as assignee under Section 9-404(e) an authenticated record that releases the account debtor from any further obligation to the secured party.

(b) This section does not apply to an assignment constituting the sale of an account, chattel paper, or payment intangible.

## Reporters' Comments

1. **Source.** New.

2. **Scope.** Like Sections 9-208 and 9-511(c), which require a secured party to relinquish control of collateral and to file or provide a termination statement for a financing statement, this section requires a secured party to free up collateral when there no longer is any outstanding secured obligation or any commitment to give value in the future. This section addresses the case in which account debtors have been notified to pay a secured party to whom the receivables have been assigned. It

1 requires the secured party (assignee) to inform the account debtors that they no  
2 longer are obligated to make payment to the secured party.

3           **SECTION 9-209. REQUEST FOR ACCOUNTING; REQUEST**  
4           **REGARDING LIST OF COLLATERAL OR STATEMENT OF ACCOUNT.**

5           (a) In this section:

6                   (1) “Request for an accounting means a record authenticated by a  
7 debtor requesting that the recipient provide an accounting of the unpaid obligations  
8 secured by collateral and reasonably identifying the transaction or relationship that  
9 is the subject of the request; ~~and~~

10                   (2) “Request regarding a list of collateral means a record authenticated  
11 by a debtor requesting that the recipient approve or correct a list of what the debtor  
12 believes to be the collateral securing an obligation and reasonably identifying the  
13 transaction or relationship that is the subject of the request; ~~and~~

14                   (3) “Request regarding a statement of account means a record  
15 authenticated by a debtor requesting that the recipient approve or correct a  
16 statement indicating what the debtor believes to be the aggregate amount of unpaid  
17 obligations secured by collateral as of a specified date and reasonably identifying  
18 the transaction or relationship that is the subject of the request.

19           (b) Subject to subsections (c), (d), and (e), a secured party other than a  
20 buyer of accounts, chattel paper, or payment intangibles shall comply with a request  
21 for an accounting, ~~or~~ a request regarding a list of collateral, or a request regarding a  
22 statement of account within two weeks after receipt by sending to the debtor an  
23 authenticated correction or approval or an accounting, as applicable.

24           (c) A secured party that claims a security interest in all of a particular type  
25 of collateral owned by the debtor may comply with a request regarding a list of

1 collateral by sending to the debtor an authenticated statement to that effect within  
2 two weeks after receipt.

3 (d) A person that receives a request regarding a list of collateral and claims  
4 no interest in the collateral shall comply with the request within two weeks after  
5 receipt by sending to the debtor an authenticated statement disclaiming any interest  
6 in the collateral and, if known to the recipient, containing the name and mailing  
7 address of any assignee of or successor to the recipient's security interest in the  
8 collateral.

9 (e) A person that claims no interest in the obligations when it receives a  
10 request for an accounting or a request regarding a statement of account shall  
11 comply with the request within two weeks after receipt by sending to the debtor an  
12 authenticated statement disclaiming any interest in the obligations and, if known to  
13 the recipient, containing the name and mailing address of any assignee of or  
14 successor to the recipient's interest in the obligations.

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

#### 19 Reporters' Comments

20 1. **Source.** Former Section 9-208.

21 2. **Scope.** This section resolves some of the issues that have arisen under  
22 former Section 9-208 and makes information concerning the secured indebtedness  
23 readily available to debtors, both before and after default. It applies to statutory-  
24 lien transactions (see the definitions of "debtor," "secured party," and "collateral" in  
25 Section 9-102) but generally not to sales of receivables. See subsection (b).

26 Subsection (a) contemplates that the debtor can request three types of  
27 information from the secured party. First, under subsection (a)(1), the debtor can  
28 request the secured party to prepare and send an "accounting" as defined in Section  
29 9-102. Second, under subsection (a)(2), the debtor can submit to the secured party  
30 a list of collateral for the secured party's approval or correction. Third, under  
31 subsection (a)(3), the debtor can submit to the secured party for its approval or



1 correction a statement of the aggregate amount of unpaid secured obligations.  
2 Inasmuch as a secured party may have numerous transactions and relationships with  
3 a debtor, each request must identify the relevant transactions or relationships.  
4 Problems may arise for secured parties that have many places of business and who  
5 may receive a request at a place of business having no relation to the secured  
6 transaction. We believe that problem could be addressed best by modifications to  
7 Section 1-201(26) and (27). Those provisions should be expanded to address not  
8 only notifications but also demands and other records that may be received by an  
9 organization.

10           **3. Recipients Claiming No Interest in the Transaction.** A debtor may be  
11 unaware that the creditor with whom it has dealt has assigned its security interest or  
12 the secured obligation. Subsections (d) and (e) impose upon recipients of requests  
13 under this section the duty to inform the debtor that they claim no interest in the  
14 collateral or secured obligation, respectively, and to inform the debtor of the name  
15 and mailing address of any known assignee or successor.

16           **4. Remedy for Failure to Comply.** Section 9-624(e) sets forth the remedy  
17 for noncompliance with the requirements of this section.

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**PART 3**  
**PERFECTION AND PRIORITY OF SECURITY INTERESTS**  
[SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY]

Reporters’ Prefatory Comment

1. **Scope of Choice-of-Law Rules.** Part 3, Subpart 1 contains choice-of-law rules similar to those of former Section 9-103. Former Section 9-103 generally addresses which State’s law governs “perfection and the effect of perfection or non-perfection of security interests. See, e.g., former Section 9-103(1)(b). This Article follows the broader and more precise formulation in former Section 9-103(6)(b), which was revised in connection with the recent promulgation of Revised Article 8: “perfection, the effect of perfection or non-perfection, and the priority of security interests. Priority, in this context, subsumes all of the rules in Part 3, including “cut off” or “take free” rules such as Sections 9-315(a), (b), and (c), 9-316, and 9-328. This subpart does not address choice of law for other purposes. For example, the law applicable to issues such as attachment, validity, characterization (e.g., true lease or security interest), and enforcement would be governed by the rules in Section 1-105; that governing law typically is specified in the security agreement. And, another jurisdiction’s law may govern other third-party matters addressed in Article 9. See Part 4, Reporters’ Prefatory Comment.

2. **Scope of Referral.** In designating the jurisdiction whose law governs, this Article directs the court to apply only the substantive (“local”) law of a particular jurisdiction and not its choice-of-law rules.

*Example:* Litigation over the priority of a security interest in accounts arises in State X. State X has adopted the Official Text of this Article, which sends one to the local law of the jurisdiction in which the debtor is located. See Section 9-301(3). The debtor is located in State Y. Even if State Y has enacted a nonuniform choice-of-law rule (e.g., one that provides that perfection is governed by the law of State Z), a State X court should look only to the substantive law of State Y. State Y’s substantive law indicates that financing statements should be filed in State Y. Note, however, that if the identical perfection issue were to be litigated in State Y, the court would look to State Y’s nonuniform 9-103 and conclude that a filing in State Y is ineffective. Revision of the Official Text cannot eliminate this problem. A complete solution would require complete uniformity in the enacted text.

Eliminating the reference to the choice-of-law rules is likely to minimize the impact of the nonuniformity. Under former Section 9-103(3), which refers to “the law (including the conflict of laws rules) of a jurisdiction, every time a uniform provision refers one to State Y, one winds up having to file in State Z. Inasmuch as there have been relatively few nonuniform amendments to Section 9-103, lawyers are likely to file in State Y without first checking State Y’s choice-of-laws rules. If this Article, which eliminates the reference to choice-of-laws rules, is widely adopted, then these lawyers will have filed properly if the issue is litigated in any jurisdiction that has adopted a uniform Section 9-301 (i.e., in most jurisdictions

1 other than State Y). The burden now falls on the litigators to file the lawsuit in the  
2 “correct place.

3 The approach of this Article is likely to reduce the frequency with which the  
4 *renvoi* arises.

5 **Example:** In the preceding Example, assume that State Y’s nonuniform  
6 Section 9-301(1) refers to the substantive and choice-of-law rules of State  
7 X. If so, State X’s referral to State Y’s choice-of-law rules would present  
8 the classic *renvoi*: State X’s Section 9-301 directs one to State Y’s choice  
9 of law, and State Y’s Section 9-301 says to look to State X’s choice of law.  
10 (The 1972 amendments to Section 9-103(3) created precisely this scenario  
11 with respect to security interests in accounts created by debtors whose chief  
12 executive offices were in a State that had the 1962 Official Text but whose  
13 records concerning the accounts were located in a State that had adopted the  
14 1972 Official Text.) Eliminating either State’s reference to choice-of-laws  
15 rules, as Section 9-301(1) does, would eliminate the *renvoi*.

16 **SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY**  
17 **OF SECURITY INTERESTS.** Except as otherwise provided in Sections 9-303  
18 through 9-305, ~~9-306~~, the following rules determine the law governing perfection,  
19 the effect of perfection or nonperfection, and the priority of a security interest in  
20 collateral:

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

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

27 (3) While goods, chattel paper, instruments, money, or negotiable  
28 documents are located in a jurisdiction, the local law of that jurisdiction governs the  
29 effect of perfection or nonperfection and the priority of a nonpossessory security  
30 interest.

1 (4) While goods are located in a jurisdiction, the local law of that  
2 jurisdiction governs perfection of a security interest in the goods by filing a fixture  
3 filing.

4 (5) The local law of the jurisdiction in which timber to be cut is located  
5 governs perfection of a security interest in the timber.

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

9 Reporters' Comments

10 1. **Source.** Former Sections 9-103(1)(a), (b); 9-103(3)(a), (b); 9-103(5),  
11 substantially modified.

12 2. **Law Governing Perfection: General Rule.** Paragraph (1) contains the  
13 general rule: the law governing perfection of security interests in both tangible and  
14 intangible collateral, whether perfected by filing or automatically, is the law of the  
15 jurisdiction of the debtor's location, as determined under Section 9-307. This  
16 paragraph substantially simplifies the choice-of-law rules. It eliminates former  
17 Section 9-103(1)(c) and (d), which concern nonpossessory security interests in  
18 tangible collateral that is removed from one jurisdiction to the other. It is likely to  
19 reduce the frequency of cases in which the governing law changes after a financing  
20 statement is properly filed. (Presumably, debtors change their own location less  
21 frequently than they change the location of their collateral.) The approach taken in  
22 paragraph (1) also eliminates some difficult priority issues and the need to  
23 distinguish between "mobile" and "ordinary" goods, and it reduces the number of  
24 filing offices in which secured parties must file or search.

25 There are potential drawbacks, as well. Arguably, determining the location  
26 of the debtor is a less certain enterprise than is generally assumed. Purchase-money  
27 equipment financiers and others may be ill-equipped to determine the debtor's  
28 location and the peculiar filing requirements of that jurisdiction without incurring  
29 significant additional costs. Local interests may perceive the potential changes in  
30 the volume of filings to be so great that they may be motivated to oppose revision  
31 on this ground. In addition, all acknowledge the difficulties that would attend the  
32 transition from one set of choice-of-law rules to another. The expansion of the  
33 scope of this Article, although modest, is likely to exacerbate the difficulties in  
34 applying choice-of-law rules during the transition.

35 3. **Law Governing Perfection: Exceptions.** The general rule is subject to  
36 several exceptions. It does not apply to goods covered by a certificate of title (see  
37 Sections 9-102; 9-303), deposit accounts (see Section 9-304), or investment  
38 property (see Section 9-304), ~~or minerals (see Section 9-305)~~. Nor does it apply to  
39 possessory security interests, i.e., security interests in which the secured party is in  
40 possession, or to security interests perfected by a fixture filing.

1           a. **Possessory Security Interests.** Paragraph (2) applies to possessory  
2 security interests and provides that perfection is governed by the local law of the  
3 jurisdiction in which the collateral is located. This is the rule of former Section  
4 9-103(1)(b), except paragraph (2) eliminates the troublesome “last event” test of  
5 former law.

6           The distinction between nonpossessory and possessory security interests  
7 creates the potential for the same jurisdiction to apply two different choice-of-law  
8 rules to determine perfection in the same collateral. For example, were a secured  
9 party in possession of an instrument or document to relinquish possession in  
10 reliance on temporary perfection, the applicable law immediately would change  
11 from that of the location of the collateral to that of the location of the debtor.

12           b. **Fixtures.** Application of the general rule in paragraph (1) to perfection  
13 of a security interest in fixtures would yield strange results. For example,  
14 perfection of a security interest in fixtures located in Arizona and owned by a  
15 Delaware corporation would be governed by the law of Delaware. Although  
16 Delaware law would send one to a filing office in Arizona for the place to file a  
17 financing statement as a fixture filing, see Section 9-501, Delaware law would not  
18 take account of local, nonuniform real property filing and recording requirements  
19 that Arizona law might impose. For this reason, paragraph (4) contains a special  
20 rule for security interests perfected by a fixture filing; the law of the jurisdiction  
21 where the fixtures are located governs perfection, including the formal requisites of  
22 a fixture filing.

23           c. **Timber to Be Cut.** Application of the general rule in paragraph (1) to  
24 perfection of a security interest in timber to be cut would yield undesirable results  
25 analogous to those described with respect to fixtures. Paragraph (5) adopts a  
26 similar solution: perfection is governed by the law of the jurisdiction where the  
27 timber is located. Note that paragraph (5) applies only to “timber to be cut, not to  
28 timber that has been cut. Consequently, once the timber is cut the choice-of-law  
29 rule in paragraph (1), which applies to ordinary goods, becomes applicable. To  
30 ensure continued perfection, a secured party should file in both the state where the  
31 timber to be cut is located and in the state where the debtor is located. The former  
32 filing would be with the office at which a real property mortgage would be filed,  
33 and the latter would be a central filing. See Section 9-501. The treatment of timber  
34 to be cut differs from that provided in paragraph (6) for as-extracted collateral.  
35 Under paragraph (5), the law of the jurisdiction where the timber to be cut is  
36 located governs perfection, leaving priority to be governed by the law of the  
37 debtor’s location under paragraph (1). Under paragraph (6), the law of the  
38 jurisdiction where the wellhead or minehead is located governs both perfection and  
39 priority.

40           d. **As-extracted Collateral.** Paragraph (6) adopts the rule of former  
41 Section 9-103(5) with respect to certain security interests in minerals and related  
42 accounts.

43           4. **Law Governing the Effect of Perfection and Priority.** Under former  
44 Section 9-103, the law of a single jurisdiction governs both questions of perfection  
45 and those of priority. This Article generally adopts that approach. See paragraph  
46 (1). But the approach may create problems if the debtor and collateral are located

1 in different jurisdictions. For example, assume a security interest in equipment is  
2 perfected by filing in Illinois (where the debtor is located). The equipment is  
3 located in Pennsylvania. If the law of the jurisdiction in which the debtor is located  
4 were to govern priority, then the priority of an execution lien on the goods located  
5 in Pennsylvania would be governed by rules enacted by the Illinois legislature.

6 To address this problem, paragraph (3) divorces questions of perfection  
7 from questions of “the effect of perfection or nonperfection and the priority of a  
8 security interest. Under paragraph (3), the rights of competing claimants to  
9 tangible collateral are resolved by reference to the law of the jurisdiction in which  
10 the collateral is located. Although this bifurcated approach may introduce  
11 complexities, its appearance in prior drafts with respect to agricultural liens met  
12 with generally favorable reviews. A similar bifurcation applies to security interests  
13 in investment property under former Section 9-103(6). See Section 9-305. The  
14 principal efficiencies of moving from the location-of-collateral rule to a location-of-  
15 debtor rule concern where to file and search and what to file. The bifurcated  
16 approach generally preserves these benefits.

17 Paragraph (3) applies the law of the situs to determine priority only with  
18 respect to goods (including fixtures), chattel paper, instruments, and negotiable  
19 documents. Compare former Section 9-103(1), which applies the law of the  
20 location of the collateral to documents, instruments, and “ordinary (as opposed to  
21 “mobile ) goods. This Article does not distinguish among types of goods. The  
22 ordinary/mobile goods distinction appears to address concerns about where to file  
23 and search, rather than concerns about priority. There appears to be no reason to  
24 preserve this distinction under the bifurcated approach.

25 Particularly serious confusion may arise when the choice-of-law rules of a  
26 given jurisdiction result in each of two competing security interests in the same  
27 collateral being governed by a different priority rule. The potential for this  
28 confusion exists under former Section 9-103(4) with respect to chattel paper:  
29 Perfection by possession is governed by the law of the location of the paper,  
30 whereas perfection by filing is governed by the law of the location of the debtor.  
31 Consider the mess that would be created if the language or interpretation of former  
32 Section 9-308 were to differ in the two relevant States, or if one of the relevant  
33 jurisdictions (e.g., a foreign state) had not adopted Article 9. The potential for  
34 confusion could be exacerbated when a secured party perfects both by taking  
35 possession in the State where the collateral is located (State A) and by filing in the  
36 State where the debtor is located (State B)—a common practice for some chattel  
37 paper financiers. By providing that the law of the jurisdiction in which the collateral  
38 is located governs priority, paragraph (3) substantially diminishes this problem.

39 **5. Non-U.S. Debtors.** This Article deletes former Section 9-103(3)(c),  
40 which contained the choice-of-law rule governing security interests created by  
41 debtors located in a non-U.S. jurisdiction. The rule has proven unsatisfactory for  
42 several reasons. First, it determines the applicable law for non-U.S. debtors by  
43 reference to the location of the debtor’s “major executive office in the United  
44 States. Some, perhaps many, non-U.S. debtors lack any “executive office at all in  
45 the U.S.; with respect to others, determining which of the executive offices in the  
46 United States is the “major one has proven quite difficult.



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

5 This Article applies the same choice-of-law rules to all debtors, foreign and  
6 domestic. For example, it adopts the bifurcated approach for determining the law  
7 applicable to goods and other tangible collateral. See Comment 4, above. The  
8 Article contains a new rule governing the location of non-U.S. debtors. The rule  
9 appears in Section 9-307 and is explained in the Reporters' Comments following  
10 that section.

## 11 SECTION 9-302. LAW GOVERNING PERFECTION AND PRIORITY 12 OF STATUTORY LIENS.

### 13 Alternative A

14 (a) While a debtor is located in a jurisdiction, the local law of that  
15 jurisdiction governs perfection of a statutory lien on collateral.

16 (b) While collateral is located in a jurisdiction, the local law of that  
17 jurisdiction governs the effect of perfection or nonperfection and the priority of a  
18 statutory lien on the collateral.

### 19 Alternative B

20 While collateral is located in a jurisdiction, the local law of that jurisdiction  
21 governs perfection, the effect of perfection or nonperfection, and the priority of a  
22 statutory lien on the collateral.

### 23 Reporters' Comments

24 1. **Source.** New.

25 2. **Statutory Liens.** This section provides choice-of-law rules for statutory  
26 liens. Like Section 9-301, Alternative A divorces perfection from  
27 priority. Under subsection (a), paragraph (1), the law of the jurisdiction of the  
28 debtor's location governs perfection—i.e., filing, which is the sole means of  
29 perfecting a statutory lien (other than the special rules for proceeds in Section  
30 9-313). Under subsection (b), paragraph (2), priority is governed by the law of the  
31 jurisdiction where the collateral is located. Alternative B provides that perfection,  
32 as well as priority, is governed by the law of the jurisdiction where the collateral is  
33 located. Other choice-of-law rules, including Section 1-105, will determine the law  
34 governing other matters, such as remedies on default. Nonuniformity in the law  
35 governing statutory liens and in non-UCC choice-of-law rules may engender some



confusion in this area. Nevertheless, this section's approach seems generally consistent with current law applicable to statutory liens.

**SECTION 9-303. LAW GOVERNING PERFECTION AND PRIORITY  
OF SECURITY INTERESTS IN GOODS COVERED BY A CERTIFICATE  
OF TITLE.**

(a) Goods become covered by a certificate of title when a valid application for the certificate of title and the applicable fee are delivered to the appropriate authority.

(b) The local law of the jurisdiction under whose certificate of title the goods are covered governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in goods covered by a certificate of title 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.

(c) This section applies to goods covered by a certificate of title even if there is no other relationship between the jurisdiction under whose certificate of title the goods are covered and the goods or the debtor.

## Reporters' Comments

1. **Source.** Former Section 9-103(2)(a), (b), substantially revised.

**2. External Constraints on This Section.** This section, like former Section 9-103(2), proceeds from the premise that, for goods covered by a certificate of title on which a security interest may be indicated, compliance with the certificate-of-title statute is a more appropriate method of perfection than filing. The concept of perfection by notation on a certificate is simple; however, certificate-of-title statutes are not. Unlike the Article 9 filing system, which is designed to afford publicity to security interests, certificate-of-title statutes were created primarily to deter theft. The need to coordinate Article 9 with a variety of nonuniform certificate-of-title statutes, the need to provide rules to take account of goods that are covered by more than one certificate, and the need to govern the transition from perfection by filing to perfection by notation all create pressure for a detailed and complex set of rules. In particular, much of the complexity arises from

1 the possibility that more than one certificate of title issued by more than one  
2 jurisdiction can cover the same goods. That possibility results from defects in  
3 certificate-of-title laws and the interstate coordination of those laws, not from  
4 deficiencies in Article 9. As long as that possibility remains, the potential for  
5 innocent parties to suffer losses will continue. At best, Article 9 can identify  
6 clearly which innocent parties will bear the losses in familiar fact patterns.

7       **3. Scope of This Section.** This section applies to “goods covered by a  
8 certificate of title. The new definition of “certificate of title” in Section 9-102  
9 makes clear that this section applies not only to certificate-of-title acts under which  
10 perfection occurs upon notation of the security interest on the certificate but also to  
11 those that contemplate notation but provide that perfection is achieved by other  
12 means, e.g., delivery of designated documents to an official. Subsection (a)  
13 explains that goods become “covered” by a certificate of title when a valid  
14 application for a certificate and the applicable fee are delivered to the appropriate  
15 issuing authority. The time when goods become “covered” determines when this  
16 section begins to apply to perfection of security interests in the goods, and thus  
17 when the law of the jurisdiction under whose certificate the goods are covered will  
18 begin to apply. Subsection (c), which is also new, makes clear that this section  
19 applies to certificates of a jurisdiction having no other contacts with the goods or  
20 the debtor. This result comports with most of the reported cases on the subject and  
21 with contemporary business practices in the trucking industry.

22       **4. Law Governing Perfection.** Subsection (b) is the basic choice-of-law  
23 rule for goods covered by a certificate of title. Perfection is governed by the law of  
24 the jurisdiction under whose certificate the goods are covered from the time the  
25 goods become covered until the earlier of (i) the time the certificate becomes  
26 ineffective under the law of that jurisdiction or (ii) the time the goods become  
27 covered subsequently by a certificate of title from another jurisdiction.

28       Normally, under the law of the relevant jurisdiction, the perfection step  
29 would consist of compliance with that jurisdiction’s certificate-of-title act and a  
30 resulting notation of the security interest on the certificate of title. See Section  
31 9-309A(c). In the typical case of an automobile or over-the-road truck, a person  
32 who wishes to take a security interest in the vehicle can ascertain whether it is  
33 subject to any security interests by looking at the certificate of title. But certificates  
34 of title cover certain types of goods in some States but not in others. A secured  
35 party who does not realize this may extend credit and attempt to perfect by filing in  
36 the jurisdiction where the debtor is located. If the goods had been titled in another  
37 jurisdiction, the lender would be unperfected.

38       Subsection (b) explains when the law of the jurisdiction under whose  
39 certificate the goods are covered ceases to apply. Former Section 9-103(2)(b)  
40 provides that the law of the jurisdiction issuing the certificate ceases to apply upon  
41 “surrender” of the certificate. In the case of automobiles, certificate-of-title statutes  
42 generally require tender of any outstanding certificate as a condition for issuance of  
43 a new certificate. See, e.g., Uniform Motor Vehicle Certificate of Title and Anti-  
44 Theft Act § 6(c)(1). This tender is the “surrender” to which former subsection  
45 (2)(b) refers. The former rule reflects the idea that notation of a security interest on  
46 a certificate of title affords notice to third parties only so long as the certificate is  
47 outstanding.

1           This Article eliminates the concept of “surrender. Instead, the law of the  
2 original jurisdiction ceases to apply when the certificate “becomes ineffective  
3 under the law of that jurisdiction. Given the diversity in certificate-of-title statutes,  
4 the term “ineffective” is not defined. Depending on the certificate-of-title law, this  
5 revision may ameliorate somewhat the problem of certificates that are wrongfully  
6 surrendered. Note, however, that if the certificate is surrendered in conjunction  
7 with an appropriate application for a certificate to be issued by another jurisdiction,  
8 the law of the original jurisdiction ceases to apply for another reason: the goods  
9 became covered subsequently by a certificate of title from another jurisdiction.

10           The last sentence of subsection (b) indicates that, when the certificate  
11 becomes ineffective or the goods subsequently become covered by a certificate of  
12 title from another jurisdiction, the goods are “not covered by the certificate of title  
13 within the meaning of this section.

14           **Example:** The goods are covered by a certificate of title from State X, and  
15 a security interest is perfected in accordance with State X’s law. Thereafter,  
16 the goods are covered by a certificate of title from State Y. Under  
17 subsection (b), the law of State X no longer governs perfection of the  
18 security interest. The goods no longer are covered by “*the* certificate of  
19 title (i.e., the *State X* certificate of title). They are, however, covered by *a*  
20 certificate of title (i.e., the *State Y* certificate) as defined in Section 9-102, so  
21 that the law of the jurisdiction under whose certificate of title the goods are  
22 covered (State Y) governs perfection.

23           **5. Continued Perfection.** The fact that the law of one State ceases to  
24 apply under subsection (a) does not necessarily mean that a security interest  
25 perfected under that law automatically becomes unperfected. See Section ~~9-314(d)~~  
26 9-314(c).

27           **6. Inventory.** Compliance with a certificate-of-title act generally is *not* the  
28 method of perfecting security interests in inventory. Section 9-309A(b) provides  
29 that a security interest created in inventory held by a person in the business of  
30 selling goods of that kind is subject to the normal filing rules; compliance with a  
31 certificate-of-title act is not necessary or effective to perfect the security interest.  
32 Most certificate-of-title acts are in accord.

33           The following example explains the subtle relationship between this rule  
34 and the choice-of-law rules in Section 9-303(b) and former Section 9-103(2):

35           **Example:** Goods are located in State A and covered by a certificate of title  
36 issued under the law of State A. The State A certificate of title is “clean” :  
37 it does not reflect a security interest. Owner takes the goods to State B and  
38 sells (trades in) the goods to Dealer, who is located (within the meaning of  
39 Section 9-307) in State B. As is customary, Dealer retains the duly assigned  
40 State A certificate of title pending resale of the goods. Dealer’s inventory  
41 financier, SP-B, obtains a security interest in the goods under its after-  
42 acquired property clause.

43           Under Section 9-309A(b) of both State A and State B, Dealer’s  
44 inventory financier, SP-B, must perfect by filing instead of complying with a

1 certificate-of-title law. If under Section 9-303(b) the law applicable to  
2 perfection of SP-B's security interest is that of State A, because the goods  
3 are covered by a State A certificate, SP-B would be required to file in State  
4 A under State A's Section 9-501. That result would be anomalous, to say  
5 the least, since the principle underlying Section 9-309A(b) is that the  
6 inventory should be treated as ordinary goods.

7 Section 9-303(b) (and former Section 9-103(2)) should be read as  
8 providing that the law of State B, not State A, applies. A court looking to  
9 the forum's Section 9-303(b) would find that the subsection applies only if  
10 two conditions are met: (i) the goods were "covered by the certificate as  
11 defined in Section 9-102, i.e., application had been made for a State (here,  
12 State A) to issue a certificate of title covering the goods and (ii) the  
13 certificate is a "certificate of title as defined in Section 9-102, i.e., a statute  
14 of that State "provides for the security interest in question to be indicated on  
15 the certificate as a condition or result of perfection. Stated otherwise,  
16 Section 9-303(b) applies only when compliance with a certificate-of-title  
17 statute, and not filing, is the appropriate method of perfection. Under the  
18 law of State A, *for purposes of perfecting SP-B's security interest in the*  
19 *dealer's inventory*, the proper method of perfection is filing—not compliance  
20 with State A's certificate-of-title act. For that reason, the goods are not  
21 covered by a "certificate of title, and the second condition is not met.  
22 Thus, Section 9-303(b) does not apply to the goods. Instead, Section 9-301  
23 applies, and the applicable law is that of State B, where the debtor (dealer)  
24 is located.

25 7. **Relation Back.** We suggest that a Legislative Note recommend the  
26 elimination of relation-back provisions in certificate-of-title laws affecting  
27 perfection of security interests. See Section 9-309A, Comment 6.

28 **SECTION 9-304. LAW GOVERNING PERFECTION AND PRIORITY**  
29 **OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS.** Perfection, the  
30 effect of perfection or nonperfection, and the priority of a security interest in a  
31 deposit account are governed by the local law of the depositary institution's  
32 jurisdiction. The following rules determine a depositary institution's jurisdiction for  
33 purposes of this section:

34 (1) If an agreement between the depositary institution and the debtor  
35 expressly specifies a particular jurisdiction as the depositary institution's  
36 jurisdiction for purposes of this part, this article, or [the Uniform Commercial  
37 Code], ~~this [Act]~~, that jurisdiction is the depositary institution's jurisdiction.

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

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

## Reporters' Comments

1. **Source.** New. Derived from Section 8-110(e) and former Section 9-103(6).

**2. Deposit Accounts.** Under this section, the law of the “depository institution’s jurisdiction” governs perfection and priority of a security interest in deposit accounts. Paragraphs (1) through (4) contain rules for determining the “depository institution’s jurisdiction.” The substance of these rules is substantially similar to that of the rules determining the “security intermediary’s jurisdiction” under Section 8-110(e), except that paragraph (1) provides more flexibility than the analogous provision in Section 8-110(e)(1). Paragraph (1) permits the parties to choose the law of one jurisdiction to govern perfection and priority of security interests and a different governing law for other purposes. Section 8-110(e)(1) (included in the Appendix to this draft) has been conformed to paragraph (1) of this section, and Section 9-305(a)(4)(A), concerning a commodity intermediary’s jurisdiction, makes a similar departure from former Section 9-103(6)(e)(i).

3. **Style.** This section departs stylistically from Section 8-110(e) in several ways. If these departures are retained, Section 8-110(e) probably should be conformed.

1           **SECTION 9-304A. LAW GOVERNING PERFECTION AND PRIORITY**  
2           **OF SECURITY INTERESTS IN LETTERS OF CREDIT AND PROCEEDS**  
3           **OF LETTERS OF CREDIT.**

4           Perfection, the effect of perfection or nonperfection, and the priority of a  
5           security interest in a letter of credit or proceeds of the letter of credit are governed  
6           by the local law of the issuer's jurisdiction if the issuer's jurisdiction is a State. The  
7           following rules determine an issuer's jurisdiction for purposes of this section:

8           (1) If the letter of credit specifies a particular jurisdiction as the issuer's  
9           jurisdiction for purposes of this part, this article, or [the Uniform Commercial  
10          Code], that jurisdiction is the issuer's jurisdiction.

11          (2) If the letter of credit does not specify the issuer's jurisdiction pursuant  
12          to paragraph (1) but the letter of credit indicates an address of the issuer, the  
13          jurisdiction in which that address is located is the issuer's jurisdiction.

14          (3) If the letter of credit does not specify the issuer's jurisdiction or indicate  
15          an address of the issuer pursuant to paragraph (1) or (2) or indicates more than one  
16          address, but the letter of credit indicates that it was issued at an office in a particular  
17          jurisdiction, that jurisdiction is the issuer's jurisdiction.

18          (4) If the letter of credit does not specify the issuer's jurisdiction, indicate  
19          the address of the issuer, or indicate that it was issued at an office in a particular  
20          jurisdiction pursuant to paragraph (1), (2), or (3), the issuer's jurisdiction is the  
21          jurisdiction in which is located the chief executive office of the issuer.



1. **Source.** New. Derived in part from Sections 5-116, Section 8-110(e), and former Section 9-103(6).

2. ***Sui Generis Treatment.*** This section governs the applicable law for perfection and priority of security interests in letters of credit and proceeds of letters of credit. The treatment differs substantially from that provided in Section 9-304 for deposit accounts. The basic rule is that law of the issuer's jurisdiction, derived from the terms of the letter of credit itself, controls perfection and priority, but only if the issuer's jurisdiction is a State, as defined in Section 9-102. If the issuer's jurisdiction is not a State, the baseline rule of Section 9-301 applies--perfection and priority are governed by the law of the debtor's location, determined under Section 9-307. Export transactions typically involve a foreign issuer and a domestic nominated person, such as a confirmer, located in a State. However, there could be many nominated persons and, in the case of letters of credit under which drafts can be negotiated by any bank, it would be impossible to determine any particular nominated person's jurisdiction. The principal goal of this section is to reduce the likelihood that perfection and priority would be governed by the law of a foreign jurisdiction in a transaction that is essentially domestic from the standpoint of the debtor-beneficiary, its creditors, and a domestic nominated person.

## SECTION 9-305. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY.

(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, the local law of that jurisdiction governs perfection, the effect of perfection or nonperfection, and the priority of a security interest in the certificated security represented thereby.

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

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



1                   (4) The local law of the commodity intermediary's jurisdiction governs  
2 perfection, the effect of perfection or nonperfection, and the priority of a security  
3 interest in a commodity contract or commodity account. The following rules  
4 determine a commodity intermediary's jurisdiction for purposes of this paragraph  
5 and Section 9-314:

6                   (A) If an agreement between the commodity intermediary and  
7 commodity customer expressly specifies the commodity intermediary's jurisdiction  
8 for purposes of this part, this article, or [the Uniform Commercial Code], ~~this [Act]~~,  
9 that jurisdiction is the commodity intermediary's jurisdiction.

10                  (B) If an agreement between the commodity intermediary and  
11 commodity customer does not specify the commodity intermediary's jurisdiction  
12 pursuant to subparagraph (A) but expressly specifies that the commodity account is  
13 maintained at an office in a particular jurisdiction, that jurisdiction is the  
14 commodity intermediary's jurisdiction.

15                  (C) If an agreement between the commodity intermediary and  
16 commodity customer does not specify a jurisdiction pursuant to subparagraph (A)  
17 or (B), the commodity intermediary's jurisdiction is the jurisdiction in which is  
18 located the office identified in an account statement as the office serving the  
19 commodity customer's account.

20                  (D) If an agreement between the commodity intermediary and  
21 commodity customer does not specify a jurisdiction pursuant to subparagraph (A)  
22 or (B) and an account statement does not identify an office serving the commodity  
23 customer's account pursuant to subparagraph (C), the commodity intermediary's  
24 jurisdiction is the jurisdiction in which is located the chief executive office of the  
25 commodity intermediary.

1 (b) The local law of the jurisdiction in which the debtor is located governs  
2 perfection of a security interest by filing, automatic perfection of a security interest  
3 in investment property granted by a broker or securities intermediary, and automatic  
4 perfection of a security interest in a commodity contract or commodity account  
5 granted by a commodity intermediary.

6 Reporters' Comments

7 1. **Source.** Former Section 9-103(6).

8 2. **Change from Former Law.** Subsection (a)(4)(A) has been revised to  
9 provide more flexibility for the parties to select the security intermediary's  
10 jurisdiction. See also Section 9-304(1) (depository institution's jurisdiction);  
11 Section 8-110(e)(1) (securities intermediary's jurisdiction) (included in the  
12 Appendix to this draft).

13 3. **Style.** This section departs stylistically from Section 8-110(e) in several  
14 ways. If these departures are retained, Section 8-110(e) probably should be  
15 conformed.

~~SECTION 9-306. LAW GOVERNING PERFECTION AND PRIORITY  
OF SECURITY INTERESTS IN MINERALS. /MINOR STYLE CHANGES~~

~~**ONLY]** The local law of the jurisdiction in which the wellhead or minehead is located governs perfection, the effect of perfection or nonperfection, and the priority of a security interest 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. [deleted]~~

## Reporters' Comments

This section has been replaced by Section 9-301(6).

~~1. **Source.** Former Section 9-103(5).~~

~~2. **Status.** Although the Drafting Committee held a preliminary discussion of the provisions relating to security interests in minerals, the draft does not reflect the deliberations.~~

**SECTION 9-307. LOCATION OF DEBTOR.**

(a) Except as otherwise provided in this section, for purposes of this part, an individual debtor is located at the individual's residence, any other debtor having only one place of business is located at its place of business, and any other debtor having more than one place of business is located at its chief executive office, but only if the residence, place of business, or chief executive office, as applicable, is located either in a State or in a jurisdiction, other than a State, whose law requires information concerning the [possible] existence of a security interest to be made publicly available as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. 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.

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

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

#### 6 Reporters' Comments

7 1. **Source.** Former Section 9-103(3)(d), as substantially revised.

8 2. **General Rule.** As a general matter, the location of the debtor  
9 determines the jurisdiction whose law governs perfection of a security interest or a  
10 statutory lien. See Sections 9-301(1), 9-302(b), and 9-305(b). This section  
11 determines the location of the debtor. Subsection (a) states the baseline rules: An  
12 individual debtor is deemed to be located at the individual's residence with respect  
13 to both personal and business assets. Any other debtor is deemed to be located at  
14 its place of business if it has only one, or at its chief executive office if it has more  
15 than one place of business. As used in this subsection, "business" is meant to  
16 include the activities of eleemosynary institutions. The Drafting Committee may  
17 wish to consider whether the statutory text adequately expresses this expansive  
18 view of "business" activity. The baseline rule is subject to four exceptions, each of  
19 which is discussed below.

20 3. **Registered Entities.** Under subsection (b), "a registered entity is located  
21 in its State of organization. Section 9-102 defines a "registered entity" as "an  
22 organization organized under the law of a State and as to which the State maintains  
23 a public record showing the organization to have been organized" and the "State of  
24 organization" as the "State under whose law the [registered] entity is organized.  
25 For example, a Delaware corporation is a registered entity, and Delaware is its  
26 jurisdiction of organization. Other examples of registered entities are limited  
27 partnerships and limited liability companies.

28 Determining the registered entity-debtor's location by reference to the  
29 jurisdiction of organization could provide some important side benefits for the  
30 filing systems. A jurisdiction could structure its filing system so that it would be  
31 impossible to make a mistake in a registered entity-debtor's name on a financing  
32 statement. A filing designating an incorrect corporate name for the debtor would be  
33 rejected, for example. Linking filing to the jurisdiction of organization also could  
34 reduce pressure on the system imposed by transactions in which registered entities  
35 cease to exist. The jurisdiction of organization might prohibit such transactions  
36 unless steps were taken to ensure that existing filings were refiled against a  
37 successor entity or terminated by the secured party.

38 During discussions of the proposal to change the location of a registered  
39 entity to its jurisdiction of organization, concerns were expressed that the change  
40 might cause a significant shift in filing revenues from some States to others, and to  
41 Delaware in particular. That prospect, it was argued, could render the proposal  
42 politically impractical. According to a recent study, however, the impact would not

1 be material. See Lynn M. LoPucki, *Why the Debtor's State of Incorporation*  
2 *Should Be the Proper Place for Article 9 Filing*, 79 Minn. L. Rev. 577 (1995).  
3 Professor LoPucki's study also suggests that for the vast majority of filings, the  
4 change would have no impact at all. Most collateral, it appears, is located in the  
5 same jurisdiction where the debtor is located (and where corporate debtors are  
6 incorporated).

7       **4. United States as Debtor.** To the extent that Article 9 governs (see  
8 Sections 1-105; 9-112(c)), the United States and its subdivisions, instrumentalities,  
9 and other governmental entities are located in the District of Columbia. See  
10 subsection (c).

11       **Example:** Debtor is an instrumentality of the United States, having its chief  
12 executive office in New York City. Debtor creates a security interest in its  
13 equipment, which is located in Boulder, Colorado. Assuming Article 9  
14 applies, subsection (c) provides that Debtor is located in the District of  
15 Columbia. Under Section 9-301(1), perfection is governed by the law of the  
16 debtor's location, i.e., the District of Columbia, whereas under 9-301(3), the  
17 law of the jurisdiction in which the collateral is located—here,  
18 Colorado—governs priority.

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

22       **5. Non-U.S. Debtors.** The Reporters' Comments to Section 9-301 explain  
23 the shortcomings of former Section 9-103(3)(c), which contains special choice-of-  
24 law rules for debtors who are located in a non-U.S. jurisdiction. Under the baseline  
25 rule of this section, a non-U.S. debtor normally would be located in a foreign  
26 jurisdiction and, as a consequence, foreign law would govern perfection. When  
27 foreign law affords no public notice of security interests, the baseline rule yields  
28 unacceptable results.

29       Accordingly, subsection (a) provides that the normal rules for determining  
30 the location of a debtor apply only if they yield a location that is either a State (as  
31 broadly defined in Section 9-102) or "a jurisdiction, other than a State, whose law  
32 requires information concerning the [possible] existence of a security interest to be  
33 made publicly available as a condition or result of the security interest's obtaining  
34 priority over the right of a lien creditor with respect to the collateral. In other  
35 cases, the debtor is located in the District of Columbia. Note that the law of the  
36 jurisdiction in which the debtor is located governs not only perfection but also, with  
37 respect to accounts and other intangible collateral, "the effect of perfection or  
38 nonperfection and the priority of a security interest. Section 9-301(1). With respect  
39 to goods and other tangible collateral, these issues are governed by the law of the  
40 jurisdiction in which the collateral is located. See Section 9-301(3).

41       A "registered entity" is located in its State of organization. See subsection  
42 (b). Inasmuch as "registered entity" is defined to exclude entities that are not  
43 organized under the law of a "State," both foreign individuals and foreign  
44 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 Section 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 Section 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 Section 9-301(3).

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 (Sections 9-301 through 9-307), will not apply. See Section 9-112, Comment 6..

**6. Foreign Air Carriers.** Subsection (d) follows former Section 9-103(3)(d).

[SUBPART 2. PERFECTION]

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

(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 in Sections 9-309 through 9-313 have been satisfied. If the requirements are satisfied before the security interest attaches, it is perfected when it attaches.

(b) A statutory lien is perfected if it has become effective and all of the applicable requirements for perfection in Sections 9-309 and 9-313 have been

satisfied. ~~met.~~ If the requirements are satisfied before the statutory lien becomes effective, it is perfected when it becomes effective.

(c) If a security interest or statutory lien is originally perfected in one manner 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 statutory lien is perfected continuously.

(d) Perfection of a security interest in an account, chattel paper, document, instrument, [insurance policy,] general intangible, or 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 property] [lien on property] securing the right.

*Legislative Note: To avoid confusion, any statute conflicting with subsection (f) should be made expressly subject to that subsection.*

### Reporters' Comments

**1. Source.** Former Sections 9-303, 9-115(2).

2. **General Rule.** Subsection (a) explains that a security interest is perfected only when it has attached and when a required “perfection” or “public notice” step has been taken. The “except” clause refers to the automatic perfection rules appearing in Section 9-308A. It also reflects that other subsections of this section, e.g., subsection (d), contain perfection steps.

3. **Statutory Liens.** Subsection (b) is new. It describes the elements of perfection of a statutory lien.

4. **Support Obligation.** Subsection (d) is new. It provides for automatic perfection of a security interest in a support obligation for collateral if the security



1 interest in the collateral is perfected. This is unlikely to effect any change in current  
2 law.

3 **Example:** Buyer is obligated to pay Debtor for goods sold. Buyer's  
4 president guarantees the obligation. Perfection of a security interest in  
5 Debtor's right to payment (an account) constitutes perfection of a security  
6 interest in Debtor's rights under the guarantee.

7 **5. Investment Property.** Subsection (e) follows former Section 9-115(2).

8 **6. Right to Payment Secured by Mortgage.** Subsection (f) is new and  
9 overrides other law to the contrary. It deals with the situation in which a mortgagee  
10 of real property creates a security interest in an obligation (e.g., a note) secured by a  
11 real property mortgage. Section 9-203(e)(5) adopts the traditional view that the  
12 transferee of the note acquires the mortgage, as well. This subsection adopts a  
13 similar principle: perfection of a security interest in the right to payment constitutes  
14 perfection of a security interest in the mortgage securing it.

15 The primary consequence of the rules in Section 9-203(e)(5) and subsection  
16 (f) is that, by acquiring a perfected security interest in a mortgage note, the secured  
17 party acquires a security interest in the mortgage that is senior to the rights of a  
18 person who becomes a lien creditor of the mortgagee (Article 9 debtor). See  
19 Section 9-315(a)(2). This result helps prevent the separation of the mortgage from  
20 the note. As a comment to the Restatement of Mortgages observes, "when the  
21 ownership of the note and mortgage are split, the note becomes, as a practical  
22 matter, unsecured. This result is economically wasteful and confers an unwarranted  
23 windfall on the mortgagor. Restatement of the Law of Property (Mortgages)  
24 § 5.4(a), Comment a., Tent. Draft No. 5 (March 18, 1996).

## 25 **SECTION 9-308A. SECURITY INTEREST PERFECTED UPON**

26 **ATTACHMENT.** The following security interests are perfected when they attach:

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

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

33 (3) a sale of a payment intangible;

34 (4) a security interest of a collecting bank arising under Section 4-210 ~~or~~  
35 ~~Article 2 or 2A;~~

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

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

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

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

9 (9) a security interest created by an assignment of a beneficial interest in a  
10 trust unless the beneficial interest constitutes investment property;

11 (10) a security interest created by an assignment of a beneficial interest in a  
12 decedent's estate; and

13 (11) a security interest arising under Article 2 or 2A.

14 **Reporters' Comments**

15 1. **Source.** Derived from former Sections 9-302(1); 9-115(4)(c), (d); 9-116.

16 2. **Automatic Perfection.** This section contains the automatic perfection  
17 rules previously located former Sections 9-302(1), 9-115(4)(c), (d), and 9-116.  
18 Rather than continue to state the rule by indirection, this section explicitly provides  
19 for perfection upon attachment.

20 3. **Purchase Money Security Interest in Consumer Goods.** Former  
21 Section 9-302(1)(d) has been revised and appears here as paragraph (1). No filing  
22 or other step is required to perfect a purchase money security interest in consumer  
23 goods, other than goods that are subject to a statute or treaty described in Section  
24 9-309A(a). However, filing is necessary to prevent a buyer of the goods from  
25 taking free of the security interest under Section 9-316(b), and a fixture filing is  
26 required for priority over conflicting interests in fixtures to the extent provided in  
27 Section 9-331.

28 4. **Payment Intangibles.** Paragraph (2) expands upon former subsection  
29 (1)(e) by affording automatic perfection to certain assignments of payment  
30 intangibles. Paragraph (3), which is new, affords automatic perfection to sales of  
31 payment intangibles. It reflects the practice under former Article 9. Under that  
32 Article, filing a financing statement does not affect the rights of a buyer of payment  
33 intangibles, inasmuch as the Article does cover those sales. To the extent that the  
34 exception in paragraph (2) covers outright sales of payment intangibles, which  
35 automatically are perfected under paragraph (3), the exception is redundant.

1           **5. Investment Property.** Paragraphs (5) replaces the last clause of each  
2 subsection of former Section 9-116. Paragraphs (6) and (7) replace former Section  
3 9-115(4)(c) and (d). The last two indicated that, with respect to certain security  
4 interests created by a securities intermediary or commodity intermediary, “[t]he  
5 filing of a financing statement . . . has no effect for purposes of perfection or  
6 priority with respect to that security interest. No change in meaning is intended by  
7 the deletion of the quoted phrase.

8           **6. Beneficial Interests in Trusts.** The formulation of paragraph (9) is  
9 new. It explicitly limits automatic perfection in a beneficial interest in a trust to  
10 those beneficial interests that do not constitute investment property. Thus, a  
11 collateral assignment of the beneficial interest in a business trust would not be  
12 automatically perfected, whereas a collateral assignment of the beneficial interest in  
13 a family trust would be.

14           **SECTION 9-309. WHEN FILING REQUIRED TO PERFECT**  
15 **SECURITY INTEREST OR STATUTORY LIEN; SECURITY INTERESTS**  
16 **AND STATUTORY LIENS TO WHICH FILING PROVISIONS DO NOT**  
17 **APPLY.**

18           (a) A financing statement must be filed to perfect all security interests and  
19 statutory liens other than a security interest:

- 20                   (1) in a support obligation under Section 9-308(d);  
21                   (2) that is perfected when it attaches (Section 9-308A);  
22                   (3) in property subject to a statute, regulation, or treaty described in  
23 Section 9-309A(a);  
24                   (4) in instruments, certificated securities, chattel paper, or documents  
25 perfected without filing or possession under Section 9-310(d) or (e);  
26                   (5) in collateral in the secured party's possession under Section 9-311;  
27                   (6) in investment property, a deposit account, or a letter of credit and  
28 proceeds of the letter of credit which is perfected without filing under Section  
29 9-312;  
30                   (7) in or statutory lien on proceeds under Section 9-313(e); or  
31                   (8) perfected under Section 9-314(a), (c), or (d).

1 (b) If a secured party assigns a perfected security interest, a filing under this  
2 article is not required to continue the perfected status of the security interest against  
3 creditors of and transferees from the original debtor.

4 Reporters' Comments

5 1. **Source.** Former Section 9-302(1), (2).

6 2. **General Rule.** Subsection (a) establishes a central Article 9 principle:  
7 Filing a financing statement is necessary for perfection of all security interests  
8 unless the subsection specifies otherwise.

9 3. **Support Obligations.** New subsection (a)(1) reflects the rule in new  
10 Section 9-308(d), which provides for automatic perfection of a security interest in a  
11 support obligation for collateral if the security interest in the collateral is perfected.

12 4. **Automatic Perfection.** The automatic perfection rules of former  
13 Section 9-302(1) have been relocated to new Section 9-308A, to which subsection  
14 (a) now makes reference.

15 5. **Preemptive Federal Law; Certificate of Title Acts.** New subsection  
16 (a)(3) excepts from the filing requirement property covered by a statute, regulation,  
17 or treaty described in Section 9-309A(a). Perfection as to this property is governed  
18 by Section 9-309A(c).

19 6. **Statutory Liens.** Statutory liens may be perfected only by filing, except  
20 to the extent that Section 9-313(e) provides otherwise with respect to proceeds.  
21 Thus agricultural liens are not mentioned in subsection (a)(5) or Section 9-311,  
22 which deal with possessory security interests. The priority rule in Section 9-330  
23 remains applicable to possessory statutory liens.

24 7. **Investment Property; Letters of Credit; Deposit Accounts.**  
25 Subsection (a)(6) is new. It reflect that a security interest in investment property, a  
26 letter of credit and proceeds of the letter of credit, and a deposit account may be  
27 perfected by control under Section 9-312.

28 8. **Assignments of Perfected Security Interests.** Subsection (b) concerns  
29 assignment of a perfected security interest. It provides that no filing is necessary in  
30 connection with an assignment of a perfected security interest by a secured party to  
31 an assignee in order to maintain perfection as against creditors and transferees of  
32 the debtor. Although subsection (b) addresses explicitly only the absence of an  
33 additional filing requirement, the same result normally will follow in the case of an  
34 assignment of a security interest perfected in a manner other than by filing, such as  
35 by control, by possession, or by compliance with a statute, regulation, or treaty  
36 under Section 9-309A(c). For example, as long as possession of collateral is  
37 maintained by an assignee or by the assignor or another person on behalf of the  
38 assignee, no further perfection steps need be taken on account of the assignment.  
39 Of course, additional action may be required for perfection of the assignee's interest  
40 as against creditors and transferees of the *assignor*.

1           **SECTION 9-309A. PERFECTION OF SECURITY INTERESTS IN**  
2           **PROPERTY SUBJECT TO CERTAIN STATUTES, REGULATIONS, AND**  
3           **TREATIES.**

4           (a) Except as otherwise provided in subsection (b), the filing of a financing  
5           statement is not necessary or effective to perfect a security interest in property  
6           subject to:

7                   (1) a statute, regulation, or treaty of the United States whose  
8           requirements for a security interest's obtaining priority over the rights of a lien  
9           creditor with respect to the property preempt Section 9-309(a); [or]

10                   (2) ~~the following statutes of this State;~~ [list any certificate-of-title statute  
11           covering automobiles, trailers, mobile homes, boats, farm tractors, or the like,  
12           which provides for a security interest to be indicated on the certificate as a  
13           condition or result of perfection, and any non-UCC central filing statute] .] [; or

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

18           (b) During any period in which collateral is inventory held for sale or lease  
19           or leased by a person that is in the business of selling or leasing goods of that kind,  
20           subsection[s] (a)(2) [does] [and (a)(3) do] not apply to a security interest in that  
21           collateral created by that person as debtor.

22           (c) Compliance with the requirements prescribed by a statute, regulation, or  
23           treaty described in subsection (a) for obtaining priority over the rights of a lien  
24           creditor is equivalent to the filing of a financing statement under this article.

25           Except as otherwise provided in Sections 9-311 and 9-314(c) for goods covered by  
26           a certificate of title, a security interest in property subject to a statute, regulation, or

1 treaty described in subsection (a) may be perfected only by compliance with those  
2 requirements, and a security interest so perfected remains perfected notwithstanding  
3 a change in the use or transfer of possession of the collateral. Except as otherwise  
4 provided in Section 9-314(c), duration and renewal of perfection of a security  
5 interest perfected by compliance with the requirements prescribed by the statute,  
6 regulation, or treaty are governed by the statute, regulation, or treaty. In other  
7 respects the security interest is subject to this article.

#### 8 Reporters' Comments

9 1. **Source.** Former Section 9-302(3), (4).

10 2. **Federal Statutes, Regulations, and Treaties.** Subsection (a)(1)  
11 provides explicitly that the filing requirement of this Article defers only to federal  
12 statutes, regulations, or treaties whose requirements for a security interest's  
13 obtaining priority over the rights of a lien creditor preempt Section 9-309(a). The  
14 provision eschews reference to the term "perfection, inasmuch as Section 9-308  
15 specifies the meaning of that term and a preemptive rule may use other  
16 terminology.

17 3. **Forum's Certificate-of-title Statute.** The description of certificate-of-  
18 title statutes in subsection (a)(2) has been revised to track the language of Section  
19 9-303.

20 4. **Foreign Jurisdiction's Certificate-of-title Statute.** Subsection (a)  
21 retains paragraph (3) (former Section 9-302(3)(c)), with appropriate revisions to  
22 conform that paragraph to Section 9-303. However, paragraph (3) appears in  
23 brackets because Section 9-303 apparently makes the paragraph unnecessary.  
24 Assume that a court is applying Section 9-309A as enacted in State B. If goods are  
25 covered by a State A certificate of title and State B has not issued a certificate, then  
26 State A's law, including its Section 9-309A(a)(2), will apply. Once application is  
27 made for a State B certificate, State B's law will apply, including State B's Sections  
28 9-303(b) and 9-309A(a)(2). There seems to be no room for a security interest to be  
29 perfected *under the law of State B* through compliance with *State A's certificate-of-*  
30 *title act*. Note, however, that State B's 9-314(c) does terminate perfection if  
31 perfection would have lapsed under the law of State A.

32 5. **Inventory Covered by a Certificate of Title.** Under subsection (d),  
33 perfection of a security interest in the inventory of a dealer is governed by the  
34 normal perfection rules, even if the inventory is covered by a certificate of title.  
35 Under former Section 9-302(3), a secured party who finances a dealer may need to  
36 perfect by filing for goods held for sale and by compliance with a certificate-of-title  
37 statute for goods held for lease. In some cases, this may require notation on  
38 thousands of certificates. The problem is compounded by the fact that dealers,  
39 particularly of automobiles, often do not know whether a particular item of



1 inventory will be sold or leased. Under subsection (d), notation is both unnecessary  
2 and ineffective.

3 The filing and other perfection provisions of this Article apply to goods  
4 covered by a certificate of title only “during any period in which collateral is  
5 inventory held for sale or lease or leased. If the debtor takes goods of this kind out  
6 of inventory and uses them, say, as equipment, a filed financing statement would  
7 not remain effective to perfect a security interest.

8 The phrase “held for sale or lease or leased by a person who is in the  
9 business of selling or leasing goods” is intended to include inventory in the  
10 possession of a lessee from a dealer. The definition of “inventory” (former Section  
11 9-101(4)) contains a similar phrase, but omits any reference to goods that are  
12 “leased. Section 9-106(d) conforms the definition of inventory to Section  
13 9-309A(a)(2) by including a reference to “leased” goods. (See also former Section  
14 9-103(3)(a), which seems to distinguish goods “leased” and goods “held for lease.”)

#### 15 **6. Compliance with Perfection Requirements of Other Statute.**

16 Subsection (c) clarifies former Section 9-302(4) by providing that compliance with  
17 the perfection requirements (i.e., the requirements for obtaining priority over a lien  
18 creditor), but not other requirements, of a statute, regulation, or treaty described in  
19 subsection (a) is equivalent to filing and is sufficient for perfection under this  
20 Article.

21 The Study Committee recommended that Article 9 preempt non-UCC law  
22 in this regard and provide that perfection occurs “upon receipt by appropriate state  
23 officials of a properly tendered application for a certificate of title on which the  
24 security interest is to be indicated. Recommendation 22.A. The draft does not  
25 include such a preemptive rule in Article 9 itself. We recognize that, in  
26 jurisdictions where perfection occurs upon issuance of a certificate, the absence of a  
27 preemptive rule may create a gap between the time that the goods are “covered” by  
28 the certificate under Section 9-303 and the time of perfection and also may result in  
29 turning some unobjectionable transactions into avoidable preferences under  
30 Bankruptcy Code § 547. (The preference risk arises if more than ten days passes  
31 between the time a security interest attaches and the time it is perfected.) A Note  
32 that instructs the legislature to amend the applicable certificate-of-title act to reflect  
33 the result urged by the Study Committee seems appropriate. Unless adjustments are  
34 made to a certificate-of-title act itself, conflicting rules in the Act and Article 9  
35 could create confusion and uncertainty.

36 Under some certificate-of-title statutes, including the Uniform Motor  
37 Vehicle Certificate of Title and Anti-Theft Act, perfection generally occurs upon  
38 delivery of specified documents to a state official but may, under certain  
39 circumstances, relate back to the time of attachment. This relation-back feature can  
40 create great difficulties for the application of the rules in Sections 9-303 and  
41 9-309A(c). Accordingly, we suggest that this Article include a Note recommending  
42 to legislatures that they remove any relation-back provisions from certificate-of-title  
43 laws affecting security interests.

44 **7. Compliance with Other Statute as Equivalent of Filing.** Like former  
45 Section 9-302(4), subsection (c) provides that compliance with a statute or treaty



described in subsection (a) (former Section 9-302(3)) “is equivalent to the filing of a financing statement. The meaning of this phrase currently is unclear, and many questions have arisen concerning the extent to which and manner in which Article 9 rules referring to “filing” are applicable to perfection by compliance with a certificate-of-title statute. There are at least three separate approaches for applying Article 9 filing rules to compliance with other statutes and treaties. First, as discussed in Comment 6 above, there are rules such as the rule establishing time of perfection (Section 9-515(a)) that we believe should be determined by the other statutes themselves. Second, some Article 9 filing rules can be applied to perfection under other statutes or treaties by revisions to the Article 9 text. Examples are Section 9-309(b) and Section 9-505. Third, other Article 9 rules may be made applicable to security interests perfected by compliance with another statute through the “equivalent to . . . filing” provision in the first sentence of Section 9-309A(c). We suggest that the third approach be reflected for the most part in the Official Comments. Official Comments could be added to various sections to explain how particular rules apply when perfection is accomplished under Section 9-309A(c). In the alternative, the Official Comments to Section 9-309A could be expanded to explain the “equivalent to . . . filing” concept as making applicable to the other statutes and treaties all references in Article 9 to “filing,” “financing statement,” and the like.

**8. Perfection by Possession of Goods Covered by a Certificate-of-title Statute.** A secured party that has perfected a security interest under the law of State A in goods that subsequently are covered by a State B certificate of title may face a predicament. Ordinarily, the secured party will have four months under State B’s Section 9-314(c) in which to (re)perfect by having its security interest noted on a State B certificate. This procedure is likely to require the cooperation of the debtor and any competing secured party whose security interest has been noted on the certificate. Official Comment 4(e) to former Section 9-103 observes that “that cooperation is not likely to be forthcoming from an owner who wrongfully procured the issuance of a new certificate not showing the out-of-state security interest, or from a local secured party finding himself in a priority contest with the out-of-state secured party. According to the Comment, “[t]he only solution for the out-of-state secured party under present certificate of title laws seems to be to reperfect by possession, i.e., by repossessing the goods. But, as the Report observes, the “solution” may not work. Report, 176. Former Section 9-302(4) provides that a security interest in property subject to a certificate-of-title statute “can be perfected only by compliance therewith.

This Article resolves the conflict in Sections 9-314(c), 9-309A(c), and 9-311(b) to provide that a security interest that remains perfected solely by virtue of Section 9-314(c) can be (re)perfected by the secured party’s taking possession of the collateral. These sections contemplate only that taking possession of goods covered by a certificate of title will work as a method of perfection. None of these sections creates a right to take possession. Section 9-609 and the agreement of the parties define the secured party’s right to take possession.

## **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.**

(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 may be perfected only by the secured party's taking possession under Section 9-311;

(2) a security interest in a deposit account may be perfected only by control under 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 may be perfected only by control under Section 9-312.

(b) While goods are in the possession of a bailee that has issued a negotiable document under Section 7-104(1) [or federal law] 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 that has issued a non-negotiable document under Section 7-104(2) [or federal law] 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

1 days from the time it attaches to the extent that it arises for new value given under  
2 an authenticated security agreement.

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

7 (1) makes available to the debtor the goods or documents representing  
8 the goods for the purpose of ultimate sale or exchange or for the purpose of loading,  
9 unloading, storing, shipping, transshipping, manufacturing, processing, or  
10 otherwise dealing with them in a manner preliminary to their sale or exchange, but  
11 priority among conflicting security interests in the goods is subject to Section  
12 9-322; or

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

16 (f) After the period specified in subsection (d) or (e) expires, perfection  
17 depends upon compliance with this article.

#### 18 Reporters' Comments

19 1. **Source.** Former Section 9-304, with additions and some minor changes.

20 2. **Instruments.** Under subsection (a), a security interest in instruments  
21 may be perfected by filing. This security interest is subject to defeat by subsequent  
22 purchasers (including secured parties). Section 9-328 provides that filing a  
23 financing statement does not constitute notice that would preclude a subsequent  
24 purchaser from becoming a holder in due course and taking free of all claims under  
25 Section 3-306. Moreover, if Section 9-327 is made applicable to instruments,  
26 purchasers that take possession of an instrument and give new value generally  
27 would achieve priority over a security interest in the instrument perfected by filing.

28 3. **Deposit Accounts.** Under new subsection (a)(2), the only means of  
29 perfecting a security interest in a deposit account as original collateral is by control.  
30 Filing is ineffective, except as provided in Section 9-313 with respect to proceeds.  
31 As defined in Section 9-109, "control" can arise as a result of an agreement among  
32 the secured party, debtor, and depository institution, whereby the last agrees to

1 comply with instructions of the first with respect to disposition of the funds on  
2 deposit, even though the debtor retains the right to direct disposition of the funds.  
3 Thus, subsection (a)(2) takes an intermediate position between certain non-UCC  
4 law, which conditions the effectiveness of a security interest on the secured party's  
5 enjoyment of such dominion and control over the deposit account that the debtor is  
6 unable to dispose of the funds, and the approach this Article takes to securities  
7 accounts (approved by the Conference as part of the Article 8 revisions in 1994),  
8 under which a secured party who is unable to reach the collateral without resort to  
9 judicial process may perfect by filing. By conditioning perfection on "control,  
10 subsection (a)(2) accommodates the views of those who think that a secured party  
11 who wishes to rely upon a deposit account should take steps to be able to reach the  
12 funds upon the debtor's default without having to resort to the judicial process. It  
13 also accommodates those who think that a more stringent perfection requirement--  
14 e.g., requiring the secured party to achieve absolute dominion and control, to the  
15 exclusion of the debtor--, would prevent perfection in transactions in which the  
16 secured party actually relies on the deposit account and maintains some meaningful  
17 control over it.

18       **4. Letters of Credit and Proceeds of Letters of Credit.** A letter of credit  
19 commonly is a "support obligation, as defined in Section 9-102. If so, and  
20 perfection as to the related account, chattel paper, document, instrument, [insurance  
21 policy,] general intangible, or investment property will perfect as to the letter of  
22 credit and proceeds of the letter of credit. See Section 9-308(d). Those who are  
23 familiar with letter-of-credit practice disagree about the circumstances, if any, under  
24 which perfection by control should be permitted. Until this issue is resolved, new  
25 subsection (a)(3) provides, except for letters of credit that are support obligations, a  
26 security interest in a letter of credit or the proceeds of the letter of credit may be  
27 perfected only by control.

28       **5. Goods in Possession of Bailee.** The rule in subsection (c) has been  
29 limited to goods in the possession of a bailee that has issued a non-negotiable  
30 document of title under Article 7 [or federal law]. Subsection (b) applies to goods  
31 in the possession of a bailee that has issued a negotiable document. Section 9-311  
32 governs perfection of a security interest in goods in the possession of a bailee that  
33 has not issued a document of title.

34       The perfection step under subsection (c) occurs when the bailee receives  
35 notification of the secured party's interest in the goods, regardless of who sends the  
36 notification. Receipt of notification is effective to perfect regardless of whether the  
37 bailee attorns to the secured party. Compare Section 9-311(c) (perfection by  
38 possession as to goods not covered by a document requires bailee's  
39 acknowledgment).

40       **6. Maintaining Perfection After Surrendering Possession.**  
41 "Enforcement" has been added in subsection (e) as one of the special and limited  
42 purposes for which a secured party can release an instrument or certificated security  
43 to the debtor and still remain perfected.

44       **7. Length of Temporary Perfection.** The time periods in subsections (d),  
45 (e), and (f) have been reduced from 21 to 20 days, which is the time period  
46 generally applicable in this Article.

1           **SECTION 9-311. WHEN POSSESSION BY SECURED PARTY**  
2           **PERFECTS SECURITY INTEREST WITHOUT FILING.**

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

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

11          (c) This subsection applies to collateral other than goods covered by a  
12          document. If the collateral is in the possession of a person other than the debtor,  
13          the secured party, or a lessee of the collateral from the debtor in the ordinary course  
14          of the debtor's business, the secured party takes possession when the person in  
15          possession signs a record acknowledging that it holds possession for the secured  
16          party's benefit. If a person, other than the debtor, the secured party, or a lessee of  
17          the collateral from the debtor in the ordinary course of the debtor's business, takes  
18          possession of the collateral after having authenticated a record acknowledging that  
19          it will hold possession of collateral for the secured party's benefit, the secured party  
20          takes possession when the person takes possession. [A security interest is perfected  
21          by possession when the secured party takes possession, without a relation back, and  
22          continues only while the secured party retains possession, unless otherwise  
23          provided in this article.]

24          (d) A person in possession of collateral is not required to acknowledge that  
25          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.

#### Reporters' Comments

1. **Source.** Former Sections 9-305; 9-115(6).

2. **Certificated Securities.** The second sentence of subsection (a) reflects the traditional rule for perfection of a security interest in certificated securities. Compare Sections 9-115(4)(a), 8-106(a), 9-115(6) (1994 Official Text); Sections 8-321, 8-313(1)(a) (1978 Official Text); Section 9-305 (1972 Official Text).

3. **Goods Covered by a Certificate of Title.** Subsection (b) is necessary to effect changes to the choice-of-law rules governing goods covered by a certificate of title. These changes are described in the Reporters' Comments to Section 9-309. Subsection (b), like subsection (a), does not create a right to take possession. Rather, it indicates the circumstances under which the secured party's taking possession of goods covered by a certificate of title is effective to perfect a security interest in the goods.

4. **Goods in Possession of a Third Party: Perfection.** Former Section 9-305 permits perfection of a security interest by notification to a bailee in possession of collateral. This Article distinguishes between goods in the possession of a bailee that has issued an Article 7 [or federal] document of title covering the goods and goods in the possession of a third party that has not issued a document. Section 9-310(b) or (c) applies to the former, depending on whether the document is negotiable; Section 9-311(c) applies to the latter.

Notification of a third person does not suffice to perfect under Section 9-311(c). Rather, perfection does not occur unless the third person authenticates an acknowledgment that it holds possession of the collateral for the secured party's benefit. Compare Section 9-310(c), under which receipt of notification of the security party's interest by a bailee holding goods subject to a non-negotiable document is sufficient to perfect, even if the bailee does not acknowledge receipt of the notification. A third person may acknowledge that it will hold for the secured party's benefit goods to be received in the future. Under these circumstances,



1 perfection by possession occurs when the third person obtains possession of the  
2 goods.

3 Under subsection (c), acknowledgment of notification by a lessee in  
4 ordinary course of business (as defined in Section 2A-103) does not suffice for  
5 possession. The section thus rejects the reasoning of *In re Atlantic Systems, Inc.*,  
6 135 B.R. 463 (Bankr. S.D.N.Y. 1992) (holding that notification to debtor-lessor's  
7 lessee sufficed to perfect security interest in leased goods). See Steven O. Weise,  
8 *Perfection by Possession: The Need for an Objective Test*, 29 Idaho Law Rev. 705  
9 (1992-93) (arguing that lessee's possession in ordinary course of debtor-lessor's  
10 business does not provide adequate public notice of possible security interest in  
11 leased goods). Inclusion of a per se rule concerning lessees is not meant to  
12 preclude a court, under appropriate circumstances, from determining that a third  
13 person is so closely connected to or controlled by the debtor that the debtor has  
14 retained effective possession. If so, the third person's acknowledgment would not  
15 be sufficient for perfection.

16 The brackets around the last sentence of subsection (c) reflect uncertainty  
17 about whether the sentence is necessary and, if so, where it should appear.

18 **5. Goods in Possession of a Third Party: Consequences of**  
19 **Acknowledgment.** Subsections (e) and (f) are new and address matters as to which  
20 former Article 9 is silent. They derive in part from Section 8-106(g). Subsection  
21 (e) provides that a person in possession of collateral is not required to acknowledge  
22 that it holds for a secured party. Subsection (f) provides that an acknowledgment is  
23 effective even if wrongful as to the debtor and that, in the absence of the person's  
24 agreement, the person has no responsibilities to a secured party by virtue of its  
25 making an acknowledgment. For example, by acknowledging, a third party does  
26 not become obliged to act on the secured party's direction or to remain in  
27 possession of the collateral. Arrangements involving the possession of goods are  
28 hardly standardized. They include bailments for services to be performed on the  
29 goods (such as repair or processing), for use (leases), as security (pledges), for  
30 carriage, and for storage. This Article leaves to the agreement of the parties and to  
31 any other applicable law the imposition of duties and responsibilities upon a person  
32 who acknowledges under subsection (d). The purpose of subsections (e) and (f) is  
33 to make clear that an acknowledgment does not give rise to any such duties or  
34 responsibilities under this Article.

35 **6. "Possession."** This section does not define "possession. In  
36 determining whether a particular person has possession, the principles of agency  
37 apply. For example, if the collateral clearly is in possession of an agent of the  
38 secured party for the purposes of possessing on behalf of the secured party, and if  
39 the agent is not also an agent of the debtor, the secured party has taken actual  
40 possession without the need to rely on a third-party acknowledgment. However, if  
41 the agent is an agent of both the secured party and the debtor, prudence might  
42 suggest that the secured party obtain the agent's acknowledgment in order to ensure  
43 perfection by possession.

## 44 **SECTION 9-312. PERFECTION BY CONTROL.**



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

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

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

9 Reporters' Comments

10 1. **Source.** New.

11 2. **Control.** This section provides for perfection by control with respect to  
12 letters of credit and proceeds of letters of credit, deposit accounts, and investment  
13 property.

14 **SECTION 9-313. "PROCEEDS"; SECURED PARTY'S RIGHTS ON**  
15 **DISPOSITION OF COLLATERAL AND IN PROCEEDS.**

16 (a) "Proceeds" includes the following property:

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

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

20 (3) rights arising out of collateral;

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

23 (5) to the extent of the value of collateral and to the extent payable to the  
24 debtor or the secured party, insurance payable by reason of the loss or  
25 nonconformity of, defects in, or damage to the collateral.

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

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

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

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

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

15          (e) A security interest in or a statutory lien on proceeds is a perfected  
16     security interest or statutory lien if the interest in or lien on the original collateral  
17     was perfected. The security interest in or statutory lien on proceeds ceases to be a  
18     perfected interest or lien and becomes unperfected on the 21st day after the security  
19     interest attaches to the proceeds or the statutory lien becomes effective as to the  
20     proceeds unless:

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

1 (2) the proceeds are identifiable cash proceeds; or  
2 (3) the security interest in or statutory lien on the proceeds is perfected  
3 within 20 days after the security interest attaches to the proceeds or the statutory  
4 lien becomes effective as to the proceeds.

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

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

14 Reporters' Comments

15 1. **Source.** Former Section 9-306.

16 2. **What Constitutes Proceeds.** Subsection (a) expands the definition of  
17 proceeds beyond that contained in former Section 9-306 and resolves ambiguities in  
18 the former section.

19 a. **Distributions on Account of Collateral.** The phrase “whatever is . . .  
20 distributed on account of, collateral, in subsection (a)(2), is broad enough to cover  
21 cash or stock dividends distributed on account of securities or other investment  
22 property that is original collateral. Compare former Section 9-306 (1994 Official  
23 Text) (“Any payments or distributions made with respect to investment property  
24 collateral are proceeds. ”). This section rejects the holding of *Hastie v. FDIC*, 2  
25 F.3d 1042 (10th Cir. 1993) (holding that post-petition cash dividends on stock  
26 subject to pre-petition pledge are not “proceeds” under Bankruptcy Code § 552(b))  
27 to the extent the holding relies on the Article 9 definition of “proceeds.”

28 b. **Distributions on Account of Support Obligations.** Subsection (a)(2)  
29 makes explicit what is implicit under current law: Collections and distributions  
30 under collateral consisting of various credit support arrangements (“support  
31 obligations, as defined in Section 9-102) are afforded treatment identical to  
32 proceeds collected from or distributed by the obligor on the underlying (supported)  
33 right to payment or other intangible collateral. Proceeds of support obligations also  
34 are proceeds of the underlying rights to payment or intangible. Note that in the  
35 special case of a letter of credit, the secured party’s failure to take a direct interest

1 in the support obligation may leave its security interest exposed to a priming  
2 interest of a party who does take a direct interest. See Section 9-326 (security  
3 interest in letter of credit perfected by control has priority over a conflicting security  
4 interest).

5 c. **Proceeds of Proceeds.** The definition of “proceeds” no longer provides  
6 that proceeds of proceeds are themselves proceeds. This idea is expressed in the  
7 revised definition of “collateral” in Section 9-102. No change in meaning is  
8 intended.

9 d. **Proceeds Received by Person Who Did Not Create Security Interest.**  
10 When collateral is sold subject to a security interest and the buyer then resells the  
11 collateral, a question has arisen under former Article 9 concerning whether the  
12 “debtor” has “received” what the buyer received on resale and, therefore, whether  
13 those receipts are “proceeds.” See former Section 9-306(2). This Article contains  
14 no requirement that property be “received” by the debtor for the property to qualify  
15 as proceeds. It is necessary only that the property be traceable, directly or  
16 indirectly, to the original collateral.

17 3. **Authorized Dispositions.** Subsection (c), which derives from existing  
18 subsection (2), makes explicit that the authorized disposition to which it refers is an  
19 authorized disposition “free of” security interests. See PEB Commentary No. 3.  
20 The change in language is not intended to address the frequently-litigated situation  
21 in which the effectiveness of the secured party’s consent to a disposition is  
22 conditioned upon the secured party’s receipt of the proceeds. In that situation,  
23 subsection (c) would leave the determination of authorization to the courts, as under  
24 current law.

25 4. **Identifiability; Tracing.** Subsection (d) is new. It indicates when  
26 proceeds commingled with other property are identifiable proceeds. The “equitable  
27 principles” to which subsection (d) refers may include the “lowest intermediate  
28 balance rule.” See Restatement of Trusts, Second, § 202.

29 5. **Automatic Perfection in Proceeds.** This Article extends the period of  
30 automatic perfection in proceeds from 10 days to 20 days, commencing with the  
31 day the security interest attaches to the proceeds. See subsection (e). The loss of  
32 perfected status under subsection (e) is prospective only. Compare, e.g., Section  
33 9-516(a) (deeming security interest unperfected retroactively).

34 a. **Proceeds Acquired with Cash Proceeds or Funds from Deposit**  
35 **Account.** Under former Section 9-306(3)(a), a security interest in proceeds remains  
36 perfected beyond the period of automatic perfection if a filed financing statement  
37 covers the original collateral and the proceeds are collateral in which a security  
38 interest may be perfected by filing in the office where the financing statement has  
39 been filed. A different rule applies if the proceeds are acquired with cash proceeds,  
40 as is the case if the original collateral (inventory) is sold for cash (cash proceeds)  
41 that is used to purchase equipment (proceeds). Under these circumstances, the  
42 security interest in the equipment proceeds remains perfected only if the description  
43 in the filed financing indicates the type of property constituting the proceeds  
44 (equipment). Subsection (e)(1) of this Article applies the rule of former Section

1 9-306(3)(a) to proceeds that have been acquired with funds from a deposit account  
2 serving as original collateral.

3 Security interests in the proceeds of bank accounts evidenced by an  
4 instrument (e.g., certain certificates of deposit), which by definition are not “deposit  
5 accounts, would be governed by the rules applicable to proceeds of instruments  
6 generally.

7 **b. Continuation of Perfection in Cash Proceeds.** Former subsection  
8 (3)(b) provides that if a filed financing statement covers original collateral, a  
9 security interest in cash proceeds of the collateral remains perfected beyond the ten-  
10 day period of automatic perfection. Subsection (e)(2) extends the benefits of  
11 former paragraph (3)(b) to proceeds of original collateral in which a security  
12 interest is perfected by a method other than filing. This subsection provides that if  
13 the security interest in the original collateral was perfected, a security interest in  
14 identifiable cash proceeds will remain perfected indefinitely, regardless of whether  
15 the security interest in the original collateral remains perfected.

16 **6. Transferees of Cash Proceeds.** The former text of and Official  
17 Comments to Section 9-306 do not deal adequately with the rights of a person to  
18 whom the debtor has transferred cash proceeds, such as a person who receives  
19 payment of a check drawn on a deposit account constituting proceeds. Section  
20 9-329 addresses this issue.

21 **7. Insolvency Proceedings; Returned and Repossessed Goods.** This  
22 Article deletes former subsection (4), which deals with proceeds in insolvency  
23 proceedings, and former subsection (5), which deals with returned and repossessed  
24 goods. In the absence of Section 9-306(5), Official Comments to Section 9-327  
25 will explain and clarify the application of priority rules to returned and repossessed  
26 goods as proceeds of chattel paper.

27 **8. Proceeds of Collateral Subject to Statutory Lien.** Subsection (c),  
28 which gives a secured party an interest in proceeds automatically, applies only to  
29 collateral encumbered by a security interest. If collateral is encumbered by a  
30 statutory lien, other law (e.g. the statute giving rise to the statutory lien), and not  
31 subsection (c), determines the extent to which the lien continues in proceeds. Only  
32 if other law provides that the statutory lien covers proceeds do the rules relating to  
33 continued perfection of security interests in proceeds (i.e., subsections (e), (f), and  
34 (g)) apply to the proceeds.

35 **9. Lapse or Termination of Financing Statement During 20-day Period.**  
36 Subsection (g) provides that a security interest in or statutory lien on proceeds  
37 perfected under subsection (e)(1) ceases to be perfected when the financing  
38 statement covering the original collateral lapses or is terminated. If the lapse or  
39 termination occurs before the 21st day after the security interest or statutory lien  
40 attaches, however, the security interest in or statutory lien on the proceeds remains  
41 perfected until the 21st day. Section 9-309A(c) provides that compliance with the  
42 perfection requirements of a statute or treaty described in Section 9-309A(a) “is  
43 equivalent to the filing of a financing statement. It follows that collateral subject  
44 to a security interest perfected by such compliance under Section 9-309A(c) is

1 covered by a “filed financing statement within the meaning of Section 9-313(e)(1)  
2 and (g).

3 **SECTION 9-314. CONTINUED PERFECTION OF SECURITY**  
4 **INTEREST OR STATUTORY LIEN FOLLOWING CHANGE IN**  
5 **APPLICABLE LAW.**

6 (a) A security interest perfected pursuant to the law designated in Section  
7 9-301(1) or a statutory lien perfected pursuant to the law designated in Section  
8 9-302(1) remains perfected until the earliest of the expiration of four months after a  
9 change of the debtor’s location to another jurisdiction, the expiration of four  
10 months after a transfer of collateral to a debtor located in another jurisdiction, the  
11 expiration of four months after a new debtor located in another jurisdiction  
12 becomes bound under Section 9-203(c), or the time perfection would have ceased  
13 under the law of the first jurisdiction. If the security interest or statutory lien  
14 becomes perfected under the law of the other jurisdiction before the end of that  
15 period, it continues perfected thereafter. Otherwise, it becomes unperfected and is  
16 deemed never to have been perfected as against a ~~prior~~ previous or subsequent  
17 purchaser of the collateral for value.

18 (b) A possessory security interest in collateral, other than goods covered by  
19 a certificate of title and as-extracted collateral consisting of goods, minerals  
20 ~~described in Section 9-306~~, remains continuously perfected if:

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

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

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

26 **Alternative A**

1 (c) A security interest in goods covered by a certificate of title which is  
2 perfected by any method under the law of another jurisdiction when the goods  
3 become covered by a certificate of title from this jurisdiction remains perfected  
4 until the earlier of the time the security interest would have become unperfected  
5 under the law of the other jurisdiction had the goods not become so covered or the  
6 expiration of four months after the goods had become so covered. If the security  
7 interest becomes perfected under Section 9-309A(c) or 9-311 before the earlier of  
8 that time or the expiration of that period, it continues perfected thereafter.  
9 Otherwise, it becomes unperfected and is deemed never to have been perfected as  
10 against a ~~prior~~ previous or subsequent purchaser of the collateral for value.

11 **Alternative B**

12 (c) A security interest in goods covered by a certificate of title which is  
13 perfected by any method under the law of another jurisdiction when the goods  
14 become covered by a certificate of title from this jurisdiction remains perfected  
15 until the security interest would have become unperfected under the law of the other  
16 jurisdiction had the goods not become so covered. However, if the applicable  
17 requirements for perfection under Section 9-309A(c) or 9-311 are not satisfied  
18 before the earlier of the time the security interest would have become unperfected  
19 under the law of the other jurisdiction had the goods not become so covered or the  
20 expiration of four months after the goods had become so covered, the security  
21 interest becomes unperfected as against a purchaser of the goods for value and is  
22 deemed never to have been perfected as against a ~~prior~~ previous or subsequent  
23 purchaser of the collateral for value.

24 **End of Alternatives**

25 (d) A security interest in deposit accounts[, a letter of credit or proceeds of  
26 the letter of credit,] [or investment property] perfected under the law of the



1       depository institution's jurisdiction[, the issuer's jurisdiction,] [, the securities  
2       intermediary's jurisdiction, or the commodity intermediary's jurisdiction, as  
3       applicable] remains perfected until the earlier of the expiration of four months after  
4       a change of the [depository institution's] jurisdiction or the time perfection would  
5       have ceased under the law of the first jurisdiction. If the security interest becomes  
6       perfected under the law of the other jurisdiction before the end of that period, it  
7       continues perfected thereafter. Otherwise, it becomes unperfected and is deemed  
8       never to have been perfected as against a ~~prior~~ previous or subsequent purchaser of  
9       the collateral for value.

10       [(e) A security interest in a letter of credit or proceeds of the letter of credit  
11       perfected under the law of the issuer's jurisdiction remains perfected until the  
12       earlier of the expiration of four months after a change of the issuer's jurisdiction or  
13       the time perfection would have ceased under the law of the first jurisdiction. If the  
14       security interest becomes perfected under the law of the other jurisdiction before  
15       the end of that period, it continues perfected thereafter. Otherwise, it becomes  
16       unperfected and is deemed never to have been perfected as against a previous or  
17       subsequent purchaser of the collateral for value.]

18       [(f) ~~(e)~~ A security interest in investment property perfected under the law of  
19       the securities intermediary's jurisdiction or the commodity intermediary's  
20       jurisdiction, as applicable, remains perfected until the earlier of the expiration of  
21       four months after a change of the intermediary's jurisdiction or the time perfection  
22       would have ceased under the law of the first jurisdiction. If the security interest  
23       becomes perfected under the law of the other jurisdiction before the end of that  
24       period, it continues perfected thereafter. Otherwise, it becomes unperfected and is  
25       deemed never to have been perfected as against a ~~prior~~ previous or subsequent  
26       purchaser of the collateral for value.]

Reporters' Comments

1. **Source.** Former Section 9-103(1)(d), (2)(b), (3)(e).

2. **Retroactive Unperfection.** This section deals with continued perfection of security interests and statutory liens that have been perfected under the law of another jurisdiction. The fact that the law of a particular jurisdiction ceases to govern perfection under Sections 9-301 through 9-307 does not necessarily mean that a security interest or statutory lien perfected under that law automatically becomes unperfected. This section generally provides that a security interest or statutory lien perfected under the law of one jurisdiction remains perfected for four months even though the jurisdiction whose law governs perfection changes.

This section generally follows the approach of former Section 9-103(1)(d) and (3)(e) with respect to 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 security interest becomes unperfected prospectively and, as against purchasers for value but not as against donees or lien creditors, retroactively. The rule applies to statutory liens, as well. See also Section 9-516 (taking the same approach with respect to lapse). Although this approach creates the potential for circular priorities, the alternative—retroactive unperfection against lien creditors—would create substantial and unjustifiable preference risks.

3. **Goods Covered by a Certificate of Title.** 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, a prior perfection under the law of another jurisdiction 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.

4. **Depository Institutions, Letter of Credit Issuers, and Securities Intermediaries.** The bracketed language in subsection (d) and the brackets around subsections (e) and (f) raise the issue whether one subsection is adequate to address changes in the jurisdiction of a depository institution, issuer of a letter of credit, securities intermediary, and commodity intermediary, or whether a one or more separate subsections are needed. ~~for depository institutions. (A third possibility is to create three separate subsections—one for depository institutions, one for securities intermediaries, and one for commodity intermediaries—each of which would contain the same rule.)~~

1 [SUBPART 3. PRIORITY]

2 **SECTION 9-315. INTERESTS THAT TAKE PRIORITY OVER AND**  
3 **TAKE FREE OF UNPERFECTED SECURITY INTEREST OR**  
4 **AGRICULTURAL LIEN.**

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

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

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

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

13 (c) Except as otherwise provided in subsection (f), ~~(g)~~, a buyer of goods,  
14 instruments, documents, a security certificate, or chattel paper which is not a  
15 secured party takes free of a security interest if the buyer gives value and receives  
16 delivery of the collateral without knowledge of the security interest and before it is  
17 perfected.

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

21 (e) A buyer of accounts, general intangibles, or investment property other  
22 than a security certificate which is not a secured party takes free of a security  
23 interest if the buyer gives value without knowledge of the security interest and  
24 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.

#### Reporters' Comments

1. **Source.** Former Section 9-301.

2. **Filed but Unattached Security Interests.** Under former Section 9-301(1)(b), a lien creditor's rights have priority over an unperfected security interest. Perfection requires attachment (former Section 9-303) and attachment requires the giving of value (former Section 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. This result comports with the *nemo dat* concept: When the security interest attaches, the collateral is already subject to the judicial lien.

On the other hand, this result treats the first secured advance differently from all other advances. The special rule for future advances in Section 9-320(b) (former Section 9-301(d)) affords priority to a discretionary advance made by a secured party within 45 days after the lien creditor's rights arise as long as the secured party is "perfected" when the lien creditor's lien arises—i.e., so long as the advance is not the first one and an earlier advance has been made.

Subsection (a)(2) revises former Section 9-301(1)(b) and treats the first advance the same as subsequent advances. That is, a judicial lien that arises after the secured party files and before the security interest attaches and becomes perfected is subordinate to all advances secured by the security interest.

3. **Security Interests of Consignors and Receivables Buyers.** "Security interest" is defined in Section 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). A consignee or a seller of receivables each has rights in the collateral that a lien creditor may reach, as 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. See Section 9-315A.

4. **Receivables Buyers That Are Not Secured Parties.** A buyer of accounts, chattel paper, or payment intangibles can be a person "which is not a secured party" under subsection (c) or (d) only in a transaction that is excluded from Article 9 by Section 9-112(c)(7), (8), (9), or (10).

5. **Statutory Liens.** Subsection (a) subordinates unperfected agricultural liens in the same fashion that it subordinates unperfected security interests.

Subsection (b), which is new, incorporates by reference a priority rule governing competing statutory liens and security interests. See Section 9-319A. This Article does not govern the relative priority of a judicial lien creditor and a holder of a non-agricultural statutory lien.

6. **Bulk Sales; Bulk Transfers.** This section deletes the references, contained in prior official texts, to the transferee in bulk and the buyer in a bulk sale. Each of these persons is a “buyer not in ordinary course of business.

7. **“Receives Delivery.”** The Official Comments should clarify when a debtor “receives delivery” of collateral for purposes of subsections (c), (d), and (f).

## **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.

### **Reporters' Comments**

1. **Source.** New.

2. **Consignments.** Revised Section 1-201(37), reproduced in the Appendix, defines “security interest” to include the interest of a consignor of goods under a many true consignments. ~~consignment.~~ Subsection (a) of this section provides that, for purposes of determining the rights of third parties, the consignee acquires all rights and title that the consignor had, if the consignor's security interest is unperfected. The consignee acquires these rights even though, as between the parties, it purchases a limited interest in the goods (as would be the case, e.g., in a true consignment, under which the consignee acquires only the interest of a bailee). As a consequence of this section, creditors of the consignee can acquire judicial liens and security interests in the goods. Former Section 9-114 contained priority rules applicable to security interests in consigned goods. Under this Article, the priority rules for purchase money security interests in inventory apply to consignments. See Section 9-104(b). Accordingly, a special section

1 containing priority rules for consignments no longer is needed. Section 9-315  
2 determines whether the rights of a judicial lien creditor are senior to the interest of  
3 the consignor, Sections 9-319 and 9-322 govern competing security interests in  
4 consigned goods, and Sections 9-315, 9-313, and 9-316 determine whether a buyer  
5 takes free of the consignor's interest.

6 **Example:** SP-1 delivers goods to D in a transaction that constitutes a  
7 "consignment" as defined in Section 9-102. ~~on consignment.~~ SP-1 does not  
8 file a financing statement. D then grants a security interest in the goods to SP-2.  
9 SP-2 files a proper financing statement. Assuming D is a mere bailee, as in a  
10 "true consignment, D would not appear to have any rights in the collateral  
11 (beyond those of a bailee) so as to permit SP-2's security interest to attach to the  
12 greater rights. Nevertheless, under this section, for purposes of determining the  
13 rights of D's creditors, D acquires SP-1's rights. Accordingly, SP-2's security  
14 interest attaches, is perfected by the filing, and is senior to SP-1's interest.

15 Insofar as creditors of the consignee are concerned, this Article to a  
16 considerable extent reformulates the former law, which appears in Sections 2-326  
17 and former 9-114, without changing the results. Neither Article 2 nor former  
18 Article 9 specifically addresses the rights of non-ordinary course buyers from the  
19 consignee.  
20

21 **3. Buyers of Accounts and Chattel Paper.** Subsection (b) takes a similar  
22 approach to the interest of a debtor that has sold an account or chattel paper. If the  
23 buyer-secured party's security interest is unperfected, then the seller can transfer  
24 and the creditors of the seller can reach the account or chattel paper as if it had not  
25 been sold.

26 **Example:** D sells accounts or chattel paper to B-1 and retains no interest in  
27 them as against B-1. B-1 does not file a financing statement. D then sells the  
28 same receivables to B-2. B-2 files a proper financing statement. Having sold  
29 the receivables to B-1, D would not appear to have any rights in the collateral so  
30 as to permit B-2's security (ownership) interest to attach. Nevertheless, under  
31 this section, for purposes of determining the rights of D's creditors, D has the  
32 rights that D sold. Accordingly, B-2's security interest attaches, is perfected by  
33 the filing, and is senior to B-1's interest.

34 **4. Effect of Perfection.** This section leaves to other law (including Article  
35 2 and applicable Article 9 cut-off and priority rules) the question whether a  
36 consignee has a property interest in the goods (beyond that of a bailee) that could be  
37 reached by creditors or acquired by purchasers if the consignor's security interest is  
38 perfected. However, if the security interest of a buyer of an account or chattel paper  
39 is perfected, the seller normally would not retain property rights in the account or  
40 chattel paper.

## 41 **SECTION 9-316. BUYER OF GOODS.**

42 (a) Subject to subsection (d) ~~(c)~~, a buyer in ordinary course of business [,  
43 other than a person buying farm products from a person engaged in farming

1 operations,] takes free of a security interest created by the buyer's seller, even if the  
2 security interest is perfected and even if the buyer knows of its existence.

3 (b) Subject to subsection (d) ~~(e)~~, a buyer of consumer goods takes free of a  
4 security interest, even if perfected, if the buyer buys without knowledge of the  
5 security interest, for value, and for the buyer's own personal, family, or household  
6 purposes, unless before the buyer's purchase the secured party filed a financing  
7 statement covering the goods. To the extent that it affects the priority of a security  
8 interest over a buyer of consumer goods under this section, the period of  
9 effectiveness of a filing made in the jurisdiction in which the debtor is located is  
10 governed by Section 9-314(a).

11 (c) [Subject to subsection (d), a] [A] buyer in ordinary course of business  
12 buying oil, gas, or other minerals at the wellhead or minehead or after extraction  
13 takes free of an interest arising out of an encumbrance.

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

16 Reporters' Comments

17 1. **Source.** Former Section 9-307.

18 2. **Possessory Security Interests.** Subsection (c) is new. It rejects the  
19 holding of *Tanbro Fabrics Corp. v. Deering Milliken, Inc.*, 350 N.E.2d 590 (N.Y.  
20 1976) and, together with Section 9-315(c), prevents a buyer of collateral from  
21 taking free of a security interest if the collateral is in the possession of the secured  
22 party. "The secured party referred in subsection (c) is the holder of the security  
23 interest referred to in one of the preceding subsections. A secured party is in  
24 possession of collateral for purposes of this subsection if the collateral is in the  
25 possession of a third party and the secured party takes possession under Section  
26 9-311(c).

27 3. **Farm Products.** Brackets have been added to the farm products  
28 exception in subsection (a). The Drafting Committee will consider this question  
29 further.

30 4. **Oil, Gas, and Other Minerals.** Under subsection (a), a buyer in  
31 ordinary course of business of minerals at the wellhead or minehead or after  
32 extraction takes free of a security interest created by the seller. New subsection (c)  
33 generally follows the recommendation of the ABA Oil and Gas Task Force by



expanding the protection afforded these buyers. See Alvin C. Harrell & Owen L. Anderson, *Report of the ABA UCC Committee Task Force on Oil and Gas Finance*, 26 Texas Tech. L. Rev. 805, 813-14 (1994). Specifically, it provides that the buyers take free not only of Article 9 security interests but also of interests “arising out of an encumbrance. The term “encumbrance” is defined in Section 9-102 to include real property mortgages, other liens on real property, and “any other right in real property other than an ownership interest. Thus, to the extent that a real property mortgage encumbers minerals not only before but also after extraction, this section enables a buyer in ordinary course of the minerals to take free of the mortgage. The draft does not, however, follow the Task Force’s recommendation that these buyers should also take free of interests arising out of ownership interests in the real property. This issue is significant only in a minority of states. Several of them have adopted special statutes and nonuniform amendments to Article 9 to provide special protections to mineral owners, whose interests often are highly fractionalized in the case of oil and gas. See Terry I. Cross, *Oil and Gas Product Liens--Statutory Security Interests for Producers and Royalty Owners Under the Statutes of Kansas, New Mexico, Oklahoma, Texas and Wyoming*, 50 Consumer Fin. L. Q. Rep. 418 (1996). Inasmuch as a complete resolution of the issue is likely to require the addition of complex provisions to the draft, and there are good reasons to believe that a uniform solution would not be feasible, the draft leaves its resolution to other legislation.

## SECTION 9-317. LESSEE OF GOODS IN ORDINARY COURSE OF

**BUSINESS.** 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 if the security interest is perfected and the lessee knows of its existence.

## Reporters' Comments

1. **Source.** Section 2A-307(3).

2. **Status.** The Drafting Committee for Articles 2A and 9 will coordinate their work on the issues addressed by this section.

**SECTION 9-318. LICENSEE IN ORDINARY COURSE OF BUSINESS.**

[To be moved from Article 2B]

## Reporters' Comments

**Status.** The Article 2B Drafting Committee has been developing the rules governing licenses and other transfers of intellectual property rights, including the creation of security interests in intellectual property. We have been communicating with the Reporter for Article 2B, Raymond Nimmer, in an effort to ensure that the provisions of Articles 2B and 9 are consistent.

1           We anticipate that rules having their principal effect on security interests in  
2 intellectual property will appear in Article 9. Although rules of general  
3 applicability to transferees or creditors are likely to appear in Article 2B, we expect  
4 that the Article 9 Drafting Committee will have an opportunity to review and  
5 comment upon them before they are finalized.

6           **SECTION 9-319. PRIORITIES AMONG CONFLICTING SECURITY**  
7 **INTERESTS AND AGRICULTURAL LIENS IN SAME COLLATERAL.**

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

13           (1) Conflicting security interests and agricultural liens rank according to  
14 priority in time of filing or perfection. Priority dates from the earlier of the time a  
15 filing covering the collateral is first made or the time the security interest or  
16 agricultural lien is first perfected, unless there is a period thereafter when there is  
17 neither filing nor perfection.

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

20           **Alternative A**

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

23           **Alternative B**

24           (b) Except as otherwise provided in [this Article] [the Uniform Commercial  
25 Code] [Sections 9-322 and 9-325], a security interest in or agricultural lien on  
26 collateral which has priority over a conflicting security interest or agricultural lien

1       also has priority in [identifiable] proceeds of the collateral while the security  
2       interest or agricultural lien in proceeds is perfected.

3                               **[End of Alternatives]**

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

8                               Reporters' Comments

9               1. **Source.** Former Section 9-312(5), (6).

10              2. **General Rule.** Subsection (a)(1) contains the basic, first-in-time rule,  
11       under which the first security interest that is filed or perfected takes priority. This  
12       rule is subject to the other rules contained in Part 3 of this Article, including cases  
13       of production money security interests, purchase money security interests, security  
14       interests in deposit accounts, and security interests in letters of credit that qualify  
15       for the special priorities in Sections 9-321, 9-322, 9-325, and 9-326. This  
16       subsection also is subject to Sections 4-210 and 5-118. The latter is new. It affords  
17       a security interest in a letter of credit to the issuer or nominated person and appears  
18       in the Appendix to the draft. Inasmuch as Section 9-104(b) treats the interest of a  
19       consignor to be a purchase money security interest in inventory, the reference to  
20       former Section 9-114 has been deleted.

21              3. **Priority in Proceeds.** Subsection (b), Alternative A, derives from  
22       former Section 9-312(6). It recognizes that the temporal (first-in-time) priority rule  
23       of subsection (a) should apply to proceeds as well as to the antecedent collateral.  
24       Under that approach, it is necessary to make special provision for situations where  
25       the applicable priority rule is not based on the first-in-time principle. For example,  
26       former Section 9-312(3) and (4) provided that purchase money priority in inventory  
27       extended only to certain cash proceeds and purchase money priority in other  
28       collateral extended to all proceeds. Section 9-322 continues this approach.  
29       However, the purchase money priority rules are not the only priority rules that do  
30       not observe the first-in-time principle. See[, e.g.], Sections 9-321, 9-322, 9-323, 9-  
31       323A, 9-324, 9-325, 9-326, 9-327, 9-331, 9-332, 9-333, and 9-334. Consequently,  
32       if Alternative A is retained, it will be necessary to specify in connection with each  
33       of these sections whether or not the same priority obtains in the case of proceeds.

34              Alternative B takes a simpler approach. It provides that the priority for  
35       proceeds generally follows the priority for the antecedent collateral, as long as the  
36       security interest in proceeds is perfected. The Drafting Committee has decided that,  
37       in some cases, priority in proceeds should not follow priority in the original  
38       collateral. The rule of Alternative B should be subject to those special rules. For  
39       example, it should not override the limitation on the priority of the proceeds of  
40       collateral subject to a purchase money security interest in inventory and livestock.  
41       See Section 9-322. Nor should the rule override the limitation on the priority of the

1       proceeds of a deposit account. See Section 9-325. If the Drafting Committee  
2       approves Alternative B, it will be necessary to determine whether other exceptions  
3       are in order.

4               4 3. **Agricultural Liens.** Subsections (a) and (b) apply the same the same  
5       priority rule to agricultural liens as to security interests, regardless of whether they  
6       conflict with other agricultural liens or with security interests. New subsection (c)  
7       sets forth narrow circumstances under which a non-UCC priority rule may displace  
8       the Article 9 priority rule applicable to agricultural liens: a perfected agricultural  
9       lien may achieve priority notwithstanding the Article 9 priority rules only if the  
10       statute creating the lien so provides.

11               **SECTION 9-319A. PRIORITIES BETWEEN CONFLICTING**  
12       **SECURITY INTERESTS AND STATUTORY LIENS OTHER THAN**  
13       **AGRICULTURAL LIEN IN SAME COLLATERAL.**

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

17               (1) A conflicting security interest and a statutory lien other than an  
18       agricultural lien rank according to priority in time of filing or perfection. Priority  
19       dates from the earlier of the time a filing covering the collateral is first made or the  
20       time the security interest or statutory lien is first perfected, unless there is a period  
21       thereafter when there is neither filing nor perfection.

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

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

27               (c) If a statute under which a statutory lien other than an agricultural lien in  
28       collateral is created provides that the statutory lien has priority over a conflicting

1 security interest in the same collateral, the statute governs priority [if the statutory  
2 lien is perfected].

3 Reporters' Comments

4 1. **Source.** New; derived from Section 9-319.

5 2. **Non-Agricultural Statutory Liens.** Although this section derives from  
6 Section 9-319, its scope is more narrow. Consistent with the apparent  
7 recommendation in the Report of the Subcommittee on Relation to Other Law, this  
8 section governs priority between a statutory lien (other than an agricultural lien) and  
9 a security interest, but does not address priority contests between or among  
10 statutory liens. Inasmuch as the approach taken in this section could give rise to  
11 circular priorities and statutory liens are being brought into the Article 9 filing  
12 regime, the Drafting Committee may wish to consider whether this approach should  
13 be abandoned in favor of the approach taken in Section 9-319 for agricultural liens.  
14 Also, the bracketed language in subsection (c) invites the Drafting Committee to  
15 consider whether an overriding non-Article 9 statutory priority rule should control  
16 when a statutory lien is unperfected.



1           1. **Source.** Former Sections 9-312(7), 9-301(4), 9-307(3), 2A-307(4).

2           2. **Competing Security Interests.** This section collects all of the special  
3 rules dealing with “future advances. Subsection (a) replaces and clarifies former  
4 Section 9-312(7). No substantive change is intended. Former subsection (7) was  
5 added by the 1972 Revisions to Article 9 in order to override some decisions that  
6 subordinated future advances to intervening interests. Under a proper reading of  
7 the first-to-file-or perfect rule of Section 9-319(a) (and former Section 9-312(5)), it  
8 is abundantly clear the time that an advance is made plays no role in determining  
9 priorities among conflicting security interests except when the advance is the giving  
10 of value as the last step for attachment and perfection. Subsection (a), accordingly,  
11 states affirmatively the only other instance when the time of an advance figures in  
12 the priority scheme. See UCC, 1972 Official Text, Section 9-312, Reasons for  
13 1972 Change:

14           The proposed unified priority rule of subsection 9-312(5) would indicate  
15 that subsequent advances by the first-filed party have priority, and  
16 subsequent advances under a security interest perfected by possession  
17 likewise have priority over an intervening filed security interest. These  
18 priority rules are expressly stated in subsection (7). That proposal also deals  
19 with the rare case of the priority position of a subsequent advance made by a  
20 secured party whose security interest is temporarily perfected without either  
21 filing or possession, against an intervening secured party. Since there is no  
22 notice by the usual method of filing or possession of the existence of the  
23 security interest, the subsequent advances rank only from the actual date of  
24 making unless made pursuant to commitment.

25           Although the drafting history of the 1972 amendments suggests that the  
26 drafters may have assumed that the special rule under which the priority of future  
27 advances differs from that of the first advance would apply only to cases of  
28 temporary perfection, former Section 9-312(7) appears to apply to cases of  
29 automatic perfection, as well. The addition of the bracketed language in subsection  
30 (a), which refers to the automatic perfection provisions of new Section 9-308A,  
31 would conform subsection (a) to the former law. The Drafting Committee has yet  
32 to consider whether the reference to automatic perfection should be added to  
33 subsection (a).

34           The new formulation in subsection (a) also omits the ambiguous treatment  
35 in former subsection (7) of the situation where the initial advance is paid and a new  
36 (“future ) advance is made subsequently: Was the new advance “made while a  
37 security interest is perfected by filing or the taking of possession ? We think so,  
38 but clarification seems worthwhile.

39           3. **Competing Lien Creditors.** Subsection (b) replaces former Section  
40 9-301(4). It addresses the problem considered by P.E.B. Commentary No. 2 and  
41 removes the ambiguity that necessitated the commentary. Former subsection (4)  
42 appears to state a general rule that a lien creditor has priority over a perfected  
43 security interest and is “subject to the security interest “only in specified  
44 circumstances. Because subsection (4) speaks to the making of an “advance, it  
45 arguably implies that to the extent a security interest secures non-advances  
46 (expenses, interest, etc.), it is junior to the lien creditor’s interest. Subsection (b)



1 solves the problem by providing that a security interest is subordinate only to the  
2 extent that the specified circumstances occur, thereby eliminating the erroneous  
3 implication. As under former Section 9-301(4), a secured party's knowledge does  
4 not cut short the 45-day period during which future advances can achieve priority  
5 over an intervening lien creditor's interest.

6           **4. Competing Buyers and Lessees.** Subsection (c) replaces former  
7 Section 9-307(3) and subsection (d) replaces former Section 2A-307(4). These  
8 subsections contain minor style changes only.

9           **5. Buyers of Receivables.** As drafted, subsections (a) and (b) do not apply  
10 to outright sales of accounts, chattel paper, or payment intangibles. They may need  
11 refinements to take account of particular financing practices.

12           **[SECTION 9-321. PRIORITY OF PRODUCTION MONEY SECURITY**  
13 **INTERESTS AND AGRICULTURAL LIENS.**

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

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

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

27                   (2) the production money secured party gives an authenticated  
28 notification to the holder of the conflicting security interest not less than 10 or more  
29 than 30 days before the production money secured party first gives new value to

1 enable the debtor to produce the crops if the holder had filed a financing statement  
2 covering the crops before the date of the filing made by the production money  
3 secured party; and

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

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

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

13 *Legislative Note: This section is optional. States that do not enact this section also*  
14 *should not enact Section 9-105.*

#### 15 Reporters' Comments

16 1. **Source.** New.

17 2. **Legislative Option.** This new section replaces the limited priority in  
18 crops afforded by former Section 9-312(2). As explained in Section 9-105,  
19 Comment 2, that priority generally has been thought to be of little value for its  
20 intended beneficiaries. Neither the Drafting Committee nor the agricultural  
21 financing community has been able to reach a consensus on the desirability of  
22 including a special production money priority rule in Article 9. For this reason, the  
23 rule appears as an optional provision for each State to consider during the  
24 legislative enactment process.

25 3. **Production Money Security Interests.** This section attempts to balance  
26 the interests of the production money secured party with those of a secured party  
27 who has previously filed a financing statement covering the crops that are to be  
28 produced. For example, to qualify for priority under this section, the production  
29 money secured party must notify the earlier-filed secured party prior to extending  
30 the production money credit. The notification affords the earlier secured party the  
31 opportunity to prevent subordination by extending the credit itself. Moreover, the  
32 production money security interest does not take priority over all secured  
33 obligations owed to the earlier filer. Rather, the production money security interest  
34 has priority only over obligations incurred relatively recently, i.e., those incurred  
35 during the [ ] months before the production money secured party first gives new  
36 value.

1           **4. Multiple Production Money Security Interests.** In the case of multiple  
2 production money security interests that qualify for priority under subsection (a),  
3 the first to file has priority. See subsection (c). Note that only a security interest  
4 perfected by filing is entitled to production money priority. See subsection (b)(1).  
5 Consequently, subsection (c) does not adopt the *first-to-file-or-perfect* formulation.

6           **5. Holder of Agricultural Lien and Production Money Security**  
7 **Interest.** Subsection (d) deals with a creditor who holds both an agricultural lien  
8 and an Article 9 production money security interest in the same collateral. In these  
9 cases, the priority rules applicable to agricultural liens govern. The creditor can  
10 avoid this result by waiving its agricultural lien. These rules remain under  
11 consideration by the Drafting Committee.

12           **SECTION 9-322. PRIORITY OF PURCHASE MONEY SECURITY**  
13 **INTERESTS.**

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

19                   (1) the purchase money security interest is perfected when the debtor  
20 receives possession of the inventory;

21                   (2) the purchase money secured party gives an authenticated notification  
22 to the holder of the conflicting security interest, if the holder had filed a financing  
23 statement covering the same types of inventory:

24                           (A) before the date of a filing made by the purchase money secured  
25 party; or

26                           (B) if the purchase money security interest is temporarily perfected  
27 without filing or possession under Section 9-310(e), before the beginning of the  
28 20-day period thereunder;

29                   (3) the holder of the conflicting security interest receives the notification  
30 no earlier than five years before the debtor receives possession of the inventory; and

1                   (4) the notification states that the person giving the notification has or  
2 expects to acquire a purchase money security interest in inventory of the debtor and  
3 describes the inventory by item or type.

4                   (b) If a purchase money security interest in inventory has priority over a  
5 conflicting security interest under subsection (a), a security interest held by the  
6 purchase money secured party in chattel paper [or an instrument] constituting  
7 proceeds of the inventory has priority over a conflicting security interest in the  
8 chattel paper [or instrument] if:

9                   (1) the conflicting security interest in the chattel paper [or instrument] is  
10 claimed merely as proceeds of inventory subject to a security interest; and

11                   (A) the purchase money secured party takes possession of the chattel  
12 paper [or instrument] in the ordinary course of its business; and

13                   (B) the chattel paper [or instrument] does not indicate that it has  
14 been assigned to [an identified assignee] [the person holding the conflicting security  
15 interest]; or

16                   (2) the purchase money secured party takes possession of the chattel  
17 paper [or instrument] in good faith, in the ordinary course of its business, and  
18 without knowledge that its security interest violates the rights of the person holding  
19 the conflicting security interest.

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

25                   (1) the purchase money security interest is perfected when the debtor  
26 receives possession of the livestock;

1                   (2) the purchase money secured party gives an authenticated notification  
2 to the holder of the conflicting security interest, if the holder had filed a financing  
3 statement covering the same types of livestock:

4                   (A) before the date of a filing made by the purchase money secured  
5 party; or

6                   (B) if the purchase money security interest is temporarily perfected  
7 without filing or possession under Section 9-310(e), before the beginning of the  
8 20-day period thereunder;

9                   (3) the holder of the conflicting security interest receives the notification  
10 no earlier than six months before the debtor receives possession of the livestock;  
11 and

12                   (4) the notification states that the person giving the notification has or  
13 expects to acquire a purchase money security interest in livestock of the debtor and  
14 describes the livestock by item or type.

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

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

23                   (1) a security interest securing an obligation incurred [by an obligor] as  
24 the price of the collateral has priority over a security interest securing an obligation  
25 incurred [by an obligor] for value given to enable the debtor to acquire rights in  
26 collateral; and

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

## Reporters' Comments

1. **Source.** Former Section 9-312(3), (4).

2. **Purchase Money Security Interests in Inventory.** Subsection (a), which affords a special priority to certain purchase money security interests in inventory, derives from former Section 9-312(3). No change in meaning is intended.

3. **Consignments.** Subsection (a) also determines the priority of a consignor's interest in consigned goods as against a security interest in the goods created by the consignee. Inasmuch as a consignment subject to this Article is defined to be a purchase money security interest, see Section 9-104(b), no inference concerning the nature of the transaction should be drawn from the fact that a consignor uses the term "security interest" in its notice under subsection (a)(4). Similarly, a notice stating that the consignor has delivered or expects to deliver goods, properly described, "on consignment" meets the requirements of subsection (a)(4), even if it does not contain the term "security interest" and even if the transaction subsequently is determined to be a security interest. Cf. Section 9-505 (use of "consignor" and "consignee" in financing statement).

4. **Priority in Chattel Paper Proceeds.** Subsection (b) is new. It enables the holder of a purchase money security interest in inventory to obtain priority in chattel paper that constitutes the proceeds of inventory. Unlike Section 9-327, subsection (b) awards priority in chattel paper proceeds to the holder of a purchase money security interest in inventory even if the holder does not give new value.

5. **Purchase Money Security Interests in Livestock.** New subsection (c) provides a purchase money priority rule for farm-products livestock. It is patterned on the purchase money priority rule for inventory found in subsection (a) and includes a requirement that the purchase money secured party notify earlier-filed parties. Two differences between subsections (a) and (c) are noteworthy. First, unlike the purchase money inventory lender, the purchase money livestock lender enjoys priority in *all* proceeds of the collateral. Thus, under subsection (c), the purchase money secured party takes priority in accounts over an earlier-filed accounts financier. Second, the bracketed language in subsection (c) affords priority in products of the collateral as well as proceeds. Former Article 9 does not deal with products in any meaningful way. The Drafting Committee has deferred considering whether the subsection (d) priority should carry over into products until such time as it considers the larger issues.

6. **Purchase Money Security Interests in Aquatic Farm Products.** Aquatic goods produced in aquacultural operations (e.g., catfish raised on a catfish farm) are farm products. See Section 9-106(c) (definition of "farm products"). The definition does not indicate whether aquatic goods are "crops," as to which the (optional) production money security interest priority in Section 9-321 applies, or "livestock," as to which the purchase money priority in subsection (c) of this section applies. One possibility is to treat aquatic vegetables as "crops" and aquatic

1 animals as “livestock. An alternative is to place all aquatic goods in the category  
2 that seems to fit better most often. A third option is to leave the courts free to  
3 determine the classification of particular goods on a case-by-case basis, applying  
4 whichever priority rule makes more sense in the overall context of the debtor’s  
5 business. The Drafting Committee has yet to resolve this issue.

6 **7. Purchase Money Priority in Goods Other than Inventory and**  
7 **Livestock.** Subsection (d) extends from 10 days to 20 days the “grace period” for  
8 achieving purchase money priority in non-inventory collateral found in former  
9 Section 9-312(4). It reflects that a secured party may hold a “purchase money  
10 security interest” only in goods. See also Section 9-104(a).

11 Several reported cases arising under former Section 9-312(4) address the  
12 question of when the “debtor” receives “possession” of collateral for purposes of  
13 that section. Among other issues, these cases concern collateral that is delivered in  
14 stages and goods that were held in a person’s possession for a period of time (e.g.,  
15 under a lease) before the person created a security interest in them. The Drafting  
16 Committee is inclined to address this question and the analogous question under  
17 Section 9-315(f) in the Official Comments.

18 **8. Multiple Purchase Money Security Interests.** New subsection (e)  
19 governs priority among multiple purchase money security interests in the same  
20 collateral. It grants priority to purchase money security interests securing the price  
21 of collateral (i.e., created in favor of the seller) over purchase money security  
22 interests that secure enabling loans. Section 7.2(c) of the Restatement of the Law  
23 of Property (Mortgages), Tentative Draft No. 4 (February 28, 1995), approves this  
24 rule with respect to real property mortgages, on the ground that:

25 the equities favor the vendor. Not only does the vendor part with  
26 specific real estate rather than money, but the vendor would never  
27 relinquish it at all except on the understanding that the vendor will  
28 be able to use it to satisfy the obligation to pay the price. This is the  
29 case even though the vendor may know that the mortgagor is going  
30 to finance the transaction in part by borrowing from a third party and  
31 giving a mortgage to secure that obligation. In the final analysis, the  
32 law is more sympathetic to the vendor’s hazard of losing real estate  
33 previously owned than to the third party lender’s risk of being  
34 unable to collect from an interest in real estate that never previously  
35 belonged to it.

36 The first-to-file-or-perfect rule of Section 9-319 applies to multiple purchase money  
37 security interests securing enabling loans.

38 Subsection (e) makes no reference to proceeds. The Official Comments can  
39 explain how the proceeds rules would be applied in these unusual cases.

40 **SECTION 9-323. PRIORITY OF SECURITY INTERESTS IN**  
41 **TRANSFERRED COLLATERAL.** If a debtor acquires property subject to a



1 security interest created by another person, the security interest is perfected when  
2 the debtor acquires the property, and there is no period thereafter when it is  
3 unperfected, any security interest created by the debtor is subordinate to the security  
4 interest created by the other person, notwithstanding anything to the contrary in this  
5 part. [However, if the security interest created by the other person is unperfected  
6 when the debtor acquires the property or at any time thereafter, the other provisions  
7 of this part, as applicable, determine its priority.]

#### 8 Reporters' Comments

9 1. **Source.** New.

10 2. **"Double Debtor" Problem.** This section addresses the "double debtor  
11 problem that arises when a debtor acquires property that is subject to a security  
12 interest created by another debtor.

13 3. **Taking Subject to Perfected Security Interest.** Consider the following  
14 scenario:

15 *Example:* A owns an item of equipment subject to a perfected security  
16 interest in favor of SP-A. A sells the equipment to B, not in the ordinary  
17 course of business. B acquires its interest subject to SP-A's security  
18 interest. See Sections 9-201; 9-313(c).

19 Under the first sentence of this section, if B creates a security interest in the  
20 equipment in favor of SP-B, SP-B's interest is subordinate to SP-A's interest, even  
21 if SP-B filed against B before SP-A filed against A, and even if SP-B took a  
22 purchase money security interest. Normally, SP-B could have investigated the  
23 source of the equipment and discovered SP-A's filing before making an advance  
24 against the equipment, whereas SP-A had no reason to search the filings against  
25 someone other than its debtor, A.

26 4. **Taking Subject to Unperfected Security Interest.** If, in the foregoing  
27 Example, SP-A's security interest is unperfected, B will take free of it as long as B  
28 gives value and takes delivery of the equipment without knowledge of the security  
29 interest. See Section 9-315(c). If B takes free of SP-A's security interest and then  
30 creates a security interest in favor of SP-B, no priority issue arises; SP-B has the  
31 only security interest in the equipment. Suppose, however, that B knows of SP-A's  
32 security interest and therefore takes the equipment subject to it. If B creates a  
33 security interest in the equipment in favor of SP-B, and SP-B perfects its security  
34 interest, then the second sentence of this section provides that the normal priority  
35 rules govern. Under Section 9-319(a)(1), the "first-to-file-or-perfect" rule, SP-A's  
36 unperfected security interest will be junior to SP-B's perfected security interest.  
37 The award of priority to SP-B is premised on the belief that SP-A's failure to file  
38 could have misled SP-B.

**5. Taking Subject to Perfected Security Interest that Becomes Unperfected.** If SP-A's interest is perfected when B acquires the equipment but for some reason SP-A's security interest later becomes unperfected, the second sentence of this section provides that the normal priority rules govern. For example, if SP-A's financing statement lapses while SP-B's security interest is perfected, SP-B's security interest would become senior to SP-A's security interest. See Sections 9-319(a)(1); 9-516(c).

6. **Bracketed Sentence.** The first sentence of this section covers some, but not all, “double debtor” cases. As explained above, if a case falls outside the first sentence, in the absence of a special “double debtor” rule, the normal priority rules would apply. The second sentence makes this point explicitly. Inasmuch as one could reach the right result without the second sentence, the sentence appears in brackets. However, retaining the explicit statement in the second sentence is likely to make the statute easier to use.

## SECTION 9-323A. PRIORITY OF SECURITY INTERESTS CREATED

**BY NEW DEBTOR.** 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 provisions of this part, as applicable, determine the priority of the subordinated security interests as among themselves.

## Reporters' Comments

1. **Source.** New.

2. **Collateral of New Debtors.** This section addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each has a secured creditor.

The first sentence subordinates the original debtor's secured party's security interest perfected under Section 9-510 to security interests in the same collateral perfected in another manner, e.g., by filing against the new debtor.

**Example 1:** SP-X holds a perfected-by-filing security interest in X Corp’s existing and after-acquired inventory, and SP-Z holds a perfected-by-filing security interest in Z Corp’s existing and after-acquired inventory. Z Corp “becomes bound” as debtor by X Corp’s security agreement (e.g., Z Corp buys X Corp’s assets and assumes its security agreement). Under Section 9-510, SP-X’s financing statement is effective to perfect a security interest in inventory acquired by Z Corp after it becomes bound.

1 The first sentence of this section provides that SP-X's security interest is  
2 subordinate to SP-Z's, regardless of which financing statement was filed first.

3 The second sentence of this section addresses the priority among security  
4 interests created by the original debtor (X Corp). By invoking the other priority  
5 rules of this subpart, as applicable, the second sentence preserves the relative  
6 priority of security interests created by the original debtor.

7 **Example 2:** Under the facts of Example 1, SP-Y also holds a perfected-by-  
8 filing security interest in X Corp's existing and after-acquired inventory.  
9 SP-Y filed after SP-X.

10 SP-X has priority over SP-Y. See Section 9-319(a)(1).

11 **SECTION 9-324. PRIORITY OF SECURITY INTERESTS IN**  
12 **INVESTMENT PROPERTY.** Priority among conflicting security interests in the  
13 same investment property is governed by the following rules:

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

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

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

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

26 (4) A security interest held by a securities intermediary in a security  
27 entitlement or a securities account maintained with the securities intermediary has  
28 priority over a conflicting security interest held by another secured party.

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

5           (5) A security interest held by a commodity intermediary in a commodity  
6 contract or a commodity account maintained with the commodity intermediary has  
7 priority over a conflicting security interest held by another secured party.

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

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

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control). Those secured parties for whom the deposit account is less essential will not take control, thereby running the risk that the debtor will dispose of funds on deposit (either outright or for collateral purposes) after default but before the account can be frozen by court order or the secured party can obtain control.

Subsection (2) governs the case (expected to be very rare) in which a depositary institution enters into a Section 9-109(a)(2) control agreement with more than one secured party. Subsection (a)(2) provides that the security interests rank equally. If the depositary institution is solvent, there often will be no need for a priority rule inasmuch as the depositary institution is likely to be liable to each secured party.

**4. Priority of Depositary Institution.** Under subsection (3), the security interest of the depositary institution with which the deposit account is maintained normally takes priority over all other conflicting security interests in the deposit account, regardless of whether the deposit account constitutes the competing secured party's original collateral or its proceeds. A rule of this kind enables depositary institutions to extend credit to their depositors without the need to examine either the public record or their own records to determine whether another party might have a security interest in the deposit account.

A secured party who takes a security interest in the deposit account as original collateral can protect itself against the results of this rule in one of two ways. It can take control of the deposit account by becoming the depositary institution's customer (i.e., by having the account in its name). Under subsection (4), this arrangement operates to subordinate the depositary institution's security interest. Alternatively, the secured party can obtain an express subordination agreement from the depositary institution. See Section 9-336. Additional clarification of subsection (4) or the Official Comments is likely to be needed to cover cases in which both the debtor and the secured party are indebted to the depositary institution.

A secured party who claims the deposit account as proceeds of other collateral can reduce the risk of becoming junior by obtaining the debtor's agreement to deposit proceeds into a specific cash collateral account and obtaining the agreement of that depositary institution to subordinate all its claims to those of the secured party. But if the debtor violates its agreement and deposits funds into a deposit account other than the cash collateral account, the secured party risks being subordinated.

**5. Priority in Proceeds.** The priority afforded by this section is not intended to extend to proceeds of a deposit account. Accordingly, Section 9-319(a)(1), the first-to-file-or-perfect rule, normally will govern priorities in proceeds. A secured party who obtains control but who nevertheless leaves the debtor with the power (but perhaps not the right) to withdraw from the deposit account is not entitled to special priority in the proceeds. Section 9-313(e) addresses continuation of perfection in proceeds of deposit accounts. As to funds transferred from a deposit account that serves as collateral, see Section 9-329.





1 (a) A purchaser of chattel paper [or an instrument] has priority over a  
2 security interest in the chattel paper [or instrument] which is claimed merely as  
3 proceeds of inventory subject to a security interest and, except as otherwise  
4 provided in Section 9-325, in proceeds of the chattel paper; if:

5 (1) in the ordinary course of the purchaser's business, the purchaser  
6 gives new value and takes possession of the chattel paper [or instrument]; and

7 (2) the chattel paper [or instrument] does not indicate that it has been  
8 assigned to [an identified assignee] [the person holding the conflicting security  
9 interest].

10 (b) A purchaser of chattel paper [or an instrument] has priority over a  
11 security interest in the chattel paper [or instrument] which is claimed other than  
12 merely as proceeds of inventory subject to a security interest and, except as  
13 otherwise provided in Section 9-325, in proceeds of the chattel paper [or  
14 instrument] if the purchaser, in good faith, in the ordinary course of the purchaser's  
15 business, and without knowledge that the purchase violates the rights of the secured  
16 party, gives new value and takes possession of the chattel paper [or instrument].

17 (c) For purposes of subsection (b), if chattel paper [or an instrument]  
18 indicates that it has been assigned to an identified secured party, a purchaser of the  
19 chattel paper [or instrument] has knowledge that the purchase violates the rights of  
20 the secured party.

21 [(d) Except as otherwise provided in Section 9-328(c), a [possessory  
22 security interest in] [purchaser for value that takes possession of] an instrument has  
23 priority over a [nonpossessory security interest in the instrument perfected by  
24 means other than filing] [security interest in the instrument perfected by filing].]

25 Reporters' Comments

26 1. **Source.** Former Section 9-308.

1           **2. Chattel Paper.** This section enables purchasers of chattel paper,  
2 including secured parties, to obtain priority over earlier-perfected security interests  
3 in the chattel paper. It follows former Section 9-308 in distinguishing between  
4 earlier-perfected security interests in chattel paper that is claimed merely as  
5 proceeds of inventory subject to a security interest and chattel paper that is claimed  
6 other than merely as proceeds. Like former Section 9-308, this section does not  
7 elaborate upon the phrase “merely as proceeds. For an elaboration, see P.E.B.  
8 Commentary No. 8.

9           This section retains the requirements of “the ordinary course of the  
10 purchaser’s business and the giving of “new value as a conditions for priority.  
11 Concerning the latter, the Article deletes former Section 9-108 and adds to Section  
12 9-102 a completely different definition of the term “new value.

13           A possessory security interest in chattel paper that does not qualify for  
14 priority under this section may be subordinate to a perfected-by-filing security  
15 interest under Section 9-319(a). In this respect, the priority rules applicable to  
16 negotiable instruments constituting part of chattel paper differ from those  
17 applicable to security certificates. Compare Section 9-324(2) (security interest  
18 perfected by possession takes priority over security interest perfected other than by  
19 control).

20           **3. Chattel Paper Claimed Merely as Proceeds.** Subsection (a) revises the  
21 rule in former Section 9-308(b) to eliminate reference to what the purchaser knows.  
22 Instead, a purchaser who meets the possession, ordinary course, and new value  
23 requirements takes priority over a competing security interest unless the chattel  
24 paper itself indicates that it has been assigned to an identified assignee or a person  
25 holding the conflicting security interest. Thus subsection (a) recognizes the  
26 common practice of placing a “legend on chattel paper to indicate that it has been  
27 assigned. The Drafting Committee is informed that this approach, under which the  
28 chattel paper purchaser who gives new value in ordinary course can rely on  
29 possession of unlegended paper without any concern for other facts that it may  
30 know, comports with the expectations of both inventory and chattel paper financiers.

31           **4. Chattel Paper Claimed Other Than Merely as Proceeds.** Subsection  
32 (b) revises the rule in former Section 9-308(a) by adding the requirement that the  
33 purchaser take in good faith. It also eliminates the requirement that the purchaser  
34 take without knowledge that the “specific paper is subject to the security interest  
35 and substitutes for it the requirement that the purchaser take “without knowledge  
36 that the purchase violates the rights of the secured party. This standard derives  
37 from the definition of “buyer in ordinary course of business in Section 1-201(9).  
38 The source of the purchaser’s knowledge is irrelevant. Note, however, that  
39 “knowledge means “actual knowledge. Section 1-201(25). Thus, without more,  
40 a purchaser of chattel paper who has seen a financing statement covering the chattel  
41 paper or who knows that the chattel paper is encumbered with a security interest,  
42 does not have knowledge that its purchase violates the secured party’s rights.  
43 However, under new subsection (c), a legend to the effect that the chattel paper had  
44 been assigned to an identified assignee or the person holding the conflicting  
45 security interest would cause a purchaser to have wrongful knowledge for purposes  
46 of subsection (b), thereby preventing the purchaser from qualifying for priority  
47 under that subsection, even if the purchaser did not have actual knowledge.

1           5. **“Electronic Chattel Paper.”** The Drafting Committee (with the  
2 assistance of the Working Group on Secured Transactions, Committee on the law  
3 of Commerce in Cyberspace, ABA Section of Business Law) is pursuing the  
4 possibility of extending subsections (a) and (b) to cover obligations that otherwise  
5 would meet the definition of “chattel paper” but are not evidenced by a writing. If  
6 this proves feasible (e.g., if a suitable analogue for “possession” can be developed)  
7 and desirable, the subsections might be expanded even further to cover accounts.

8           6. **Instruments.** The bracketed language in subsections (a), (b), and (d)  
9 reflects the unresolved status of the priority of security interests in instruments  
10 (both negotiable and nonnegotiable) which are perfected by filing. This issue is not  
11 significant under current law, inasmuch as security interests in instruments  
12 generally can be perfected only by possession.

13           Bracketed language in the draft presents three possible approaches. One  
14 would be to adopt the bracketed language in subsections (a) and (b), thereby  
15 affording purchasers of instruments, both buyers and secured parties, the same  
16 rights as purchasers of chattel paper. This is the approach of former Section 9-308.  
17 Adoption of this approach would eliminate any need for bracketed subsection (d).

18           Subsection (d) presents two other options for a priority rule. One is to adopt  
19 for instruments the priority rule applicable to certificated securities. The 1994  
20 revisions to Articles 8 and 9 marked the first time that Article 9 permitted  
21 perfection of security interests in securities by filing. This Article carries forward  
22 that approach. See Section 9-310(a). The 1994 revisions recognize that, in order to  
23 avoid disruption of existing practices in the securities markets, it is necessary to  
24 give perfection by filing a different and more limited effect for securities than for  
25 other forms of collateral. In particular, the necessity of conducting a search in order  
26 to ensure priority of a security interest would be enormously disruptive and  
27 detrimental. Consequently, the revisions provide that a possessory security interest  
28 in a security evidenced by a security certificate in registered form has priority over a  
29 security interest perfected by filing. Section 9-324(2) of this Article carries this rule  
30 forward.

31           The priority rule stated in Section 9-324(2) may seem anomalous, in that it  
32 can afford less favorable treatment to purchasers who buy collateral outright than to  
33 those who take a security interest in it. For example, a buyer of a security  
34 certificate would cut off a security interest perfected by filing only if the buyer  
35 achieves the status of a protected purchaser under Section 8-303. The buyer would  
36 not be a protected purchaser, for example, if it does not obtain “control” under  
37 Section 8-106 (e.g., if it fails to obtain a proper indorsement of the certificate) or if  
38 it had notice of an adverse claim under Section 8-105. As Official Comment 5 to  
39 Section 9-115 suggests, however, the priority rule is best understood not as one  
40 intended to protect careless or guilty parties, but one that eliminates the need to  
41 conduct a search of the public records only insofar as necessary to serve the needs  
42 of the securities markets.

43           The third option, also presented in subsection (d), is to afford priority to all  
44 buyers of instruments as well as to secured parties. This approach would protect  
45 every purchaser for value who takes possession of an instrument. The purchaser  
46 would take priority even if, for example, the purchaser knew of a conflicting claim

1 to the instrument that would disqualify it from becoming a holder in due course  
2 under Section 3-302, or the instrument was not negotiable.

3 It is possible that no single rule will be optimal for all the circumstances in  
4 which it might be applied. For example, broad protection of the kind suggested in  
5 the third option may be useful with respect to notes secured by real property  
6 mortgages, for which there is a secondary market, but considerably less so for bank  
7 certificates of deposit that are transferred in non-market transactions.

8 **7 Priority in Proceeds.** Subsections (a) and (b) provide that the priority  
9 afforded to purchasers of chattel paper [or instruments] extends also to proceeds of  
10 the chattel paper or instrument. The purchaser acquires priority in proceeds  
11 regardless of whether the purchaser perfects as to the proceeds. Former Article 9 is  
12 silent as to the priority of a security interest in proceeds when a purchaser qualifies  
13 for priority under Section 9-308.

14 **8. Priority in Returned and Repossessed Goods.** Returned and  
15 repossessed goods may constitute proceeds of chattel paper. ~~The discussion in the~~  
16 following Comments below explains explain the treatment of returned and  
17 repossessed goods as proceeds of chattel paper. The analysis is consistent with that  
18 of PEB Commentary No. 5, which these Comments replace, and is based upon in  
19 ~~the context of the following example:~~

20 **Example:** Secured Party 1 (SP-1) has a security interest in all the inventory  
21 of a dealer in goods (Dealer); SP-1's security interest is perfected by filing.  
22 Dealer sells some of its inventory to a buyer in the ordinary course of  
23 business (BIOCOB) pursuant to a conditional sales contract (chattel paper).  
24 Secured Party 2 (SP-2) purchases the chattel paper from Dealer and takes  
25 possession of the paper in the ordinary course of business and without  
26 knowledge that the purchase violates the rights of SP-1. Subsequently,  
27 BIOCOB returns the goods to Dealer because they are defective.  
28 Alternatively, Dealer acquires possession of the goods following BIOCOB's  
29 default.

30 **9. Assignment of Non-Lease Chattel Paper.**

31 **a. Loan by SP-2 to Dealer Secured by Chattel Paper (or Functional**  
32 **Equivalent Pursuant to Recourse Arrangement).**

33 (1) **Returned Goods.** If BIOCOB returns the goods to Dealer for repairs,  
34 Dealer is merely a bailee and acquires thereby no meaningful rights in the goods to  
35 which SP-1's security interest could attach. (Although SP-1's security interest  
36 could attach to Dealer's interest as a bailee, that interest is not likely to be of any  
37 particular value to SP-1.) Dealer is the owner of the *chattel paper* (i.e., the owner  
38 of a right to payment secured by a security interest in the goods); SP-2 has a  
39 security interest in the chattel paper, as does SP-1 (as proceeds of the goods under  
40 Section 9-313(c)). Pursuant to Section 9-327, SP-2's security interest in the chattel  
41 paper is senior to that of SP-1. SP-2 enjoys this priority regardless of whether, or  
42 when, SP-2 filed a financing statement covering the chattel paper. Because chattel  
43 paper and goods represent different types of collateral, Dealer does not have any  
44 meaningful interest in *goods* to which either SP-1's or SP-2's security interest could

1 attach in order to secure Dealer's obligations to either creditor. See Section 9-102  
2 (defining "chattel paper" and "goods").

3 Now assume that BIOCOP returns the goods to Dealer under circumstances  
4 whereby Dealer once again becomes the owner of the goods. This would be the  
5 case, for example, if the goods were defective and BIOCOP were entitled to reject  
6 or revoke acceptance of the goods. See Sections 2-602 (rejection); 2-608  
7 (revocation of acceptance). Unless BIOCOP has waived its defenses as against  
8 assignees of the chattel paper, SP-1's and SP-2's rights against BIOCOP would be  
9 subject to BIOCOP's claims and defenses. See Sections 9-403; 9-404. SP-1's  
10 security interest would attach again because the returned goods would be proceeds  
11 of the chattel paper. Dealer's acquisition of the goods easily can be characterized  
12 as proceeds consisting of an "in kind" collection on or distribution on account of  
13 the chattel paper. See Section 9-313(a). Assuming that SP-1's security interest is  
14 perfected by filing against the goods and that the filing is made in the same office  
15 where a filing would be made against the chattel paper, SP-1's security interest in  
16 the goods would be perfected. See Section 9-313(e).

17 Because Dealer's newly reacquired interest in the goods is proceeds of the  
18 chattel paper, SP-2's security interest also would attach in the goods as proceeds. If  
19 SP-2 had perfected its security interest in the chattel paper by filing (again,  
20 assuming that filing against the chattel paper was made in the same office where a  
21 filing would be made against the goods), SP-2's security interest in the reacquired  
22 goods would be perfected beyond 20 days. See Section 9-313(e). However, if the  
23 SP-2 had relied only on its possession of the chattel paper for perfection and had  
24 not filed against the chattel paper or the goods, SP-2's security interest would be  
25 unperfected after the 20-day period. See Section 9-313(e). Nevertheless, SP-2's  
26 unperfected security interest in the goods would be senior to SP-1's security interest  
27 under Section 9-327. The result in this priority contest is not affected by SP-2's  
28 acquiescence or non-acquiescence in the return of the goods to Dealer.

29 (2) **Repossessed Goods.** As explained above, Dealer owns the chattel  
30 paper covering the goods, subject to security interests in favor of SP-1 and SP-2. In  
31 Article 9 parlance, Dealer has an interest in chattel paper, not goods. If Dealer,  
32 SP-1, or SP-2 repossesses the goods upon BIOCOP's default, whether the  
33 repossession is rightful or wrongful as among Dealer, SP-1, or SP-2, Dealer's  
34 interest will not change. The location of goods and the party who possesses them  
35 does not affect the fact that Dealer's interest is in chattel paper, not goods. The  
36 goods continue to be owned by BIOCOP. SP-1's security interest in the goods  
37 does not attach until such time as Dealer reacquires an interest (other than a bare  
38 possessory interest) in the goods. For example, Dealer might buy the goods at a  
39 foreclosure sale from SP-2 (whose security interest in the chattel paper is senior to  
40 that of SP-1); that disposition would cut off BIOCOP's rights in the goods. Section  
41 9-615.

42 In many cases the matter would end upon sale of the goods to Dealer at a  
43 foreclosure sale and there would be no priority contest between SP-1 and SP-2;  
44 Dealer would be unlikely to buy the goods under circumstances whereby SP-2  
45 would retain its security interest. There can be exceptions, however. For example,  
46 Dealer may be obliged to purchase the goods from SP-2, SP-2 may convey the  
47 goods to Dealer, and Dealer may fail to pay SP-2. Or, one could imagine that SP-2,



1 like SP-1, has a general security interest in the inventory of Dealer. In the latter  
2 case, SP-2 should not receive the benefit of any special priority rule, since its  
3 interest in no way derives from priority under Section 9-327. In the former case,  
4 SP-2's security interest in the goods reacquired by Dealer is senior to SP-1's  
5 security interest under Section 9-327.

6       **b. Dealer's Outright Sale of Chattel Paper to SP-2.** Article 9 also  
7 applies to a transaction whereby SP-2 buys the chattel paper in an outright sale  
8 transaction without recourse against Dealer. Sections 1-201(37); 9-102. Although  
9 Dealer does not, in such a transaction, retain any residual ownership interest in the  
10 chattel paper, the chattel paper constitutes proceeds of the goods to which SP-1's  
11 security interest will attach and continue following the sale of the goods. Section  
12 9-313(c). Even though Dealer has not retained any interest in the chattel paper, as  
13 discussed above BIOCOP subsequently may return the goods to Dealer under  
14 circumstances whereby Dealer reacquires an interest in the goods. The priority  
15 contest between SP-1 and SP-2 will be resolved as discussed above; Section 9-327  
16 makes no distinction among purchasers of chattel paper on the basis of whether the  
17 purchaser is an outright buyer of chattel paper or one whose security interest  
18 secures an obligation of Dealer.

19       **10. Assignment of Lease Chattel Paper.** As defined in Section 9-102,  
20 chattel paper includes not only writings that evidence security interests in specific  
21 goods but also those that evidence true leases of goods.

22       The analysis with respect to lease chattel paper is similar to that set forth  
23 above with respect to non-lease chattel paper. It is complicated, however, by the  
24 fact that, unlike the case of chattel paper arising out of a sale, Dealer retains a  
25 residual interest in the *goods*. See Section 2A-103(1)(q) (defining "lessor's residual  
26 interest "); *In re Leasing Consultants, Inc.*, 486 F.2d 367 (2d Cir. 1973) (lessor's  
27 residual interest under true lease is an interest in goods and is a separate type of  
28 collateral from lessor's interest in the lease). If Dealer leases goods to a "lessee in  
29 ordinary course of business" (LIOCOB), then LIOCOB takes its interest under the  
30 lease (i.e., its "leasehold interest ") free of the security interest of SP-1. See  
31 Sections 2A-307(3); 2A-103(1)(m) (defining "leasehold interest "), (1)(o) (defining  
32 "lessee in ordinary course of business "). SP-1 would, however, retain its security  
33 interest in the residual interest. In addition, SP-1 would acquire an interest in the  
34 lease chattel paper as proceeds. If Dealer then assigns the lease chattel paper to  
35 SP-2, Section 9-327 gives SP-2 priority over SP-1 with respect to the chattel paper,  
36 *but not* with respect to the residual interest in the *goods*. Consequently, assignees  
37 of lease chattel paper typically take a security interest in and file against the lessor's  
38 residual interest in goods, expecting their priority in the goods to be governed by  
39 the first-to-file-or-perfect rule of Section 9-319.

40       If the goods are returned to Dealer, other than upon expiration of the lease  
41 term, then the security interests of both SP-1 and SP-2 normally would attach to the  
42 goods as proceeds of the chattel paper. (If the goods are returned to Dealer at the  
43 expiration of the lease term and the lessee has made all payments due under the  
44 lease, however, then Dealer no longer has any rights under the chattel paper.  
45 Dealer's interest in the goods consists solely of its residual interest, as to which  
46 SP-2 has no claim.) This would be the case, for example, when the lessee rescinds  
47 the lease or when the lessor recovers possession in the exercise of its remedies

1 under Article 2A. See, e.g., Section 2A-525. If SP-2 enjoyed priority in the chattel  
2 paper under Section 9-327, then SP-2 likewise would enjoy priority in the returned  
3 goods as proceeds. This does not mean that SP-2 necessarily is entitled to the entire  
4 value of the returned goods. The value of the goods represents the sum of the  
5 present value of (i) the value of their use for the term of the lease and (ii) the value  
6 of the residual interest. SP-2 has priority in the former, but SP-1 ordinarily would  
7 have priority in the latter. Thus, an allocation of a portion of the value of the goods  
8 to each component may be necessary.

9           **SECTION 9-328. ~~[PROTECTION]~~ [PRIORITY OF RIGHTS] OF**  
10 **PURCHASERS OF INSTRUMENTS, DOCUMENTS, AND SECURITIES**  
11 **UNDER OTHER ARTICLES; PRIORITY OF INTERESTS IN FINANCIAL**  
12 **ASSETS AND SECURITY ENTITLEMENTS UNDER ARTICLE 8.**

13           (a) Except as otherwise provided in subsection (d) ~~(e)~~, nothing in this  
14 article limits the rights of a holder in due course of a negotiable instrument, a holder  
15 to whom a negotiable document of title has been duly negotiated, or a protected  
16 purchaser of a security. These holders or purchasers take priority over an earlier  
17 security interest, even if perfected, to the extent provided in Articles 3, 7, and 8.

18           **(b) A person that deals with or has an interest in a financial asset or security**  
19 **entitlement has priority over a security interest, even if perfected, to the extent**  
20 **provided in Article 8.**

21           **(c) ~~(b)~~ Filing under this Article article does not constitute notice of a**  
22 **security interest to the holders, or purchasers, or persons mentioned in subsections**  
23 **(a) and (b).**

24           **~~(c)~~ A security interest in ~~[chattel paper, an account, or a payment~~**  
25 **intangible] ~~[a right to payment]~~ which has priority over a conflicting security**  
26 **interest in the same ~~[chattel paper, account, or payment intangible]~~ ~~[right to~~**  
27 **payment] also has priority in a check that is proceeds of the ~~[chattel paper, account,~~**  
28 **or payment intangible] ~~[right to payment]~~.**



(d) The holder of a subordinate security interest in an account takes an instrument constituting proceeds of the account subject to the claim of a holder of a security interest having higher priority in the account unless:

\_\_\_\_\_ (1) the holder of the subordinate security interest is a holder in due course;

(2) the holder of the subordinate security interest gives an authenticated notification to the holders of all security interests having higher priority in the account;

(3) each holder of a security interest having higher priority receives the notification at least 21 days prior to the receipt of the instrument by the holder of the subordinate security interest;

(4) the notification provides the name, address, and telephone number of the holder of the subordinate security interest and the name of the debtor; and

(5) the notification states that the holder of the subordinate security  
interest holds a security interest in the account.

## Reporters' Comments

**1. Source.** Former Section 9-309.

2. **“Priority.”** In some provisions, this Article distinguishes between claimants that take collateral free of a security interest (in the sense that the security interest no longer encumbers the collateral) and those that take an interest in the collateral that is senior to a surviving security interest. See, e.g., Section 9-315. Whether a holder or purchaser referred to in this section takes free or is senior to a security interest depends on whether the purchaser is a buyer of the collateral or takes a security interest in it. The term “priority” is meant to encompass both scenarios, as it does in Section 9-327. It also is intended to embrace protections against liability under Article 8. See, e.g., §§ 8-115; 8-502.

**3. Rights Acquired by Purchasers.** The holders and purchasers referred to in this section do not always take priority over a security interest. See, e.g., Section 7-503 (affording paramount rights to certain owners and secured parties as against holder to whom a negotiable document of title has been duly negotiated). Accordingly, this section adds the clause, “to the extent provided in Articles 3, 7, and 8” to former Section 9-309.

**4. Financial Assets and Security Entitlements.** New subsection (b) responds to some suggestions that this section should provide explicit protection for those who deal with financial assets and security entitlements which are parallel to those under subsection (a) for protected purchasers of securities. The new subsection makes explicit in Article 9 what is already implicit in Article 9 and explicit in several provisions of Article 8. See, e.g., Sections 8-502; 8-503(e); 8-510; 8-511. This does not change current law. As with its predecessor, former Section 9-309, the purpose of this section is to make an explicit statement in Article 9 of what would otherwise be implicit. However, further consideration must be given to whether this subsection is necessary, whether it is too broad, and whether it might spawn unintended consequences.

**5. 4: Instrument Check Constituting Proceeds of Account Right to Payment.** Subsection (d) (e) contains an exception to the general deference this Article pays to Article 3. It provides that the priority of a security interest in an account, chattel paper, or payment intangible extends to an instrument a check that is proceeds of the right to payment. The general rule in subsection (a) leaves open the possibility that the holder of a junior security interest in, say, accounts, might be able to collect the accounts and, as a holder in due course, rightfully refuse to turn them over the collections to the holder of the senior security interest. Accounts Receivables financiers are professionals and should know whether their security interests are is senior or junior. The holder-in-due-course rules of Article 3 should not enable a junior secured party to improve its position unless it first takes steps to permit the senior secured party to protect its position. Under subsection (d), a junior secured party's holder-in-due-course status affords it priority over a senior secured party's interest only if the junior party complies with the notification requirements in paragraphs (2) - (5).

**SECTION 9-329. TRANSFER OF MONEY; TRANSFER OF FUNDS  
FROM DEPOSIT ACCOUNT.**

(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.

## Reporters' Comments

1. **Source.** New.

2. **Scope.** This section affords broad protection to transferees who take funds from a deposit account and to those who take money. The term “transferee” is not defined; however, the debtor itself is not a transferee. Thus this section does

1 not cover the case in which a debtor withdraws money (currency) from its deposit  
2 account or the case in which a depository institution debits an encumbered account  
3 and credits another account it maintains for the debtor.

4 A transfer of funds from a deposit account, to which subsection (b) applies,  
5 normally will be made by check, by funds transfer, or by debiting the debtor's  
6 deposit account and crediting another depositor's account.

7 **Example 1:** Debtor maintains a deposit account with Bank A. The deposit  
8 account is subject to a security interest in favor of Lender. At Bank B's  
9 suggestion, Debtor moves the funds from the account at Bank A to Debtor's  
10 deposit account with Bank B. Unless Bank B acted in collusion with  
11 Debtor in violating Lender's rights (an unlikely scenario, where, as here,  
12 Lender allowed Debtor access to an account sufficient to transfer funds),  
13 Bank B takes the funds (the credits running in favor of Bank B) free from  
14 Lender's security interest. See subsection (b). However, inasmuch as the  
15 deposit account maintained with Bank B constitutes the proceeds of the  
16 deposit account at Bank A, Lender's security interest would attach to that  
17 account as proceeds. See Section 9-313.

18 Subsection (b) also would apply if, in the example, Bank A debited Debtor's  
19 deposit account in exchange for the issuance of Bank A's cashier's check. Lender's  
20 security interest would attach to the cashier's check as proceeds of the deposit  
21 account, and the rules applicable to instruments would govern any competing  
22 claims to the cashier's check. See Sections 3-306; 9-328.

23 If Debtor withdraws money (currency) from an encumbered deposit account  
24 and transfers the money to a third party, then subsection (a), to the extent not  
25 displaced by federal law relating to money, applies. It contains the same rule as  
26 subsection (b).

27 Subsection (b) applies to *transfers of funds from* a deposit account; it does  
28 not apply to *transfers of the deposit account* itself or of an interest therein. For  
29 example, this section does not apply to the creation of a security interest in a  
30 deposit account. Competing claims to the deposit account itself are dealt with by  
31 other Article 9 priority rules. See Sections 9-315(a); 9-325; 9-337; 9-338.  
32 Similarly, a corporate merger normally would not result in a transfer of funds from  
33 a deposit account. Rather, it might result in a transfer of the deposit account itself.  
34 The normal rules applicable to transferred collateral would apply; this section  
35 would not.

36 3. **Policy.** Broad protection for transferees helps to ensure that security  
37 interests in deposit accounts do not impair the free flow of funds. It also minimizes  
38 the likelihood that a secured party will enjoy a claim to whatever the transferee  
39 purchases with the funds. Rules concerning recovery of payments traditionally  
40 have placed a high value on finality. The opportunity to upset a completed  
41 transaction, or even to place a completed transaction in jeopardy by bringing suit  
42 against the transferee of funds, should be severely limited. Although the giving of  
43 value usually is a prerequisite for receiving the ability to take free from third-party  
44 claims, where payments are concerned the law is even more protective. Thus,  
45 Section 3-418(c) provides that, even where the law of restitution otherwise would

1 permit recovery of funds paid by mistake, no recovery may be had from a person  
2 “who in good faith changed position in reliance on the payment. Rather than  
3 adopt this standard, this section eliminates all reliance requirements whatsoever.  
4 Payments made by mistake are relatively rare, but payments of funds from  
5 encumbered deposit accounts (e.g., deposit accounts containing collections from  
6 accounts receivable) occur with great regularity. In the mine run of cases, unlike  
7 payment by mistake, no one would object to these payments. In the vast proportion  
8 of cases, the transferee probably would be able to show a change of position in  
9 reliance on the payment. This section does not put the transferee to the burden of  
10 having to make this proof.

11 4. **“Bad Actors.”** To deal with the question of the “bad actor, this section  
12 borrows “collusion” language from Article 8. See, e.g., Sections 8-115, 8-503(e).  
13 This is the most protective (i.e., least stringent) of the various standards now found  
14 in the UCC. Compare, e.g., Section 1-201(9) (“without knowledge that the sale . . .  
15 is in violation of the . . . security interest”); Section 1-201(19) (“honesty in fact in  
16 the conduct or transaction concerned”); Section 3-302(a)(2)(v) (“without notice of  
17 any claim”).

18 5. **Other Remedies for Aggrieved Secured Party.** The Drafting  
19 Committee may consider whether (and, if so, how) to address remedies that might  
20 be available to an aggrieved secured party, other than enforcement of its security  
21 interest. One approach might be to treat this issue in the statute itself. For  
22 example, the protection that Section 8-503 affords to certain purchasers extends to  
23 immunize them from any action based on the property interest, “whether framed in  
24 conversion, replevin, constructive trust, equitable lien, or other theory. Another  
25 approach would address the issue in the Official Comments, as is done in Official  
26 Comment 9 to Section 9-115 (addressing the relation of Article 9’s priority rules to  
27 other law that affords a remedy for wrongful conduct). A third possibility is to  
28 leave development of the law to the courts without additional guidance.

29 6. **Transferee Who Does Not Take Free.** This section sets forth the  
30 circumstances under which certain transferees of money or funds take free of  
31 security interests. It does not determine the rights of a transferee who does not take  
32 free of a security interest.

33 **Example 2:** The facts are as in Example 1, but, in wrongfully moving the  
34 funds from the deposit account at Bank A to Debtor’s deposit account with  
35 Bank B, Debtor acts in collusion with Bank B. Bank B does not take the  
36 funds free of Lender’s security interest under this section. If Debtor grants a  
37 security interest to Bank B, Section 9-325 governs the relative priorities of  
38 Lender and Bank B. Under Section 9-325(3), Bank B’s security interest in  
39 the Bank B deposit account is senior to Lender’s security interest in the  
40 deposit account as proceeds. However, Bank B’s senior security interest  
41 does not protect Bank B against any liability to Lender that might arise from  
42 Bank B’s wrongful conduct. As noted in Example 1, the potential for  
43 collusion in violating a secured party’s rights under these circumstances  
44 seems more theoretical than real.



1           **SECTION 9-331. PRIORITY OF SECURITY INTERESTS IN**  
2           **FIXTURES.**

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

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

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

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

14               (1) except as otherwise provided in subsection (g), the security interest  
15               is a purchase money security interest, the interest of the encumbrancer or owner  
16               arises before the goods become fixtures, the security interest is perfected by a  
17               fixture filing before the goods become fixtures or within 10 days thereafter, and the  
18               debtor has an interest of record in, or is in possession of, the real property;

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

23               (3) the fixtures are readily removable factory or office machines, readily  
24               removable equipment that is not primarily used or leased for use in the operation of  
25               the real property, or readily removable replacements of domestic appliances that are

1 consumer goods, and before the goods become fixtures the security interest is  
2 perfected by any method permitted by this article; or

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

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

8 (1) the encumbrancer or owner has, in an authenticated record,  
9 consented to the security interest or disclaimed an interest in the goods as fixtures;  
10 or

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

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

16 (g) Subject to subsections (d)(2) through (4), (e), and (f), a security interest  
17 in fixtures is subordinate to a construction mortgage recorded before the goods  
18 become fixtures if the goods become fixtures before the completion of the  
19 construction. To the extent that it is given to refinance a construction mortgage, a  
20 mortgage has this priority to the same extent as the construction mortgage.

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

24 Reporters' Comments

25 **Source.** Former Section 9-313, conformed to Section 2A-309 and to  
26 prevailing style conventions



1           **SECTION 9-332. ACCESSIONS.**

2                           **Alternative A**

3           (a) [In this section,] “accession means goods that are [installed in,  
4 [affixed to,] [attached to,] [assembled with,] [manufactured into,] [processed with,]  
5 [or] [processed into] other goods in a manner such that the identity of the original  
6 goods is not lost.

7                           **Alternative B**

8           (a) [In this section,] “accession means goods that are physically united  
9 with other goods in a manner such that the identity of the original goods is not lost.

10                          **[End of Alternatives]**

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

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

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

17           (e) A security interest in an accession is subordinate to a security interest in  
18 the whole which is perfected by compliance with the requirements of a certificate-  
19 of-title statute under Section 9-309A(b).

20           (f) ~~Subject to Part 6, on~~ On default, subject to part 6, a secured party may  
21 remove an accession from other goods if[:

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

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

(g) [Unless otherwise agreed, a] [A] secured party that removes an accession under 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 the encumbrancer or owner 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 the obligation to reimburse.

#### Reporters' Comments

1. **Source.** New. This section replaces former Section 9-314.

2. **Status.** The Drafting Committee discussed former Section 9-314 in November, 1997. This section reflects those deliberations. The Drafting Committee has yet to review this section. The Comments below explain the text and indicate specific issues that the Drafting Committee may wish to address.

3. **Background.** 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 Section 9-314 was, in Gilmore’s words, “an exact replica of the 1962 version of Section 9-313 on fixtures. As such, it went somewhat beyond the protection that the pre-UCC automobile cases afforded security interests in accessories.

4. **“Accession.”** 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 Section 9-333. Neither this section nor the following one addresses case of collateral that changes form without the addition of other goods.

The Drafting Committee has yet to choose between the alternative definitions of “accession. The alternatives are intended to convey the same meaning and differ only in the level of specificity.

5. **“Accession” versus “Other Goods.”** This section distinguishes among the “accession, the “other goods, and the “whole. The last term refers to the

1 combination of the “accession” and the “other goods.” If one person’s collateral  
2 becomes physically united with another person’s collateral, each is an “accession.”

3 **Example 1:** SP-1 holds a security interest in the debtor’s tractors (which  
4 are not subject to a certificate-of-title law), and SP-2 holds a security  
5 interest in a particular tractor engine. The engine is installed in a tractor.  
6 From the perspective of SP-1, the tractor becomes an “accession” and the  
7 engine is the “other goods.” From the perspective of SP-2, the engine is the  
8 “accession” and the tractor is the “other goods.” The completed  
9 tractor–tractor cum engine–constitutes the “whole.”

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

19 7. **Matters Left to Other Provisions of This Article: Attachment and**  
20 **Perfection.** In this connection, consider that other provisions of this Article often  
21 will govern accession-related issues. For example, this section does not address  
22 whether a secured party acquires a security interest in the whole if its collateral  
23 becomes an accession. Normally this will turn on the description of the collateral  
24 in the security agreement. The Drafting Committee may wish to consider whether  
25 to add a *per se* rule under which a security interest would extend automatically to  
26 all accessions, as it does to proceeds.

27 **Example 2:** Debtor owns a computer subject to a perfected security interest  
28 in favor of SP-1. Debtor acquires memory and installs it in the computer.  
29 Whether SP-1’s security interest attaches to the memory depends on  
30 whether the security agreement covers it.

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

35 8. **Matters Left to Other Provisions of This Article: Priority.** With one  
36 exception, concerning goods covered by a certificate of title (see subsection (e)), the  
37 other provisions of this part, including the rules governing purchase money security  
38 interests, determine the priority of most security interests in an accession, including  
39 the relative priority of a security interest in an accession and a security interest in  
40 the whole. See subsection (d).

41 **Example 3:** Debtor owns an office computer subject to a security interest in  
42 favor of SP-1. Debtor acquires memory and grants a perfected security  
43 interest in the memory to SP-2. Debtor installs the memory in the  
44 computer, at which time (we assume) SP-1’s security interest attaches to the

memory. The first-to-file-or-perfect rule of Section 9-319 governs priority in the memory. If, however, SP-2's security interest is a purchase money security interest, Section 9-322(d) would afford priority in the memory to SP-2, regardless of which security interest was perfected first.

**9. Goods Covered by a Certificate of Title.** 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 4:** 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.**

### **Alternative A**

(a) In this section, "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.

### **Alternative B**

(a) In this section, "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.

### **[End of Alternatives]**

### **Alternative A**

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

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

6 **Alternative B**

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

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

14 **[End of Alternatives]**

15 (d) If a security interest in collateral is perfected before the collateral  
16 becomes commingled goods, the security interest that attaches to the product or  
17 mass under subsection (c) is perfected.

18 (e) Except as otherwise provided in subsection (f), the other provisions of  
19 this part, as applicable, determine the priority of a security interest that attaches to  
20 the product or mass under subsection ~~(d)~~: (c).

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

23 (1) A security interest that is perfected under subsection (d) has priority  
24 over a security interest that is unperfected at the time the collateral becomes  
25 commingled goods.

(2) If 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. **Source.** New. This section replaces former Section 9-315.

2. **Status.** The Drafting Committee discussed former Section 9-315 in November, 1997. This section reflects those deliberations. The Drafting Committee has yet to review this section. The Comments below explain the text and indicate specific issues that the Drafting Committee may wish to address.

3. **“Commingled Goods.”** 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).

The Drafting Committee has yet to choose between the alternative definitions of “commingled goods.” The alternatives are intended to convey the same meaning and differ only in the level of specificity. The introductory clause, “in this section,” appears in brackets pending a determination whether the defined term will appear elsewhere in the Article.

4. **Consequences of Becoming “Commingled Goods.”** 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).

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.

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). This section leaves the courts free to define “value” in this context.

**5. Priority of Perfected Security Interests That Attach under this Section.** 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 subsections (c) and (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.

**6. Perfection: Unperfected Security Interests.** The rule explained in the preceding Comment 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) and Section 9-319, 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 Section 9-319 would apply.

**7. Multiple Security Interests.** 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



1 would determine how that share would be allocated between them. Consider the  
2 following example, which is a variation on Example 1 above:

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

9 For purposes of subsection (f)(2), we suggest that SP-1A and SP-1B be  
10 treated like a single secured party. The collective security interest would  
11 rank equally with that of SP-2. Thus, the secured parties would share in the  
12 ratio of 3 (for SP-1A and SP-1B combined) to 5 (for SP-2). Applying this  
13 ratio to the entire value of the product, SP-1A and SP-1B in the aggregate  
14 would be entitled to \$ 375 (i.e.,  $3/8 \times \$ 1000$ ), and SP-2 would be entitled to  
15 \$ 625 (i.e.,  $5/8 \times \$ 1000$ ). However, under subsection (c), SP-1A and  
16 SP-1B may enforce their security interest only to the extent of \$ 300.  
17 (Likewise, SP-2 would be limited to a \$ 500 recovery.)

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

21 If the Drafting Committee agrees with this approach, we will attempt to draft an  
22 appropriate provision. It is possible that an explanation in the Official Comments  
23 would suffice.

24 **8. Priority of Security Interests That Attach Other than by Operation**  
25 **of this Section.** Under subsection (e), the normal ~~Normal~~ priority rules determine  
26 the priority of a security interest that attaches to the product or mass other than by  
27 operation of this section. For example, assume that SP-1 has a perfected security  
28 interest in Debtor's existing and after-acquired baked goods, and SP-2 has a  
29 perfected security interest in Debtor's flour. When the flour is processed into  
30 cakes, subsections (c) and (d) provide that SP-2 acquires a perfected security  
31 interest in the cakes. If SP-1 filed against the baked goods before SP-2 filed against  
32 the flour, then SP-1 will enjoy priority in the cakes. See Section 9-319 (first-to-file-  
33 or perfect). But if SP-2 filed against the flour before SP-1 filed against the baked  
34 goods, then SP-2 will enjoy priority in the cakes to the extent of its security interest.

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

39 **SECTION 9-334. PRIORITY OF SECURITY INTERESTS IN GOODS**  
40 **COVERED BY CERTIFICATE OF TITLE.** If, while a security interest in  
41 goods is perfected by any method under the law of another jurisdiction, this State

1 issues a certificate of title that neither shows that the goods are subject to the  
2 security interest nor contains a statement that they may be subject to security  
3 interests not shown on the certificate:

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

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

12 Reporters' Comments

13 1. **Source.** Derived from former Section 9-103(2)(d).

14 2. **Protection for Buyers and Secured Parties.** This section affords  
15 protection to certain good faith purchasers for value who are likely to have relied on  
16 a "clean" certificate of title, i.e., one that neither shows that the goods are subject to  
17 a particular security interest nor contains a statement that they may be subject to  
18 security interests not shown on the certificate. Under this section, a protected buyer  
19 can take free of, and a protected secured party can acquire priority over, a security  
20 interest that is perfected by any method under the law of another jurisdiction. The  
21 fact that the security interest has been reperfected by possession does not of itself  
22 disqualify a secured party from protection under subsection (b).

23 **SECTION 9-335. PRIORITY OF SECURITY INTEREST OR**  
24 **STATUTORY LIEN PERFECTED BY EFFECTIVE FINANCING**  
25 **STATEMENT CONTAINING INCORRECT INFORMATION.**

26 (a) A security interest or agricultural lien perfected by a filed financing  
27 statement complying with Section 9-502(a) but containing information described in  
28 Section 9-515(b)(5) that is incorrect is subordinate to the rights of a holder of a  
29 perfected security interest in or [another purchaser] [a buyer] of the collateral to the

1 extent that the secured party or [other purchaser] [buyer] gives value in reasonable  
2 reliance upon the incorrect information.

3 (b) A statutory lien, other than an agricultural lien, perfected by a filed  
4 financing statement complying with Section 9-502(a) but containing information  
5 described in Section 9-515(b)(5) that is incorrect is subordinate to the rights of a  
6 holder of a perfected security interest in the collateral to the extent that the secured  
7 party gives value in reasonable reliance upon the incorrect information.

8 Reporters' Comments

9 1. **Source.** New.

10 2. **Effect of Incorrect Information in Financing Statement.** Section  
11 9-521(a) requires the filing office to reject financing statements that do not contain  
12 information concerning the debtor as specified in Section 9-515(b)(5). A error in  
13 this information does not render the financing statement ineffective. On rare  
14 occasions, a subsequent purchaser of the collateral (i.e., a buyer or secured party)  
15 may rely on the misinformation to its detriment. Subsection (a) of this section  
16 subordinates a security interest or agricultural lien perfected by an effective, but  
17 flawed, financing statement to the rights of a purchaser to the extent the purchaser  
18 gives value in reasonable reliance on the incorrect information. Subsection (b)  
19 contains a similar rule subordinating non-agricultural statutory liens, but, in keeping  
20 with the limited treatment of statutory liens under this Article, the subordination  
21 rule is limited to competing security interests and does not apply to buyers. A  
22 purchaser who has not made itself aware of the information in the filing office with  
23 respect to the debtor cannot act in "reasonable reliance upon incorrect information.

24 **SECTION 9-336. PRIORITY SUBJECT TO SUBORDINATION.**

25 *[MINOR STYLE CHANGES ONLY]* Nothing in this article prevents  
26 subordination by agreement by a person entitled to priority.

27 Reporters' Comments

28 1. **Source.** Former Section 9-316.

29 2. **Status.** The Drafting Committee has not considered this section.

30 [SUBPART 4. RIGHTS OF DEPOSITARY INSTITUTION]



account. Accordingly, this section does not apply to the depository institution's right to set off against such an account. If the instrument is an Article 3 "instrument" and the secured party is a holder in due course (HDC), Section 9-328 makes clear that Article 3 governs, and the secured party would prevail. But if the secured party is not a holder in due course, the result under former Article 9 is uncertain: either the security interest prevails over the right of set-off under Section 9-201, or the secured party has the rights of any other non-HDC under Article 3 (in which case it might or might not prevail, depending on whether the right of set-off is a defense or claim in recoupment of the kind described in Section 3-305(a)(2) or (3)). A similar uncertainty arises under current law if the Article 9 instrument is not negotiable: either the secured party prevails over the right of set-off under Section 9-201, or the secured party has the rights of any other assignee under the common law or any applicable statute. The Drafting Committee has yet to determine whether to resolve these issues and, if so, how to do so.

**4. Preservation of Set-off Right.** Subsection (b) makes clear that a depository institution may hold both a right of set-off against, and an Article 9 security interest in, the same deposit account. The subsection does not pertain to accounts evidenced by an instrument (e.g., certain certificates of deposit), which are excluded from the definition of “deposit accounts.”

**SECTION 9-338. DEPOSITORY INSTITUTION'S RIGHT TO DISPOSE OF FUNDS IN DEPOSIT ACCOUNT.** Except as otherwise provided in Section 9-337(c), and unless the depository institution otherwise agrees in an authenticated record, a depository institution's rights and duties with respect to a deposit account maintained with the depository 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.

## Reporters' Comments

1. **Source.** New.

2. **Free Flow of Funds.** This section is designed to prevent security interests in deposit accounts from impeding the free flow of funds through the payment system. Subject to two exceptions, it leaves the depository institution's rights and duties with respect to the deposit account and the funds on deposit unaffected by the creation or perfection of a security interest or by the depository institution's knowledge of the security interest. In addition, the section permits the depository institution to ignore the instructions of the secured party unless it had agreed to honor them or unless other law provides to the contrary. A secured party

1 who wishes to deprive the debtor of access to funds on deposit or to appropriate  
2 those funds for itself needs to obtain the agreement of the depository institution,  
3 utilize the judicial process, or comply with procedures set forth in other law.  
4 Section 4-303(a), concerning the effect of notice on a bank's right and duty to pay  
5 items, is not to the contrary. That section addresses only whether an otherwise  
6 effective notice comes too late; it does not determine whether a timely notice is  
7 otherwise effective.

8       **3. Operation of Rule.** The general rule of this section is subject to Section  
9 9-337(c), under which the setoff rights of the depository institution may not be  
10 exercised against a deposit account in the secured party's name. This result reflects  
11 current law in many jurisdictions and does not appear to have unduly disrupted  
12 banking practices or the payments system. The more important function of this  
13 section, which is not impaired by Section 9-337, is the depository institution's right  
14 to follow the debtor's (customer's) instructions (e.g., by honoring checks,  
15 permitting withdrawals, etc.) until such time as the depository institution is served  
16 with judicial process or receives instructions with respect to the funds on deposit  
17 from a secured party that has control over the deposit account.

18       **4. Liability of Depository Institution.** This Article does not determine  
19 whether a depository institution's that pays out funds from an encumbered deposit  
20 is liable to the holder of a security interest. Although the fact that a secured party  
21 has control over the deposit account and the manner by which control was achieved  
22 may be relevant to the imposition of liability, whatever rule applies generally when  
23 a bank pays out funds in which a third party has an interest should determine  
24 liability to a secured party. Often, this rule is found in a non-UCC adverse claim  
25 statute. If a rule were to be introduced into the UCC, Article 4, and not Article 9,  
26 would seem to be the proper location for it. Cf. Section 8-115 (securities  
27 intermediary not liable to adverse claimant).

28       **5. Certificates of Deposit.** This section does not address the obligations of  
29 depository institutions that issue instruments evidencing deposits (e.g., certain  
30 certificates of deposit).

## 31       **SECTION 9-339. DEPOSITORY INSTITUTION'S RIGHT TO REFUSE** 32 **TO ENTER INTO OR DISCLOSE EXISTENCE OF CONTROL**

33 **AGREEMENT.** This article does not require a depository institution to enter into  
34 an agreement of the type described in Section 9-109(a)(2) even if its customer so  
35 requests or directs. A depository institution that has entered into such an agreement  
36 is not required to confirm the existence of the agreement to another person unless  
37 requested to do so by its customer.

### 38                               Reporters' Comments

39       **1. Source.** New. Derived from Section 8-106(g).

1                   2. **Protection for Depositary Institution.** This section protects depositary  
2 institutions from the need to enter into agreements against their will and from the  
3 need to respond to inquiries from persons other than their customers.



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**PART 4**  
**RIGHTS OF THIRD PARTIES**

Reporters' Prefatory Comment

Part 3, Subpart 3, deals with priorities. This part deals with several other issues affecting third parties (i.e., parties other than the debtor and the secured party). Under current law, there is some uncertainty as to which jurisdiction's law (usually, which jurisdiction's version of Article 9) applies to the matters that this part addresses. These matters are not governed by the laws specified in Part 3, Subpart 1, since the matters do not relate to perfection, the effect of perfection or nonperfection, or priority.

It would be odd if a designation of applicable law by a debtor and secured party were to control some of these matters. Consider an example that may arise under current law. Former Section 9-318(4) makes ineffective terms in certain contracts that restrict assignment of the right to payment under the contracts. Under California's nonuniform version of Article 9, security interests in most insurance policies are within the scope of the Article. Under New York's (and most States') version, security interests in insurance policies are excluded. If an insurance policy provides that it is governed by the law of New York, it would seem appropriate for New York's law to determine whether a term restricting assignment of the policy is effective. Since New York's Article 9 does not cover an assignment of the policy, New York's Section 9-318(4) would not appear to render ineffective the restriction on assignment. Now assume that the owner of the policy, a California resident, assigns it as security to a California bank, and the security agreement provides that it is governed by the law of California. Does California's Section 9-318(4) then render the restriction in the policy ineffective? We are inclined to think it should not, but the answer is uncertain.

To the extent that jurisdictions adopt identical versions of this part and the courts interpret it consistently, the inability to identify the applicable law may be inconsequential. To the extent that nonuniform amendments and inconsistent interpretations occur, however, determining the applicable law may be significant. We think it plausible to assume that some nonuniformity in the rules and applicability of Part 4 will persist as the new version of Article 9 is submitted to and adopted by the States.

Nevertheless, after considering the issue, the Drafting Committee decided not to attempt to fashion choice-of-law rules for the matters covered by this Part. It opted instead to leave courts completely free to determine the applicable law on a case-by-case basis in accordance with Section 1-105 and non-UCC principles.

**SECTION 9-401. ALIENABILITY OF DEBTOR'S RIGHTS.** A debtor's rights in collateral may be voluntarily or involuntarily transferred notwithstanding

1 any provision in the security agreement prohibiting a transfer or making a transfer a  
2 default.

3 Reporters' Comments

4 1. **Source.** Former Section 9-311.

5 2. **Negative Pledge Covenant.** The debtor may grant a security interest to  
6 secure a debt in excess of the collateral's value and agree not to create subsequent  
7 security interests in the collateral. In violation of the security agreement, the debtor  
8 may purport to grant a subsequent security interest. This section validates the  
9 subsequent (prohibited) security interest, which might even achieve priority over  
10 the earlier security interest.

11 3. **Sale of Receivables.** If a debtor sells an account, chattel paper, or  
12 payment intangible outright, as against the buyer the debtor may have no remaining  
13 rights to transfer. If, however, the buyer fails to perfect its interest, then insofar as  
14 the rights of third parties are concerned, the debtor retains its rights and title. See  
15 Section 9-315A(b). The debtor has the power to convey these rights to a  
16 subsequent purchaser. If the subsequent purchaser (buyer or secured lender)  
17 perfects, it will achieve priority over the earlier, unperfected purchaser.

18 **SECTION 9-402. SECURED PARTY NOT OBLIGATED ON**  
19 **CONTRACT OF DEBTOR.** The existence of a security interest, statutory lien, or  
20 authority given to a debtor to dispose of or use collateral, without more, does not  
21 impose contract or tort liability upon a secured party for the debtor's acts or  
22 omissions.

23 Reporters' Comments

24 **Source.** Former Section 9-317, expanded to cover statutory liens.

25 **SECTION 9-403. AGREEMENT NOT TO ASSERT DEFENSES**  
26 **AGAINST ASSIGNEE.**

27 (a) In this section, "value" has the meaning provided in Section 3-303(a).

28 (b) Except as otherwise provided in this section, an agreement between an  
29 account debtor and an assignor not to assert against an assignee any claim or  
30 defense that the account debtor may have against the assignor is enforceable by an  
31 assignee that takes an assignment for value, in good faith, without notice of a claim

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

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

7 (d) This section is subject to other law that establishes a different rule for  
8 an account debtor who is an individual and who incurred the obligation primarily  
9 for personal, family, or household purposes.

10 (e) This section does not displace other law that gives effect to an  
11 agreement by an account debtor not to assert a claim or defense against an assignee.

#### 12 Reporters' Comments

13 1. **Source.** Former Section 9-206.

14 2. **Scope.** This section has been expanded to apply to all account debtors,  
15 not just those who buy or lease goods.

16 3. **Relationship to Article 3.** Former Section 9-206(1) was designed to  
17 treat certain assignees of receivables like holders in due course of negotiable  
18 instruments. It left open certain issues, e.g., whether the section incorporates the  
19 special Article 3 definition of "value" in Section 3-303 or the generally applicable  
20 definition in Section 1-201(44). In 1990, the definition of "holder in due course"  
21 (Section 3-302) and the articulation of the rights of a holder in due course (Sections  
22 3-305 and 3-306) were revised substantially. This section has been reformulated to  
23 track more closely the rules of Sections 3-302, 3-305, and 3-306.

24 This section applies only to the obligations of an "account debtor," as  
25 defined in Section 9-102. Thus, it does not determine the circumstances under  
26 which and the extent to which a person who is obligated on a negotiable instrument  
27 is disabled from asserting claims and defenses. Rather, Article 3 must be  
28 consulted. See, e.g., Sections 3-305; 3-306. Article 3 governs even when the  
29 negotiable instrument constitutes part of chattel paper. See Section 9-102 (an  
30 obligor on a negotiable instrument constituting part of chattel paper is not an  
31 "account debtor").

32 4. **Relationship to Terms of Assigned Property.** Former Section  
33 9-206(2), concerning warranties accompanying the sale of goods, has been deleted  
34 as unnecessary. This Article does not regulate the terms of the account, chattel  
35 paper, or general intangible that is assigned, except insofar as the account, chattel  
36 paper, or general intangible itself creates a security interest (as often is the case with

1 chattel paper). Thus, Article 2, and not this Article, determines whether a seller of  
2 goods makes or effectively disclaims warranties, even if the sale is secured.  
3 Similarly, other law, and not this Article, determines the effectiveness of an account  
4 debtor's undertaking to pay notwithstanding, and not to asset, any defenses or  
5 claims against an assignor—e.g., a “hell or high water” provision in the underlying  
6 agreement that is assigned. If other law gives effect to this undertaking, then, under  
7 principles of *nemo dat*, it would be enforceable by the assignee (secured party). If  
8 other law prevents the assignor from enforcing the undertaking, this section  
9 nevertheless might permit the assignee to do so. The right of the assignee to  
10 enforce would depend upon whether, under the particular facts, the account debtor's  
11 undertaking fairly could be construed as an agreement that falls within the scope of  
12 this section and whether the assignee meets the requirements of this section.

13       **5. Relationship to Other Law.** The reference to “other law,” in subsection  
14 (d) encompasses administrative rules and regulations; the reference it replaces  
15 (“statute or decision”) arguably would not. However, because Federal Trade  
16 Commission Rule 433 (the so-called “anti-holder-in-due-course” rule) requires  
17 creditors to preserve defenses by including a notice in the agreement between the  
18 assignor and the account debtor, and does not directly render waiver-of-defense  
19 agreements ineffective, Section 9-403 may not be “subject to” the FTC rule within  
20 the meaning of subsection (d). Regardless, a creditor taking an assignment with  
21 knowledge that the documentation does not comply with the FTC rule would not be  
22 in good faith and would not qualify for protection under subsection (b).

23       This section does not displace other law that gives effect to a non-consumer  
24 account debtor's agreement not to assert defenses against an assignee, even if the  
25 agreement would not qualify under subsection (b). See subsection (e).

26       This section also does not displace other law to the extent that the other law  
27 permits an assignee who takes an assignment with notice of a claim of a property or  
28 possessory right, a defense, or a claim in recoupment to enforce an agreement not to  
29 assert claims and defenses against the assignor. This section also does not displace  
30 an assignee's right to assert that an account debtor is estopped from asserting a  
31 claim or defense. Nor does this section displace other law with respect to waivers  
32 of potential future claims and defenses that are the subject of an agreement between  
33 the account debtor and the assignee. Finally, this section does not displace Section  
34 1-107, concerning waiver of a breach that allegedly already has occurred.

35       **SECTION 9-404. RIGHTS ACQUIRED BY ASSIGNEE; DEFENSES**  
36 **AGAINST ASSIGNEE; MODIFICATION OF CONTRACT; DISCHARGE**  
37 **OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT;**  
38 **IDENTIFICATION AND PROOF OF ASSIGNMENT; TERM**  
39 **PROHIBITING ASSIGNMENT INEFFECTIVE.**

1           (a) Unless an account debtor has made an enforceable agreement not to  
2     assert defenses or claims, and subject to subsections (b) and (i), the rights of an  
3     assignee are subject to:

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

7           (2) any other defense or claim of the account debtor against the assignor  
8     which accrues before the account debtor receives a notification of the assignment  
9     authenticated by the assignor or the assignee.

10          (b) Subject to subsection (i), the claim of an account debtor may be asserted  
11     against an assignee under subsection (a) only to reduce the amount owing or for the  
12     assignee's fraud.

13          (c) Subject to subsection (i), to the extent that the right to payment or a part  
14     thereof under an assigned contract has not been fully earned by performance, or to  
15     the extent that the right to payment or a part thereof has been fully earned by  
16     performance and the account debtor has not received notification of the assignment  
17     under subsection (d), any modification of or substitution for the contract made in  
18     good faith and in accordance with reasonable commercial standards is effective  
19     against an assignee unless the account debtor has otherwise agreed but the assignee  
20     acquires corresponding rights under the modified or substituted contract. The  
21     assignment may provide that the modification or substitution is a breach of contract  
22     by the assignor.

23          (d) Subject to subsections (e), (f), (g), and (i), an account debtor on an  
24     account, chattel paper, [instrument other than a negotiable instrument,] or payment  
25     intangible may discharge its obligation by paying the assignor until, but not after,  
26     the account debtor receives a notification, authenticated by the assignor or the

1 assignee, that the amount due or to become due has been assigned and that payment  
2 is to be made to the assignee. After receipt of the notification, the account debtor  
3 may discharge its obligation by paying the assignee and may not discharge the  
4 obligation by paying the assignor.

5 (e) Subject to subsection (i), a notification is ineffective under subsection  
6 (d):

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

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

11 (3) at the option of an account debtor, if the notification notifies the  
12 account debtor to make less than the full amount of any installment or other  
13 periodic payment to the assignee, regardless of whether only a portion of the  
14 account, chattel paper, or general intangible has been assigned to that assignee, a  
15 portion has been assigned to another assignee, or the account debtor knows that the  
16 assignment to that assignee is limited.

17 (f) Subject to subsection (i), if requested by the account debtor, the assignee  
18 must seasonably furnish reasonable proof that the assignment has been made.  
19 Unless the assignee complies, the account debtor may discharge its obligation by  
20 paying the assignor even if the account debtor has received [an effective] [a]  
21 notification under subsection (d).

22 (g) Except as otherwise provided in Sections 2A-303 and 9-405, and  
23 subject to subsection (i), a term in an agreement between an account debtor and an  
24 assignor is ineffective if it prohibits, restricts, or requires the account debtor's  
25 consent to the assignment or transfer of or the creation, attachment, or perfection of

1     a security interest in an account, chattel paper, or payment intangible. This  
2     subsection does not apply to the sale of a payment intangible.

3             (h) [Subject to subsection (i), an] [An] account debtor may not waive or  
4     vary its option under subsection (e)(3).

5             (i) This section is subject to other law that establishes a different rule for an  
6     account debtor who is an individual and who incurred the obligation primarily for  
7     personal, family, or household purposes.

#### 8                             Reporters' Comments

9             1. **Source.** Former Section 9-318.

10            2. **Rights of Assignee.** Subsection (a) has been revised to reflect that  
11     waiver-of-defense clauses under Section 9-206 are not limited to sales and leases  
12     and to track Section 3-305(a)(3) more closely.

13            New subsection (b) ~~tracks Section 3-305(a)(3) in limiting the size of limits~~  
14     the claim that the account debtor may assert against an assignee. ~~be asserted by the~~  
15     account debtor. ~~It follows the rule of *Michelin Tires (Canada), Ltd. v. First*~~  
16     ~~*National Bank*, 666 F.2d 673 (1st Cir. 1981), in permitting an assignee to~~  
17     Borrowing from Section 3-305(a)(3) and cases construing former Section 9-318,  
18     subsection (b) generally does not afford the account debtor the right to an  
19     affirmative recovery from an assignee. Although most claims may be asserted  
20     against an assignee only to reduce the amount owing, the account debtor may assert  
21     an affirmative claim based on the assignee's fraud ~~as well as a claim to reduce the~~  
22     amount owing.

23            New subsection (i) makes clear that the rules of this section are subject to  
24     other law establishing special rules for consumer account debtors.

25            3. **Application to "Account Debtor."** This section deals only with the  
26     rights and duties of "account debtors –and for the most part only with account  
27     debtors on accounts, chattel paper, and payment intangibles. Neither this section  
28     nor any other provision of this Article, including ~~Section~~ Sections 9-406 and 9-  
29     406A, provides analogous regulation of the rights and duties of other obligors on  
30     collateral, such as the maker of a negotiable instrument (governed by Article 3), the  
31     issuer of a letter of credit (governed by Article 5), or the issuer of a security  
32     (governed by Article 8). Article 9 leaves those rights and duties untouched;  
33     however, Section 9-406A deals with the special case of letters of credit. When  
34     chattel paper is composed in part of a negotiable instrument, the obligor on the  
35     instrument is not an "account debtor, and Article 3 governs the rights of the  
36     assignee of the chattel paper with respect to the issues this section addresses. See,  
37     e.g., Section 3-601 (dealing with discharge of an obligation to pay a negotiable  
38     instrument). However, bracketed language in the definition of "account debtor" in  
39     Section 9-102 would make it clear that an obligor on a non-negotiable instrument is



1 an account debtor; accordingly, this section would be applicable to such an obligor.  
2 The Drafting Committee has not yet discussed that issue.

3 References in this section to an “account debtor” include account debtors on  
4 collateral that is proceeds.

5 **4. Modification of Assigned Contract.** Subsection (c) changes former  
6 Section 9-318(2) by providing that good faith modifications are binding against an  
7 assignee except to the extent that the right to payment has been earned and  
8 notification has not been given to the account debtor.

9 **5. Account Debtor’s Right to Pay.** Subsection (d) provides the general  
10 rule concerning an account debtor’s right to pay the assignor until the account  
11 debtor receives appropriate notification. The revision makes clear that once the  
12 account debtor receives the notification, the account debtor cannot discharge its  
13 obligation by paying the assignor. It also makes explicit that payment to the  
14 assignor before notification, or payment to the assignee after notification,  
15 discharges the obligation. No change in meaning from former Section 9-318 is  
16 intended.

17 Subsection (d) also has been revised to apply only to account debtors on  
18 accounts, chattel paper, and payment intangibles. (The term “account debtor” is  
19 defined in Section 9-102 to include those obligated on all general intangibles.)  
20 Although this revision renders subsection (d) more precise, it probably does not  
21 change the law. Former Section 9-318(3) refers to the account debtor’s obligation  
22 to “pay,” thereby suggesting that the subsection is limited to account debtors on  
23 accounts, chattel paper, and other payment obligations.

24 The bracketed phrase in subsection (d) raises the issue whether this  
25 subsection should govern the rights and obligations of an obligor on a non-  
26 negotiable instrument. Today, these rights and obligations are governed by  
27 common law. Some observers believe that the “notification” rule of subsection (d)  
28 is preferable to the traditional common-law “merger” rule, under which the  
29 obligation to pay runs to the person in possession of an indispensable instrument.  
30 The “merger” rule may have particularly undesirable effects in the case of a real  
31 property mortgagor who pays the full amount of the mortgage note to the  
32 mortgagee, only to discover that the obligation was not discharged because the note  
33 and mortgage had been assigned and delivered to the assignee prior to payment. On  
34 the other hand, creating a rule for assignees under Article 9 that may differ from the  
35 rule applicable to non-Article 9 assignees (e.g., buyers of non-negotiable notes),  
36 carries with it the potential for mischief.

37 Nothing in this section conditions the effectiveness of a notification on the  
38 identity of the person who gives it. An account debtor that doubts whether the right  
39 to payment has been assigned may avail itself of the procedures in subsection (f).

40 **6. Limitations on Effectiveness of Notification.** This section contains  
41 three special rules concerning the effectiveness of a notification under subsection  
42 (d).

1 Subsection (e)(1) tracks former Section 9-318(3) and makes ineffective a  
2 notification that does not reasonably identify the rights assigned.

3 Subsection (e)(2), which is new, applies only to sales of payment  
4 intangibles. It makes a notification ineffective to the extent that other law gives  
5 effect to an agreement between an account debtor and a seller of a payment  
6 intangible that limits the account debtor's duty to pay a person other than the seller.  
7 Payment intangibles are substantially less fungible than accounts and chattel paper.  
8 In some (e.g., commercial bank loans), account debtors customarily and  
9 legitimately expect that they will not be required to pay any person other than the  
10 financial institution that has advanced funds.

11 It has become common in financing transactions to assign interests in a  
12 single obligation to more than one assignee. Requiring an account debtor that owes  
13 a single obligation to make multiple payments to multiple assignees would be  
14 unnecessarily burdensome. Thus, under subsection (e)(3), an account debtor that is  
15 notified to pay an assignee less than the full amount of any installment or other  
16 periodic payment has the option to treat the notification as ineffective, ignore the  
17 notice, and discharge the assigned obligation by paying the assignor. Some account  
18 debtors may not realize that the law affords them the right to ignore certain notices  
19 of assignment with impunity. By making the notification ineffective at the account  
20 debtor's option, subsection (e)(3) permits an account debtor to pay the assignee in  
21 accordance with the notice and thereby to satisfy its obligation *pro tanto*. Under  
22 subsection (h), the rights and duties created by subsection (e)(3) cannot be waived  
23 or varied.

24 **7. Proof of Assignment.** Subsection (f) links payment with discharge, as  
25 in subsection (d). It follows former Section 9-318(3) in referring to the right of the  
26 account debtor to pay the assignor if the requested proof of assignment is not  
27 seasonably forthcoming. Arguably, the notification of assignment would remain  
28 effective, so that, in the absence of reasonable proof of the assignment, the account  
29 debtor could discharge the obligation by paying either the assignee or the assignor.  
30 Of course, if no assignment was in fact made, the putative assignee has no right to  
31 payment under any circumstances, and the account debtor cannot discharge the  
32 obligation by paying the putative assignee. If no assignment was made, the quality  
33 of the notice or the "proof" of assignment are irrelevant.

34 An account debtor may face another problem if its obligation becomes due  
35 while the account debtor is awaiting reasonable proof of the assignment that it has  
36 requested from the assignee. This section does not excuse the account debtor from  
37 timely compliance with its obligations. Consequently, an account debtor may  
38 discharge its obligation by paying the assignor when payment is due, even if the  
39 account debtor has not yet received a response to its request for proof of the  
40 assignment. On the other hand, after requesting reasonable proof of the assignment,  
41 an account debtor may not discharge its obligation by paying the assignor before  
42 payment is due unless the assignee has failed to provide the proof seasonably.

43 **8. Restrictions on Assignment.** Former subsection (4) renders ineffective  
44 an agreement between an account debtor and an assignor that prohibits assignment  
45 of an account (whether outright or for collateral purposes) or prohibits a security  
46 assignment of a general intangible for the payment of money due or to become due.

1 Subsection (g) essentially follows former Section 9-318(4), but expands the rule of  
2 free assignability to chattel paper (subject to Sections 2A-303 and 9-405), and  
3 explicitly overrides restrictions on assignability as well as prohibitions.

4 Former Section 9-318(4) does not apply to sales of payment intangibles but  
5 does apply to assignments for security. Subsection (g) continues this approach.  
6 Section 9-406 addresses ~~This Article likewise does not address~~ anti-assignment  
7 clauses with respect to these sales of payment intangibles; ~~the clauses would~~  
8 ~~continue to be governed by non-UCC law.~~

9 Like former subsection (4), subsection (g) provides that anti-assignment  
10 clauses are “ineffective. The quoted term means that the clause is of no effect  
11 whatsoever; it does not prevent the assignment from taking effect between the  
12 parties, nor does the prohibited assignment constitute a default under the agreement  
13 between the account debtor and assignor.

14 98. Multiple Assignments. The section remains silent concerning multiple  
15 assignments. The Official Comments might refer to applicable non-UCC rules.

16 **SECTION 9-405. RESTRICTIONS ON CREATION OR**  
17 **ENFORCEMENT OF SECURITY INTEREST IN LEASEHOLD INTEREST**  
18 **OR IN LESSOR’S RESIDUAL INTEREST.**

19 (a) In this section, "creation of a security interest" includes the sale of a  
20 lease contract that is subject to this article.

21 (b) A provision in a lease agreement which prohibits the creation or  
22 enforcement of a security interest in an interest of a party under the lease contract or  
23 in the lessor's residual interest in the goods, or which makes such a transfer an event  
24 of default, is not enforceable unless, and then only to the extent that, there is a  
25 transfer by the lessee of the lessee's right of possession or use of the goods in  
26 violation of the provision or a delegation of a material performance of either party  
27 to the lease contract in violation of the provision. Neither the granting nor the  
28 enforcement of a security interest in the lessor's interest under the lease contract or  
29 the lessor's residual interest in the goods is a transfer that materially impairs the  
30 prospect of obtaining return performance by, materially changes the duty of, or  
31 materially increases the burden or risk imposed on, the lessee within Section

1 2A-303(5) unless, and then only to the extent that, there is a delegation of a  
2 material performance of the lessor.

3 Reporters' Comments

4 1. **Source.** Section 2A-303.

5 2. **Status.** Inasmuch as these provisions deal explicitly with the creation of  
6 a security interest, some people think they belong in Article 9. Others disagree and  
7 would keep the provisions in Article 2A. We expect that both Drafting Committees  
8 will consider the issue. In any event, it is likely that some revision of these  
9 provisions will be appropriate.

10 **SECTION 9-406. RESTRICTIONS ON ASSIGNMENT OF CERTAIN**  
11 **GENERAL INTANGIBLES INEFFECTIVE.**

12 (a) A term in a general intangible, including a contract, permit, license, or  
13 franchise, between an account debtor and a debtor which prohibits, restricts, or  
14 requires the account debtor's consent to the assignment or transfer of or creation,  
15 attachment, or perfection of a security interest in the general intangible, is  
16 ineffective to the extent that:

17 (1) the term would impair the creation, attachment, or perfection of a  
18 security interest; or

19 (2) the creation, attachment, or perfection of the security interest would  
20 cause a default, breach, right of recoupment, claim, defense, termination, right of  
21 termination, or remedy under the general intangible.

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

24 (c) A provision in a statute or governmental rule or regulation that  
25 prohibits, restricts, or requires the consent of a government or governmental body  
26 or official to the assignment or transfer of or creation of a security interest in a  
27 general intangible, including a contract, permit, license, or franchise, between an  
28 account debtor and a debtor is ineffective to the extent that:

(1) the term would impair the creation, attachment, or perfection of a security interest; or

(2) 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, or provision in a statute, rule, or regulation, is ineffective under subsection (a) or (c) but is effective under other law, the creation, attachment, or perfection of a security interest in the general intangible:

(1) is not enforceable against the account debtor;

(2) imposes no duties or obligations on the account debtor; and

(3) 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 prevails over any inconsistent provisions of the following statutes, rules, and regulations:

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

## Reporters' Comments

1. **Source.** New.

2. **Free Assignability.** This section makes ineffective any attempt to restrict assignment of a general intangible, whether the restriction appears in the terms of the general intangible (subsection (a)) or in a statute, rule, or regulation (subsection (c)). The principal goal is to protect the creation, attachment, and perfection of a security interest (including a sale of a payment intangible) while preventing these events from giving rise to a default or breach by the assignor or from triggering a remedy of the account debtor, all in the interest of enhancing the ability of certain debtors to obtain credit. On the other hand, subsection (d) protects the other party obligated to perform (the “account debtor”) from any adverse effects of the security interest. It leaves the account debtor’s rights and obligations unaffected if a restriction rendered ineffective by subsection (a) or (c) would be effective under other law.

1           **3. Terminology: “Account Debtor.”** This section uses the term “account  
2 debtor to refer to the party other than the debtor to a general intangible such as a  
3 permit, franchise, or the like. In many cases the principal payment obligation under  
4 a general intangible may be a obligation to pay *by* the debtor *to* the account debtor.  
5 But the definition of “account debtor” in Section 9-102 does not limit the term to  
6 persons who are obligated to *pay* under a general intangible. Because the other  
7 party to a general intangible may not have affirmative executory duties or  
8 obligations, it has been suggested that another term be used. Alternatively, the  
9 Drafting Committee may wish to consider whether the definition of “account  
10 debtor” should be expanded to include “a person, other than the debtor, that is a  
11 party to a general intangible.

12           **4. Scope: Sales of Payment Intangibles and Other General Intangibles.**  
13 This section applies to a security interest in payment intangibles only if the security  
14 interest arises out of sale of the payment intangibles. Security interests in payment  
15 intangibles that secure an obligation are subject to the even broader anti-assignment  
16 rule in Section 9-404(g).

17           This section does not render ineffective any term that restricts outright sales  
18 of general intangibles other than payment intangibles. It deals only with restrictions  
19 on security interests. The only sales of general intangibles that create security  
20 interests are sales of payment intangibles.

21           **5. Effect in Assignor’s Bankruptcy.** This section is likely to have a  
22 substantial effect if the assignor enters bankruptcy. Roughly speaking, Bankruptcy  
23 Code § 552 invalidates security interests in property acquired after a bankruptcy  
24 petition is filed, except to the extent that the post-petition property constitutes  
25 proceeds of pre-petition collateral. Consider the owner of a cable television  
26 franchise that, under applicable law, cannot be assigned without the consent of the  
27 municipal franchisor. A lender wishes to extend credit to the franchisee, secured by  
28 the debtor’s “going business” value. To secure the loan, the debtor grants a security  
29 interest in all its existing and after-acquired property. The franchise represents the  
30 principal value of the business. The municipality refuses to consent to any  
31 assignment for collateral purposes. As a consequence, by virtue of other law, the  
32 security interest in the franchise does not attach. If the debtor enters bankruptcy  
33 and sells the business, the secured party will receive but a fraction of the business’s  
34 value. Under this section, however, the security interest would attach to the  
35 franchise. As a result, the security interest would attach to the proceeds of any sale  
36 of the franchise during bankruptcy. This section would protect the interests of the  
37 municipality, by preventing the secured party from enforcing its security interest to  
38 the detriment of the municipality.

39           **6. Contrary Federal Law.** This section does not override federal law to  
40 the contrary.

41           **SECTION 9-406A. RESTRICTIONS ON ASSIGNMENT OF LETTERS**  
42 **OF CREDIT INEFFECTIVE.**

1       (a) A term in a letter of credit or a rule of law, custom, or practice  
2       applicable to the letter of credit that prohibits, restricts, or requires the consent of an  
3       applicant, issuer, or nominated person to a beneficiary's assignment of or creation  
4       of a security interest in the letter of credit or proceeds of the letter of credit is  
5       ineffective to the extent that:

6       (1) the term or rule of law, custom, or practice would impair the  
7       creation, attachment, or perfection of a security interest in the letter of credit or  
8       proceeds of the letter of credit; or

9       (2) the creation, attachment, or perfection of the security interest would  
10      cause a default, breach, claim, defense, termination, right of termination, or remedy  
11      under the letter of credit or proceeds of the letter of credit.

12      (b) To the extent that a provision in a letter of credit is ineffective under  
13      subsection (a) but is effective under Article 5, other law, or a rule of custom or  
14      practice applicable to the letter of credit, to the transfer of a right to draw or  
15      otherwise demand performance under the letter of credit, or to the assignment of a  
16      right to proceeds of the letter of credit, the creation, attachment, or perfection of a  
17      security interest in the letter of credit or the proceeds of the letter of credit:

18      (1) is not enforceable against the applicant, issuer, nominated person, or  
19      transferee beneficiary;

20      (2) imposes no duties or obligations on the applicant, issuer, nominated  
21      person, or transferee beneficiary; and

22      (3) does not require the applicant, issuer, nominated person, or  
23      transferee beneficiary to recognize the security interest, pay or render performance  
24      to the secured party, or accept payment or other performance from the secured  
25      party.

26      Reporters' Comments



1       1. **Source.** Former Section 9-318.

2       2. **Purpose and Relevance.** This section, patterned on Section 9-406, limits  
3       the effectiveness of any attempt to restrict assignment of a letter of credit or  
4       proceeds of the letter of credit, whether the restriction appears in the letter of credit  
5       or a rule of law, custom, or practice applicable to the letter of credit. It is intended  
6       to be consistent with Article 5.

7       The principal goal of subsection (a) is to protect the creation, attachment, and  
8       perfection of a security interest while preventing these events from giving rise to a  
9       default or breach by the assignor or from triggering a remedy or defense of the  
10      issuer or other person obligated on a letter of credit. On the other hand, subsection  
11      (b) protects the issuer and other parties from any adverse effects of the security  
12      interest. It explicitly preserves the “independence principle” of letter-of-credit law  
13      by leaving unaffected the rights and obligations of issuers, nominated persons, and  
14      transferee beneficiaries if a restriction rendered ineffective by subsection (a) would  
15      be effective under other law.

16      A letter of credit is a type of support obligation. See Section 9-102. Under  
17      Sections 9-203 and 9-308, a security interest in a support obligation attaches and is  
18      perfected automatically if the security interest in the supported obligation attaches  
19      and is perfected. See Section 9-110, Comment 5. It may be anomalous, or at least  
20      misleading, to provide for automatic attachment and perfection in Article 9 if, under  
21      other law (e.g., Article 5), a restriction on transfer or assignment is effective to  
22      block attachment. This section makes it clear that restrictions on an assignment of  
23      a letter of credit are ineffective to prevent attachment and perfection, but preserves  
24      letter of credit law and practice limiting the right of a beneficiary to transfer its right  
25      to draw or otherwise demand performance (Section 5-112) and limiting the  
26      obligation of an issuer or nominated person to recognize a beneficiary’s assignment  
27      of letter of credit proceeds (Section 5-114). Thus, this section’s treatment of letters  
28      of credit and proceeds of letters of credit differs from that of instruments and  
29      investment property.

1 **PART 5**

2 **FILING**

3 Reporters' Prefatory Comment

4 The filing system is the heart of Article 9. Part 5, which governs the filing  
5 system, has been revised substantially, with a view toward reducing the costs of  
6 filing and searching the public records and reducing the burdens upon the filing  
7 office that Article 9 now imposes. Efforts also have been made to promote  
8 uniformity in the policies and practices of filing offices. Revised Part 5 attempts to  
9 curtail the nearly unbridled discretion that Article 9 now affords to filing offices.  
10 This discretion increases the costs to users of the system and conflicts with the goal  
11 of uniformity.

12 Many of the revisions stem from three concepts. First, Part 5 is, by its  
13 express terms, "medium-neutral." It recognizes that one can "communicate" a  
14 "record" (both newly defined in Section 9-102) by means other than writing or other  
15 tangible media. This approach is designed to facilitate receipt, processing,  
16 maintenance, retrieval, reporting, and transmission of Article 9 filing data by means  
17 of electronic, voice, optical, and other technologies. In short, under the draft, a  
18 filing office may maintain and operate, in addition to or instead of a paper-based  
19 system, a non-paper-based system using any technology that will accomplish the  
20 purposes of the filing system.

21 Second, new Section 9-528 provides for administrative rules to address  
22 details that are better left outside of the statute. While recognizing that each filing  
23 office may have particular needs, the provision for administrative rules stresses the  
24 importance of establishing uniform policies and procedures to the greatest extent  
25 possible. To this end, a set of model rules is being developed by the International  
26 Association of Corporate Administrators and other participants in the Article 9  
27 Filing Project.

28 Third, revised Part 5 incorporates what has come to be known as the "open  
29 drawer" approach. This convention encompasses several aspects of filing office  
30 operations. First, the filing office may not reject a financing statement or other  
31 record for a reason other than one of the few set forth in the Article. Second, the  
32 filing office is obliged to link all subsequent records (e.g., amendments,  
33 assignments, etc.) to the initial financing statement to which they relate. Third, the  
34 filing office may delete a financing statement and related records from the files only  
35 upon lapse (i.e., five years after the filing date, in most cases), and then only if a  
36 continuation statement has not been filed. Thus, a financing statement and all  
37 records relating to it will be discovered by a search of the files even after the filing  
38 of a termination statement. This approach helps eliminate filing office discretion  
39 and also eases problems associated with multiple secured parties and multiple  
40 partial assignments.

41 In developing Part 5, the Drafting Committee has received valuable  
42 assistance from participants in the Article 9 Filing Project, a joint project sponsored  
43 by the University of Minnesota with the cooperation of the Conference.

1 In reviewing Part 5, the reader should keep in mind that Section 9-102  
2 defines the term "financing statement" to include not only the initial financing  
3 statement but also the remaining parts of the package that constitute the complete  
4 financing statement of record—e.g., assignments, continuation statements, and any  
5 other records on file that relate to the initial financing statement.

6 Most of the substantive revisions that this draft makes to Part 5 resulted  
7 from a meeting held on May 19, 1997, among the Reporters and a small group of  
8 filing experts, including some filing officers. Others reflect further thinking by the  
9 Reporters. These changes are intended for discussion purposes only. Although  
10 many of them were available for the consideration of filing officers in conjunction  
11 with the 1997 annual meeting of the International Association of Corporate  
12 Administrators, they have not been considered by the Drafting Committee.

13 In some cases, the Reporters' Comments have been revised to reflect  
14 changes. In others, we have added additional Comments to this draft, labeled  
15 "Reporters Comments - June, 1997, Draft" and, with the thought that they may be  
16 useful to some reviewers, have retained the Reporters' Comments that we prepared  
17 for the 1997 Annual Meeting Draft. Note, however, that the changes made in this  
18 draft have rendered inaccurate some of those Comments and some cross-references  
19 contained in the Comments.

20 [SUBPART 1. ~~PLACE OF FILING OFFICE~~; CONTENTS AND  
21 EFFECTIVENESS OF FINANCING STATEMENT]

22 **SECTION 9-501. ~~PLACE OF FILING OFFICE.~~**

23 (a) If the law of this State governs perfection of a security interest or  
24 statutory lien, the office with which place to file a financing statement to perfect the  
25 security interest or statutory lien is:

26 (1) the office designated for the filing or recording of a mortgage on the  
27 real property, if:

28 (i) the collateral is timber to be cut or as-extracted collateral or is  
29 minerals or the like, including oil and gas, or accounts subject to Section 9-306, or  
30 the financing statement is filed as a fixture filing and the collateral is goods that are  
31 or are to become fixtures; [and]

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

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

(b) The office with which place to file a financing statement to perfect a security interest or statutory lien in collateral, including fixtures, of a transmitting utility is the office of [ ]. This financing statement [also] constitutes a fixture filing as to the ~~described~~ collateral indicated in the financing statement which ~~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 ~~state's~~ filing system (see Section 9-526).*

## Reporters' Comments

1. **Source.** Former Section 9-401, revised as indicated below.

2. **Where to File.** Subsection (a) indicates where in a given State a financing statement is to be filed. Former Article 9 affords each State three alternative approaches, depending on the extent to which the State desires central filing (usually with the Secretary of State), local filing (usually with a county office), or both. Local filing increases the net costs of secured transactions by increasing uncertainty and the number of required filings. Any benefit that local filing may have had in the 1950's (e.g., ease of access to local creditors) is now insubstantial. Accordingly, this Article dictates central filing for most situations, while retaining local filing for real-estate-related collateral and special filing provisions for transmitting utilities. (The Drafting Committee has yet to consider whether the current definition of "transmitting utility" is adequate.) The changes relating to minerals in subsection (a)(1) respond to recommendations of the ABA Oil and Gas Task Force and are primarily for clarification. Under subsection (a)(1), a filing with the office where a mortgage on the relevant real property would be filed will perfect a security interest in as-extracted collateral. Inasmuch as the security interest does not attach until extraction, the filing continues to be effective after extraction. A different result occurs with respect to timber to be cut, however. Unlike as-extracted collateral, standing timber may be goods before it is cut. See Section 9-102 (defining "goods"). Once cut, however, it is no longer timber to be cut, and the filing in the real property mortgage office ceases to be effective. The timber then becomes ordinary goods, and filing in the office specified in subsection (a)(3) is necessary for perfection. Note also that after the timber is cut the law of the debtor's location, not the location of the timber, governs perfection under Section 9-301.

1           3. **Registered Agent.** The Reporters distributed to the Drafting Committee  
2 a proposal under which a State would permit each debtor to select a “registered  
3 agent to maintain financing statements and other Article 9 records pertaining to the  
4 debtor. Subsection (a)(2) provides for filing with such a registered agent, should  
5 the Drafting Committee elect to pursue this proposal.

6           **SECTION 9-502. CONTENTS OF FINANCING STATEMENT;**  
7 **MORTGAGE AS FINANCING STATEMENT; TIME OF FILING**  
8 **FINANCING STATEMENT.**

9           (a) A financing statement is sufficient only if it provides the name of the  
10 debtor and the name and mailing address of the secured party or a representative of  
11 the secured party and indicates the collateral covered by the financing statement. If  
12 the financing statement covers timber to be cut or as-extracted collateral, ~~or is~~  
13 ~~minerals or the like, including oil and gas, or accounts subject to Section 9-306, or~~  
14 the financing statement is filed as a fixture filing and the collateral is goods that are  
15 or are to become fixtures, the financing statement also must indicate that it covers  
16 this type of collateral, indicate that it is to be filed [for record] in the real property  
17 records, provide a description of the real property [sufficient if it were contained in  
18 a mortgage of the real property to give constructive notice of the mortgage under  
19 the law of this State], and, if the debtor does not have an interest of record in the  
20 real property, provide the name of a record owner.

21 *Legislative Note: Language in brackets is optional. Where the State has any*  
22 *special recording system for real property other than the usual grantor-grantee*  
23 *index (as, for instance, a tract system or a title registration or Torrens system)*  
24 *local adaptations of subsection (a) and Section 9-520(b) may be necessary. See,*  
25 *e.g., Mass. Gen. Laws Chapter 106, Section 9-410.*

26           (b) If a financing statement states that it is filed in connection with a [public  
27 finance transaction] [or] [manufactured home transaction], it also may indicate state  
28 that its period of effectiveness is [10, 20, or 30] years after the date of filing.

1           (c) A real property mortgage is effective from the date of recording as a  
2           financing statement filed as a fixture filing or as a financing statement covering  
3           [timber to be cut or] as-extracted collateral ~~from the date of its recording~~ only if:  
4           (1) the mortgage indicates the goods or accounts that it covers;

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**Paragraph 2--Alternative A**

(2) (A) the goods are or are to become fixtures related to the real property described in the mortgage;  
(B) the goods are minerals [related to] [located in/on] the real property described in the mortgage; or  
(C) the accounts arise from the sale of minerals [related to] [located in/on] the real property described in the mortgage;

**Paragraph 2--Alternative B**

(2) (A) the goods are or are to become fixtures related to the real property described in the mortgage; or  
(B) the collateral is as-extracted collateral related to the real property described in the mortgage;  
(3) the mortgage complies with the requirements for a financing statement in this section other than an indication that it is to be filed in the real property records; and  
(4) the mortgage is [duly] recorded.  
(d) A financing statement may be filed before a security agreement is made or a security interest otherwise attaches.

**Reporters' Comments**

1. **Source.** Former Section 9-402(1), (5), (6).
2. **Debtor's Signature; Required Authorization.** Subsection (a) omits the requirement that the debtor sign a financing statement. As PEB Commentary No. [] indicates, a paperless financing statement may be filed electronically under existing law. Nevertheless, the elimination of the signature requirement facilitates paperless filing. Elimination of the debtor's signature requirement makes the exceptions provided by former Section 9-402(2) unnecessary.
- The fact that this Article does not require that an authenticating symbol be contained in the public record does not mean that all filings are authorized. To the contrary, this Article contains several provisions designed to insure that only authorized records are filed. Section 9-508(a) permits a person to file an initial financing statement or an amendment that adds collateral only if the debtor



1 authorizes the filing, and Section 9-624(d) provides a remedy for unauthorized  
2 filings. Sections 9-515(b)(1) and 9-528 supplement these provisions by permitting  
3 the filing office to prescribe criteria for determining, for example, whether the filer  
4 is who the filer purports to be and to refuse to accept for filing a fraudulent record.  
5 This Article also contains provisions that assist in the discovery of unauthorized  
6 filings and the amelioration of their effect. For example, Section 9-520(a)(6)  
7 requires the filing office to communicate the information in each filed record to  
8 every debtor and secured party that might be affected. In addition, Section 9-519  
9 provides a procedure whereby a person may add to the public record a statement to  
10 the effect that a financing statement indexed under the person's name was  
11 wrongfully filed.

12       **3. Certain Other Requirements.** This section deletes other formerly  
13 required information because it seems unwise (real property description for  
14 financing statements covering crops), unnecessary (adequacy of copies of financing  
15 statements, address of debtor), or both (copy of security agreement as financing  
16 statement). Inasmuch as a secured party owes no obligation to disclose information  
17 concerning the security interest to third parties, the address requirement now refers  
18 to "a mailing address for the secured party. Although a mailing address for the  
19 debtor no longer is required as a condition of effectiveness, the filing office must  
20 reject a financing statement that does not provide that information. See Sections  
21 9-521(a); 9-515(b)(5)(A).

22       **4. Public Finance Transactions; Manufactured Home Transactions.**  
23 The normal 5-year period of effectiveness is inapplicable to public finance  
24 transactions and manufactured home transactions. See Section 9-516 and the  
25 Comments thereto. Subsection (b) permits a financing statement filed in  
26 connection with a transaction of either kind to indicate its period of effectiveness.  
27 The Drafting Committee has yet to consider the specifics of this subsection.

28       **5. Real-Property-Related Filings.** The second sentence of subsection (a)  
29 contains the requirements for fixture filings and financing statements covering  
30 timber, minerals, and certain accounts. Subsection (c) explains when a real  
31 property mortgage is effective as a fixture filing or to cover [timber to be cut or]  
32 minerals and minerals-related accounts constituting as-extracted collateral. The  
33 changes relating to minerals and accounts in subsections (a) and (c) primarily  
34 respond to recommendations of the ABA Oil and Gas Task Force. The draft  
35 presents two alternatives for subsection (c)(2). They are intended to convey the  
36 same meaning.

37       Subsection (a) contains the following terms: "for record, "real property  
38 records, "interest of record, and "record owner. These are terms traditionally  
39 used in real estate law. This context "otherwise requires that the definition of  
40 "record in Section 9-102(a) is not applicable.

41       **6. Security Agreement as Financing Statement.** Subsection (d), which is  
42 taken from former Section 9-402(1), may be unnecessary. Nevertheless, a majority  
43 of the Drafting Committee believe that the provision has proven useful. See also  
44 Section 9-308(a) (contemplating situations in which a financing statement is filed  
45 before a security interest attaches).

1           **SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

2           (a) A financing statement sufficiently provides the name of the debtor:

3               (1) if the debtor is a registered entity, only if the financing statement  
4 provides the name of the debtor as shown on the public records of the debtor's State  
5 of organization;

6               (2) if the debtor is a decedent's estate, only if the financing statement  
7 provides the name of the decedent and indicates that the debtor is an estate;

8               (3) if the debtor is a trust or a trustee acting with respect to property of a  
9 trust, only if the financing statement:

10               (A) provides the name, if any, specified for the trust in its organic  
11 documents or, if no name is specified, ~~states~~ provides the name of the settlor and  
12 additional information sufficient to distinguish the debtor from other trusts having  
13 one or more of the same settlors; and

14               (B) indicates, in the debtor's name or otherwise, that the debtor is a  
15 trust; and

16               (4) in other cases, only if it provides the individual or organizational  
17 name of the debtor.

18           (b) A financing statement that sufficiently provides the name of the debtor  
19 is not rendered ineffective by the absence of a trade or other name<sub>2</sub> or names of  
20 partners, members, or associates<sub>2</sub> of the debtor.

21           (c) A financing statement that provides only the debtor's trade name or only  
22 the names of the debtor's partners, members, or associates does not sufficiently  
23 provide the name of ~~the~~ a debtor that has a name.

24           (d) A financing statement may provide the name of more than one debtor  
25 and the name of more than one secured party.

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

#### 4 Reporters' Comments

5 1. **Source.** Subsection (a)(4) derives from former Section 9-402(7);  
6 otherwise, new.

7 2. **Debtor's Name.** The requirement that a financing statement give the  
8 debtor's name is particularly important. Financing statements are indexed under  
9 the name of the debtor, and those who wish to find financing statements search for  
10 them under the debtor's name. Subsection (a) explains what the debtor's name is  
11 for purposes of a financing statement. If the debtor is a "registered entity" (defined  
12 in Section 9-102 so as to ordinarily include corporations, limited partnerships, and  
13 limited liability companies), then the debtor's name is the name shown on the  
14 public records of the debtor's "State of organization" (also as defined in Section  
15 9-102). Subsections (a)(2) and (a)(3) contain special rules for decedent's estates  
16 and trusts, as to which current law is now silent.

17 Subsection (a)(4) essentially follows the first sentence of former Section  
18 9-402(7). Section 1-201(28) defines the term "organization," which appears in  
19 subsection (a)(4), very broadly, to include all legal and commercial entities as well  
20 as associations that lack the status of a legal entity. If the organization has a name,  
21 that name is the correct name to put on a financing statement. If the organization  
22 does not have a name, then the financing statement should name the individuals or  
23 other entities who comprise the organization.

24 Together with subsections (b) and (c), subsection (a) reflects the prevailing  
25 view that the actual individual or organizational name of the debtor on a financing  
26 statement is both necessary and sufficient, whether or not trade or other names are  
27 given.

28 3. **Secured Party's Name.** New subsection (e) makes clear that when the  
29 secured party is a representative, the financing statement is sufficient if it names the  
30 secured party, whether or not it indicates any representative capacity. Similarly, a  
31 financing statement that names a representative of the secured party need not  
32 indicate the representative capacity.

33 **Example:** Debtor grants a security interest to a group of secured parties, but  
34 not to their representative, the collateral agent. The collateral agent is not  
35 itself a secured party. See Section 9-102. Under Sections 9-502(a) and  
36 9-503(e), however, a financing statement is effective if it names as secured  
37 party the collateral agent and not the actual secured parties, even if it omits  
38 the collateral agent's representative capacity.

39 Difficulties may arise if (i) a person (A) is the representative for one group  
40 of lenders (Group A), (ii) the financing statement names A as the secured party  
41 without indicating that A serves as a representative for Group A, and (iii) A agrees  
42 to serve as representative for another group of lenders (Group B) and further agrees

1 that it is a representative for Group B under the financing statement originally filed  
2 on behalf of Group A. What are the relative priorities as between Group A and  
3 Group B, to the extent that each group claims the same collateral? Arguably, the  
4 priority of each group would date from the initial filing. In a case of undersecurity,  
5 the later-in-time Group B's interest could deprive Group A of the full benefit of  
6 otherwise available collateral.

7 To prevent this result, Group A might have insisted that the financing  
8 statement recite that it operates only for the benefit of lenders under a particular  
9 agreement, as it may be amended from time to time, and recite further that it is  
10 ineffective for other purposes. If Group A did not do so, presumably it could be  
11 hold A liable for money damages for breach of its agreement with Group A.

12 4. **Multiple Names.** Subsection (d) makes explicit what is implicit in  
13 current law, that a financing statement may provide the name of more than one  
14 debtor or secured party.

15 **SECTION 9-504. INDICATION OF COLLATERAL.** A description of the  
16 collateral pursuant to Section 9-111, an indication of the type of collateral, or a  
17 statement to the effect that the financing statement covers all assets or all personal  
18 property is sufficient to indicate the collateral that is covered by a financing  
19 statement.

#### 20 Reporters' Comments

21 1. **Source.** Former Section 9-402(1).

22 2. **Indication of Collateral.** This section expands the class of sufficient  
23 collateral references to embrace "a statement to the effect that the financing  
24 statement covers all assets or all personal property. If the property in question  
25 belongs to the debtor and is personal property, any searcher will know that the  
26 property is covered by the financing statement. A broad statement of this kind  
27 would not be a sufficient description for purposes of a security agreement. See  
28 Section 9-111. It follows that a somewhat narrower description than "all assets,  
29 e.g., "all assets other than automobiles, is sufficient for purposes of this section  
30 even if it does not suffice for purposes of a security agreement.

31 **SECTION 9-505. FILING AND COMPLIANCE WITH OTHER**  
32 **STATUTES AND TREATIES FOR CONSIGNMENTS, LEASES,**  
33 **BAILMENTS, AND OTHER TRANSACTIONS.** A consignor, lessor, or bailor  
34 of goods or a buyer of a payment intangible may file a financing statement, or may  
35 comply with a statute or treaty described in Section 9-309A(a), using the terms

1 “consignor, “consignee, “lessor, “lessee, “bailor, “bailee, “owner,  
2 “registered owner , “buyer, “seller, or the like, instead of the terms “secured  
3 party and “debtor. This part applies to a financing statement and, as appropriate,  
4 to compliance that is equivalent to filing a financing statement under Section  
5 9-309A(c), but the filing or compliance is not of itself a factor in determining  
6 whether the collateral secures an obligation. However, if it is determined for  
7 another reason that the collateral secures an obligation, a security interest held by  
8 the consignor, lessor, bailor, owner, or buyer which attaches to the collateral is  
9 perfected by the filing or compliance.

#### 10 Reporters’ Comments

11 1. **Source.** Former Section 9-408, expanded.

12 2. **Goods Covered by a Certificate of Title.** This section provides the  
13 same benefits for compliance with a statute or treaty described in Section  
14 9-309A(a) that former Section 9-408 provides for filing, in connection with the use  
15 of terms such as “lessor, consignor, etc. It also expands the rule to embrace more  
16 generally other bailments and transactions. The references to “owner and  
17 “registered owner are intended to address, for example, the situation where a  
18 putative lessor is the registered owner of an automobile covered by a certificate of  
19 title and the transaction is determined to create a security interest. Although this  
20 section provides that the security interest is perfected, it may be advisable or  
21 necessary to amend the relevant certificate-of-title act in order to ensure that this  
22 result will be achieved. The references to “buyer and “seller encompass sales  
23 transactions, primarily sales of receivables.

24 3. **“Intended as Security.”** Former Article 9 and Section 1-201 refer to  
25 transactions, including leases and consignments, “intended as security. This  
26 misleading phrase creates the erroneous impression that the parties to a transaction  
27 can dictate how the law will classify it (e.g., as a bailment or as a security interest)  
28 and thus affect the rights of third parties. The phrase has been deleted wherever it  
29 appears. The last two sentences of this section substitute the concept of whether  
30 collateral secures an obligation for the existing “intention standard.

31 4. **Consignments.** Although a “true consignment is a bailment, the filing  
32 and priority provisions of former Article 9 apply to it; a consignment “intended as  
33 security creates a security interest that is in all respects subject to former Article 9.  
34 This Article subsumes many true consignments under the rubric of “security  
35 interest. Nevertheless, it maintains the distinction between a (true)  
36 “consignment, as to which only certain aspects of Article 9 apply, and a would-be  
37 consignment that actually “secures an obligation, to which Article 9 applies in full.  
38 The revisions to this section reflect the change in terminology.

**SECTION 9-506. EFFECT OF MINOR ERRORS.** 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 provide the correct name of the debtor in accordance with Section 9-503(a) contains an error that is seriously misleading unless a search of the records of the filing office under the debtor's correct name, utilizing the filing office's standard search technique, would disclose the financing statement, in which case the incorrect name is not an error that renders the financing statement seriously misleading.

## Reporters' Comments

1. **Source.** Former Section 9-402(8), as expanded.

2. **Errors.** This section adds to former Section 9-402(8) two per se rules concerning the effectiveness of financing statements in which the debtor's name is incorrect. If the financing statement nevertheless would be discovered in a search under the debtor's correct name, as a matter of law the incorrect name does not make the financing statement seriously misleading. If the financing statement would not be discovered in a search under the debtor's correct name, as a matter of law the financing statement is seriously misleading.

**SECTION 9-507. EFFECT OF CERTAIN CHANGES ON EFFECTIVENESS OF FINANCING STATEMENT.**

(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 erroneous and seriously misleading.

## Reporters' Comments

**1. Source.** Former Section 9-402(7).

**2. Post-filing Change in Debtor’s Name.** This section deals with situations in which the information in a proper financing statement becomes inaccurate. Subsection (a) addresses a “pure change of name that does not implicate a new debtor. It clarifies the effectiveness of a seriously misleading financing statement for the four months following a name change and provides that the record can be corrected by an amendment to the financing statement that specifies the debtor’s new correct name or otherwise renders the financing statement not seriously misleading.



1           **3. Post-filing Transfer of Collateral.** Subsection (b) clarifies the third  
2 sentence of former Section 9-402(7) by providing that a financing statement  
3 remains effective following the transfer of collateral only when the security interest  
4 continues in that collateral. This result is consistent with the conclusion of PEB  
5 Commentary No. 3.

6           **4. Other Post-filing Changes.** Subsection (c) provides that, except for the  
7 four-month rules in subsection (a) (“pure name change) and Section 9-510 (new  
8 debtor that becomes bound by original debtor’s security agreement), post-filing  
9 changes that render a financing statement inaccurate and seriously misleading have  
10 no effect on a financing statement. The financing statement remains effective.

11           **SECTION 9-508. WHEN RECORD MAY BE FILED; EFFECTIVENESS**  
12 **OF FILED RECORD AUTHORIZATION OF FINANCING STATEMENT.**

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

15                   (1) the debtor authorizes the filing in an authenticated record; or

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

19           (b) By signing a security agreement, a debtor authorizes the filing of the  
20 ~~secured party to file~~ an initial financing statement and an amendment covering the  
21 collateral described in the security agreement [and proceeds of the collateral].

22           (c) A person may file an amendment other than an amendment that adds  
23 collateral covered by a financing statement only if:

24                   (1) the secured party of record authorizes the filing [in an authenticated  
25 record]; or

26                   (2) the amendment is a termination statement for a financing statement  
27 as to which the secured party of record has failed to file or send a termination  
28 statement as required by Section 9-511(b).

1           ~~(d)(e)~~ A ~~financing statement~~ filed record is effective only ~~ineffective~~ to the  
2 extent that this section permits a person to file it ~~filing of the financing statement is~~  
3 ~~permissible under subsection (a)~~.

4           (e) If a person is permitted to file a termination statement only under  
5 subsection (c)(2), the filed termination statement is effective only if the debtor  
6 authorizes the filing and the termination statement indicates that the filing is made  
7 by or on behalf of the debtor.

8                                 Reporters' Comments - June, 1997, Draft

9           1. **Scope of This Section.** This section collects in one place most of the rules  
10 determining whether a record may be filed and whether a filed record is effective.

11           2. **Identity of Person Who Files.** The changes to this section reflect the  
12 draft's indifference as to the person who effects a filing. The filing scheme  
13 contemplated by this part does not contemplate that the identity of a "filer" will be a  
14 part of the searchable records. This is consistent with, and a necessary aspect of,  
15 eliminating signatures or other evidence of authorization from the system (except to  
16 the extent that filing offices may choose to employ authentication procedures in  
17 connection with electronic communications). As long as the appropriate person  
18 authorizes the filing, or, in the case of a termination statement, the debtor is entitled  
19 to the termination, it is largely insignificant whether the secured party or another  
20 person files any given record.

21           3. **Termination Statements Authorized by the Debtor.** Under subsection  
22 (c)(2), the debtor itself may authorize and file an effective termination statement in  
23 the circumstances under which the secured party of record is obliged to file or send  
24 a termination statement. However, under subsection (e), the termination statement  
25 must indicate that it is filed by or on behalf of the debtor. Otherwise, it will not be  
26 effective.

27                                 Reporters' Comments

28           1. **Source.** New.

29           2. **Unauthorized Filings.** Subsection (a)(1) substitutes for the debtor's  
30 signature a requirement that the debtor authorize the filing of an initial financing  
31 statement or an amendment that adds collateral. A person who files an  
32 unauthorized record in violation of subsection (a)(1) is liable under Section  
33 9-624(d) for a statutory penalty and damages.

34           3. **Authorization in Security Agreement.** Under subsection (b), the  
35 authentication of a security agreement *ipso facto* constitutes the debtor's consent to  
36 the filing of a financing statement covering the collateral described in the security  
37 agreement. The secured party need not obtain a separate authorization. Thus, if an  
38 authenticated security agreement covers inventory, and the secured party files a

1 financing statement covering inventory and accounts, the financing statement is  
2 authorized insofar as it covers inventory and unauthorized insofar as it covers  
3 accounts. (Note, however, that the financing statement will be effective to perfect a  
4 security interest in accounts constituting proceeds of the inventory to the same  
5 extent as a financing statement covering only inventory.)

6 4. **Statutory Liens.** Under subsection (a)(2), an statutory lienholder may  
7 file a financing statement covering collateral subject to the lien without obtaining  
8 the debtor's authorization. Because the lien arises as matter of law, the debtor's  
9 consent should not be required. However, the filing office normally will inform the  
10 debtor about the filing pursuant to Section 9-520(a)(6).

11 5. **Ineffectiveness of Unauthorized or Overbroad Filings.** Subsection (c)  
12 provides that a filed financing statement is not effective to the extent that the filing  
13 was not permissible under subsection (a).

#### 14 SECTION 9-509. AMENDMENT OF FINANCING STATEMENT.

15 (a) Subject to Section ~~[s 9-509 and]~~ 9-513, a ~~secured party of record~~ person  
16 may add or delete collateral covered by a financing statement or, subject to  
17 subsection (d), otherwise amend the information contained in a financing statement  
18 by filing an amendment that identifies the initial financing statement by the file  
19 number assigned pursuant to Section 9-520(a) or, if the initial financing statement  
20 was filed before the effective date of this article, ~~[Act]~~, by the date of filing and file  
21 number.

22 (b) Except as otherwise provided in Section 9-516, an ~~An~~ amendment does  
23 not extend the period of effectiveness of a financing statement.

24 (c) If an amendment adds collateral, it is effective as to the added collateral  
25 only from the date of filing of the amendment.

26 (d) ~~Except as otherwise provided in Section 9-510(b), a~~ A filed record that  
27 adds a debtor is not effective as an amendment. ~~However, if the record otherwise is~~  
28 ~~sufficient as a financing statement under Section 9-502(a), it is sufficient as a~~  
29 ~~financing statement.~~

1. **Identity of Person Who Files.** Subsection (a) was revised to reflect the draft's neutrality as to the person who effects a filing. See § 9-508, Comment 2 - June, 1997, Draft.

2. **Addition of a Debtor.** The proper way to file a financing statement against a debtor is to file an initial financing statement. Under subsection (d), an attempt to add a different debtor to an existing financing statement already filed against a debtor is ineffective. Consistent with this approach, § 9-510(b)(2) has been revised to provide for the filing of an initial financing statement against a new debtor instead of an amendment.

## Reporters' Comments

**1. Source.** Former 9-402(4).

**2. Changes to Financing Statements.** This section addresses changes to financing statements, including addition and release of collateral. Although termination statements, assignments, and continuation statements are types of amendment, this Article follows former Article 9 and treats these types of amendments separately. See Section 9-511 (termination statements); 9-512 (assignments); 9-517 (continuation statements).

3. **Amendments.** An amendment under this Article may identify only the information contained in a financing statement that is to be changed or, alternatively, it may take the form of an amended and restated financing statement. The latter would state, for example, that the financing statement “is amended and restated to read as follows: . . . References in this Part to an “amended financing statement” are to a financing statement as amended by an amendment.

This section revises former Section 9-402(4) to permit secured parties to make changes in the public record without the need to obtain the debtor's signature. However, the filing of an amendment that adds collateral must be authorized by the debtor. See Section 9-508(a).

**[SECTION 9-509A. SECURED PARTY OF RECORD.**

(a) A secured party of record with respect to a financing statement is a person whose name is provided as the name of the secured party or a representative of the secured party in an initial financing statement that has been filed. A person whose name is provided remains a secured party of record until the filing of an effective amendment of the financing statement which indicates that the person is not a secured party or a representative of a secured party.

1                   (b) If an effective amendment of a financing statement which provides the  
2                   name of a person as a secured party or a representative of a secured party is filed,  
3                   the person named in the amendment is a secured party of record.]

4                   Reporters' Comments - June, 1997, Draft

5                   This new section reflects an alternative to the definition of "secured party of  
6                   record" in § 9-102. The goal is to explain how the secured party of record is to be  
7                   determined. If SP-1 is named as the secured party in an initial financing statement,  
8                   it is the secured party of record. If, subsequently, an amendment is filed assigning  
9                   SP-1's status to SP-2, then SP-2 becomes the secured party of record in place of SP-  
10                  1. The same result obtains if a subsequent amendment deletes the reference to SP-1  
11                  and substitutes therefor a reference to SP-2. If, however, a subsequent amendment  
12                  adds SP-2 as a secured party but does not purport to remove or delete SP-1 as a  
13                  secured party, then SP-2 and SP-1 each is a secured party of record. Although this  
14                  new section describes the means of determining the secured party of record in  
15                  somewhat more detail, the same results should be obtained by applying the  
16                  definition in § 9-102. At any point in time, all effective records that comprise a  
17                  financing statement must be examined to determine the person or persons that have  
18                  secured party of record status.

19                   **SECTION 9-510. EFFECTIVENESS OF FINANCING STATEMENT IF**  
20                   **NEW DEBTOR BECOMES BOUND BY SECURITY AGREEMENT.**

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

26                   (b) If the difference between the name of the original debtor and that of the  
27                   new debtor causes a filed financing statement that is effective under subsection (a)  
28                   to be seriously misleading:

29                   (1) the financing statement is effective to perfect a security interest in  
30                   collateral acquired by the new debtor before, and within four months after, the new  
31                   debtor becomes bound under Section 9-203(c); and

1           (2) the financing statement is not effective to perfect a security interest  
2 in collateral acquired by the new debtor more than four months after the new debtor  
3 becomes bound under Section 9-203(c) unless an initial financing statement  
4 providing the name of the new debtor ~~an amendment that renders the financing~~  
5 ~~statement not seriously misleading~~ is filed before the expiration of that time.

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

8                               Reporters' Comments - June, 1997, Draft

9           Concerning the change in subsection (b)(2), see § 9-509, Comment 2 - June,  
10 1997, Draft.

11                              Reporters' Comments

12                   1. **Source.** New.

13                   2. **The Problem.** Sections 9-203(b) and 9-510 deal with situations where  
14 one party (the "new debtor ") becomes bound as debtor by a security agreement  
15 entered into by another person (the "original debtor "). These situations often arise  
16 as a consequence of changes in business structure. For example, the original debtor  
17 may be an individual debtor who operates a business as a sole proprietorship and  
18 then incorporates it. Or, the original debtor may be a corporation that is merged  
19 into another corporation. Under both former Article 9 and this Article, collateral  
20 that is transferred in the course of the incorporation or merger normally would  
21 remain subject to a perfected security interest. See Sections 9-313(c); 9-507(b).  
22 Former Article 9 is less clear with respect to whether an after-acquired property  
23 clause in a security agreement authenticated by the original debtor would be  
24 effective to create a security interest in property acquired by the new corporation or  
25 the merger survivor and, if so, whether a financing statement filed against the  
26 original debtor would be effective to perfect the security interest. This section and  
27 Section 9-203(b) are an attempt at clarification.

28                   3. **How a New Debtor Becomes Bound.** Normally, a security interest is  
29 unenforceable unless the debtor has authenticated a security agreement describing  
30 the collateral. See Section 9-203(a). New Section 9-203(b) creates an exception,  
31 under which a security agreement entered into by one person is effective with  
32 respect to the property of another. This exception comes into play if a "new debtor  
33 "becomes bound " as debtor by a security agreement entered into by another person  
34 (the "original debtor "). (The first and last quoted terms are defined in new  
35 subsections of Section 9-102; "becomes bound " is defined in Section 9-203(c).) If  
36 a new debtor does become bound, then the security agreement entered into by the  
37 original debtor satisfies the security-agreement requirement of Section 9-203(a)(1)  
38 as to existing or after-acquired property of the new debtor to the extent the property  
39 is described in the agreement. In that case, no other agreement is necessary to make  
40 a security interest enforceable in that property. See Section 9-203(b).

1           Section 9-203(c) provides the way in which a new debtor “becomes bound  
2 by an original debtor’s security agreement. Under Section 9-203(c)(1), a new  
3 debtor becomes bound as debtor if it becomes bound by contract or by operation of  
4 non-UCC law. The latter would occur if, for example, the applicable corporate law  
5 of mergers provides that, if A Corp merges into B Corp, B Corp becomes a debtor  
6 under A Corp’s security agreement. The former might occur when B contractually  
7 assumes A’s obligations under the security agreement.

8           Under certain circumstances, a new debtor “becomes bound” for purposes  
9 of Article 9 even though it would not be bound under other law. Under Section  
10 9-203(c)(2), a new debtor becomes bound when (i) it becomes obligated not only  
11 for the secured obligation but also generally under applicable non-UCC law for the  
12 obligations of the original debtor and (ii) acquires or succeeds to substantially all  
13 the assets of the original debtor. For example, some corporate laws provide that,  
14 when two corporations merge, the surviving corporation succeeds to the assets of  
15 its merger partner and “has all liabilities” of both corporations. In the case where,  
16 for example, A Corp merges into B Corp (and A Corp ceases to exist), some people  
17 have questioned whether A Corp’s grant of a security interest in its existing and  
18 after-acquired property becomes a “liability” of B Corp, such that B Corp’s existing  
19 and after-acquired property becomes subject to a security interest in favor of A  
20 Corp’s lender. Even if corporate law were to give a negative answer, under Section  
21 9-203(c)(2), B Corp would “become bound” for purposes of Section 9-203(b) and  
22 this section. Section 9-203(c)(2) excludes sureties and other secondary obligors as  
23 well as persons who become obligated through veil piercing and other non-  
24 successorship doctrines. In many cases, it will exclude successors to the assets and  
25 liabilities of a division of a debtor.

#### 26           **4. When a Financing Statement Is Effective Against a New Debtor.**

27           Subsection (a) provides that a filing against the original debtor is effective to  
28 perfect a security interest in collateral that a new debtor acquires before the  
29 expiration of four months after the new debtor becomes bound by the security  
30 agreement. Under subsection (b), however, if the filing against the original debtor  
31 is seriously misleading as to the new debtor’s name, the filing is effective as to  
32 collateral acquired by the new debtor after the four-month period only if the secured  
33 party files during the four-month period an amendment rendering the filing not  
34 seriously misleading. A similar rule appears in Section 9-507(a) with respect to  
35 changes in a debtor’s name.

36           Note, however, that this section does not apply to collateral transferred by  
37 the original debtor to a new debtor. Under those circumstances, the filing against  
38 the original debtor continues to be effective until it lapses. See subsection (c);  
39 Section 9-507(b).

40           **5. Priority.** Section 9-323A governs the priority contest between a secured  
41 creditor of the original debtor and a secured creditor of the new debtor. This  
42 priority rule no doubt will be both under- and over-inclusive.

### 43           **SECTION 9-511. TERMINATION STATEMENT.**



1 (a) A termination statement for a financing statement is an amendment of a  
2 financing statement that, in addition to complying with the requirements of Section  
3 9-509(a), indicates either that it is a termination statement or that an identified  
4 financing statement is no longer effective.

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

7 ~~(b)(c)~~ If a financing statement covers consumer goods, within one month,  
8 or [within 10 days] [as soon as reasonably practicable but not more than 3 three  
9 days] after the secured party receives a [signed] [authenticated] demand by the  
10 debtor, and if there is no outstanding secured obligation and no commitment to  
11 make an advance, incur an obligation, or otherwise give value, or if the debtor did  
12 not authorize the filing of the initial financing statement, the secured party of record  
13 shall file with the filing office a termination statement for the financing statement.  
14 In other cases, if there is no outstanding secured obligation and no commitment to  
15 make an advance, incur an obligation, or otherwise give value, or if a financing  
16 statement covers accounts, chattel paper, or payment intangibles that have been sold  
17 but as to which the account debtor or other person obligated has discharged its  
18 obligation, the secured party of record for a financing statement, [within 10 days]  
19 [as soon as reasonably practicable but not more than 3 three days] after the secured  
20 party receives [a] [an authenticated] demand by the debtor, shall send to the debtor  
21 a termination statement for the financing statement or file the termination statement  
22 with filing office.

23 ~~(c)(d)~~ Except as otherwise provided in Section 9-513, upon the filing of [a]  
24 [an effective] termination statement with the filing office under subsection (b), the  
25 financing statement to which the termination statement relates becomes ineffective.

1 The addition to subsection (b) makes explicit what may have been implicit in  
2 earlier drafts and under the former article: If the debtor did not authorize the filing  
3 of a financing statement in the first place, the secured party of record should file or  
4 send a termination statement.

5 Reporters' Comments

6 1. **Source.** Former Section 9-404.

7 2. **Requirements for Termination Statement.** Subsection (a) establishes  
8 the requirements for a termination statement, thereby eliminating some  
9 redundancies in former Section 9-404. Most of the other changes in the section are  
10 for clarification or to embrace medium-neutral drafting. Note that, like a financing  
11 statement, a termination statement need not be signed or otherwise authenticated.

12 3. **Who May File.** Subsection (b) provides that a secured party of record  
13 may file a termination statement. If there is more than one secured party of record,  
14 a termination statement filed by one does not affect the rights of the others. See  
15 Section 9-513.

16 4. **Duty to File or Send.** Subsection (c) specifies when a secured party of  
17 record must file or send to the debtor a termination statement. The liability  
18 imposed upon a secured party that fails to comply with subsection (c) is identical to  
19 that imposed for the filing of an unauthorized financing statement or amendment.  
20 See Section 9-624(d).

21 5. **Buyers of Receivables.** Applied literally, former Section 9-404(1)  
22 would require many buyers of receivables to file a termination statement  
23 immediately upon filing a financing statement because "there is no outstanding  
24 secured obligation and no commitment to make advances, incur obligations, or  
25 otherwise give value. Subsection (c) has been revised to remedy this problem.

26 6. **Effect of Filing.** Subsection (d) is new. It states the effect of filing a  
27 termination statement. If one of several secured parties of record files a termination  
28 statement, subsection (d) applies only with respect to the rights of the person filing  
29 the termination statement. See Section 9-513.

30 7. **"Bogus" Filings and Disappearing Secured Parties.** Filing offices in  
31 some states have been beset by "bogus" filings containing forged debtor signatures.  
32 Apparently, some of these filings have been made as a form of protest or civil  
33 disobedience. Section 9-519 addresses this problem, along with the problem faced  
34 by a debtor whose secured party has disappeared or gone out of business.

35 **SECTION 9-512. ASSIGNMENT OF RIGHTS UNDER FINANCING**  
36 **STATEMENT.**

37 (a) Except as otherwise provided in subsection (c), an initial financing  
38 statement may reflect an assignment of all of the secured party's rights with respect

1 to some or all of the collateral indicated in the financing statement by providing the  
2 name and mailing address of the assignee as the name and address of the secured  
3 party. [Upon filing, the assignee named in an initial financing statement filed under  
4 this subsection is the secured party of record for the financing statement with  
5 respect to the collateral indicated in the assignment.] [~~An initial financing~~  
6 ~~statement may provide that the rights under the financing statement are being~~  
7 ~~assigned only with respect to the portion of the collateral covered by the financing~~  
8 ~~statement which is indicated in the assignment. — Otherwise, Unless an initial~~  
9 financing statement filed under this subsection indicates otherwise, the rights under  
10 the financing statement are assigned of record with respect to all of the collateral  
11 covered by the financing statement.]

12 (b) Except as otherwise provided in subsection (c), a person ~~secured party~~  
13 ~~of record~~ may assign of record all or part of the ~~secured party's rights~~ of a secured  
14 party of record under a financing statement by filing in the filing office an  
15 amendment of the financing statement that complies with the requirements of  
16 Section 9-509(a) and provides ~~indicates~~ the name and mailing address of the  
17 secured party of record and the name and mailing address of the assignee. [Upon  
18 filing, the assignee named in an amendment filed under this subsection is a secured  
19 party of record for the financing statement.]

20 (c) An assignment of record of a security interest in a fixture covered by a  
21 real property mortgage that is effective as a fixture filing under Section ~~9-502(b)~~ 9-  
22 502(c) may be made only by an assignment of record of the mortgage in the manner  
23 provided by other law of this State.

24 Reporters' Comments - June, 1997, Draft

25 The second sentences of subsection (a) and subsection (b) appear in square  
26 brackets. They may be unnecessary if new § 9-509A is adopted. Likewise, the  
27 third sentence of subsection (a) is bracketed to indicate that it may be surplusage.

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Reporters' Comments

1. **Source.** Former Section 9-405.

2. **Comparison to Prior Law.** Most of the changes to this section are for clarification or to embrace medium-neutral drafting. As a general matter, this Article preserves the opportunity given by former Section 9-405 to assign a security interest of record in one of two different ways. Under subsection (a), a secured party may assign all of its rights with respect to some or all of the collateral covered by an initial financing statement by naming an assignee in the financing statement. The secured party may accomplish the same result under subsection (b) by making a subsequent filing. Subsection (b) also may be used for an assignment of part of the secured party's rights with respect to some or all of the covered collateral.

3. **Partial Assignments in Initial Financing Statement.** The bracketed portion of subsection (a) may be unnecessary. The first sentence provides explicitly that an assignment may relate to "some or all of the collateral."

**SECTION 9-513. MULTIPLE SECURED PARTIES OF RECORD.**

(a) If there is more than one secured party of record for a financing statement, each secured party of record may file an amendment under Section 9-509(a).

(b) A record filed by one secured party of record affects only the rights of the filer and does not affect the rights under the financing statement of another secured party of record.

Reporters' Comments

1. **Source.** Former 9-406.

2. **Multiple Secured Parties.** This section deals with multiple secured parties. It permits a secured party of record to make filings concerning its own rights under a financing statement while protecting the secured party's rights from the effects of filings made by another secured party of record.

**Example 1:** A financing statement names A and B as the secured parties. If B files an amendment that limits the collateral covered by the financing statement, A's would remain perfected in all the collateral.

**Example 2:** A financing statement names A and B as the secured parties. If B files a termination statement, A's rights as a secured party of record would be unaffected. That is, the financing statement would continue to be effective to perfect A's security interest..

3. **Release of Collateral.** Former Section 9-406 deals with releases of collateral. Under new Section 9-509, releases of collateral are dealt with as a form of amendment that modifies the indication of collateral covered by a financing statement.

**[SECTION 9-514. SUCCESSOR OF SECURED PARTY.** 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.]

## Reporters' Comments

1. **Source.** New.

2. **Successors.** This section resolves a practical problem faced by successors to a secured party—how to identify itself with respect to records filed by its predecessor. Under this section, a successor of a secured party may act either in the name of the secured party that it has succeeded, without disclosing its status as a successor, or may act as a disclosed successor. This section does not determine whether a successor enjoys the right to perform any particular act. Rather, it indicates the manner in which a successor may perform an authorized act.

The definition of “successor” derives in part from the definition of “successor of a beneficiary” in revised Section 5-102(a)(15).

**3. Relation to “Open Drawer” Policy and Absence of Signature Requirement.** This section appears in brackets, inasmuch as it may not be necessary. Under the “open drawer” approach adopted by this Article, the filing office has no duty to determine whether the putative successor in fact is a successor, and it may not refuse to accept a record because of doubts about whether the putative successor in fact is a successor. Also, records communicated to the filing office need not be authenticated. Arguably, non-UCC principles of agency law are sufficient to determine the effectiveness of a filing by a putative successor.

1           **SECTION 9-515. WHAT CONSTITUTES FILING RECORD;**  
2           **EFFECTIVENESS OF FILING.**

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

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

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

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

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

13                           (A) in the case of an initial financing statement, the record does not  
14                   ~~provides~~ provide a name for the debtor ~~or the filing office is unable to read or~~  
15                   ~~decipher a name that is provided; or~~

16                           (B) in the case of an amendment that amends the name of the debtor,  
17                   the record does not provide an amended name for the debtor; or

18                           (C)~~(B)~~ in other cases, the record does not identify the initial  
19                   financing statement as required by this part or the filing office is unable to read or  
20                   decipher the identification;

21                   (4) ~~the filing office is unable to determine the secured party of record~~  
22                   ~~because~~ the record does not provide a name and mailing address for the secured  
23                   party of record ~~or the filing office is unable to read or decipher the name provided;~~

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

25                           (A) provide a mailing address for the debtor;

1 (B) indicate whether the debtor is an individual or an organization;  
2 or

3 (C) if the financing statement indicates that the debtor is an  
4 organization, provide the type of organization, provide a State of organization for  
5 the debtor, or provide an organizational identification number for the debtor or  
6 indicate that the debtor has none; or

7 (6) in the case of an assignment reflected in an initial financing  
8 statement under Section 9-512(a) or an amendment filed under Section 9-512(b),  
9 the record does not provide a name and mailing address for the assignee.

10 (c) For purposes of subsection (b), a record does not provide information if  
11 the filing office is unable to read or decipher the information.

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

15 (e)(d) A record that is presented to the filing office with tender of the filing  
16 fee but which the filing office refuses to accept for a reason other than one set forth  
17 in subsection (b) is effective as a filed record except as against a purchaser of the  
18 collateral which gives value in reasonable reliance upon the absence of the record in  
19 the files.

20 Reporters' Comments - June, 1997, Draft

21 1. **Method or Medium of Communication.** Rejection pursuant to subsection  
22 (b)(1) for failure to communicate a record properly should be understood to include  
23 noncompliance with procedures relating to security, authentication, or other  
24 requirements that the filing office may impose. The official comments will explain  
25 this point.

26 2. **Names and Mailing Addresses.** Subsection (b)(3)(B) has been revised to  
27 include rejection for a missing name in the case of a purported amendment of a  
28 debtor's name. Subsection (b)(4) has been revised to include rejection for the  
29 absence of the mailing address of the secured party of record.



**3. Acceptance or Rejection of Entire Record.** Subsection (b) contemplates rejection of an entire record for one of the specified reasons, although the statute does not determine when information is contained in only in one record or in more than one record in connection with any particular medium of communication. For example, if an initial financing statement omitted some of the information described in subsection (b)(5) with respect to one of two named debtors, a rejection of the financing statement under subsection (b)(5) would be a rejection with respect to the filing against both debtors. Inasmuch as the singular includes the plural under § 1-102(5)(a), we do not believe that the statute requires greater specificity in this respect.

**4. Inability of Filing Office to Read or Decipher Information.** Under subsection (c), if the filing office cannot read or decipher information, the information is not provided by a record for purposes of subsection (b).

## Reporters' Comments

1. **Source.** Subsection (a): former Section 9-403(1); the remainder is new.

**2. What Constitutes Filing.** Subsection (a) deals generically with what constitutes filing of a record, including an initial financing statement and amendments of all kind (e.g., assignments, termination statements, and continuation statements). It follows former Section 9-403(1), under which either acceptance of a record by the filing office or presentation of the record and tender of the filing fee constitutes filing.

**3. Effectiveness of Rejected Records.** A financing statement or other record that is presented to the filing office but which the filing office refuses to accept provides no public notice, regardless of the reason for the rejection. However, this section distinguishes between records that the filing office rightfully rejects and those that it wrongfully rejects. A filer is able to prevent a rightful rejection by complying with the requirements of subsection (b). (Failure to comply with subsection (b) affords the only grounds for rejection. See Section 9-521(a).) No purpose is served by giving effect to records that justifiably never find their way into the system, and subsection (b) so provides.

Subsection (d) deals with the filing office's unjustified refusal to accept a record. Here, the filer is in no position to prevent the rejection and, many believe, as a general matter should not be prejudiced by it. Although wrongfully rejected records generally are effective, subsection (d) contains a special rule to protect a third party purchaser of the collateral (e.g., a buyer or competing secured party) who gives value in reliance upon the apparent absence of the record in the files. As against an innocent reliance party, subsection (d) imposes upon the filer the risk that a record failed to make its way into the filing system. This risk is likely to be small, particularly when a record is presented electronically, and the filer can guard against this risk by conducting a post-filing search of the records. Moreover, Section 9-521(b) requires the filing office to give prompt notice of its refusal to accept a record for filing.

**4. Effectiveness of Rejectable But Unrejected Records.** Section 9-521(a) requires the filing office to refuse to accept an initial financing statement lacking the information described in subsection (b)(5). However, if the filing office accepts

1 such a financing statement nevertheless, the absence of the information normally  
2 does not affect the effectiveness of the financing statement. See subsection (c).  
3 Similarly, an otherwise effective financing statement remains so even though the  
4 information described in subsection (b)(5) is incorrect, except as against certain  
5 persons who relied upon the incorrect information. See Section 9-335.

6           **SECTION 9-516. DURATION AND EFFECTIVENESS OF FINANCING**  
7 **STATEMENT; EFFECT OF LAPSED FINANCING STATEMENT.**

8           (a) Except as otherwise provided in subsections (b), (e), (f), and (g), and  
9 Section 9-519(i), a filed financing statement is effective for a period of five years  
10 after the date of filing.

11           (b) Except as otherwise provided in subsections (e), (f), and (g), and  
12 Section 9-519(i), if an initial financing statement is filed in connection with a  
13 [public finance transaction] [or] [manufactured home transaction] and indicates that  
14 it is effective for an extended period under Section 9-502(b), the filed financing  
15 statement is effective for the extended period indicated.

16           (c) The effectiveness of a filed financing statement lapses on the expiration  
17 of the period of its effectiveness unless before the lapse a continuation statement is  
18 filed pursuant to subsection (d) [, notwithstanding the commencement of  
19 insolvency proceedings by or against the debtor]. Upon lapse, a financing  
20 statement becomes ineffective and any security interest or statutory lien that was  
21 perfected by the financing statement becomes unperfected, unless the security  
22 interest [or statutory lien] is perfected without filing. If the security interest or a  
23 statutory lien becomes unperfected upon lapse, it is deemed never to have been  
24 perfected as against a prior or subsequent purchaser of the collateral for value.

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

1 (e) Subject to Section 9-513, upon timely filing of a continuation statement,  
2 the effectiveness of the initial financing statement continues for a period of five  
3 years commencing on the day on which the financing statement would have become  
4 ~~effective~~ ineffective in the absence of the filing. Upon the expiration of the five-  
5 year period, the financing statement lapses in the same manner as provided in  
6 subsection (c), unless, before the lapse, another continuation statement is filed  
7 pursuant to subsection (d). Succeeding continuation statements may be filed in the  
8 same manner to continue the effectiveness of the initial financing statement.

9 (f) If a debtor is a transmitting utility and a filed financing statement so  
10 indicates, the financing statement is effective until a termination statement is filed.

11 (g) A real property mortgage that is effective as a fixture filing under  
12 Section 9-502(c) remains effective as a fixture filing until the mortgage is released  
13 or satisfied of record or its effectiveness otherwise terminates as to the real  
14 property.

#### 15 Reporters' Comments

16 1. **Source.** Former Section 9-403(2), (3), (6).

17 2. **Period of Financing Statement's Effectiveness.** Subsection (a) states  
18 the general rule: a financing statement is effective for a five-year period unless its  
19 effectiveness is continued under this section or terminated under Section 9-519.  
20 Subsection (b) provides for a longer period in the case of a public finance  
21 transaction or a manufactured home transaction, inasmuch as these financings  
22 typically extend beyond the standard, five-year period. Under subsection (f), a  
23 financing statement filed against a transmitting utility remains effective indefinitely,  
24 until a termination statement is filed. Likewise, under subsection (g), a real  
25 property mortgage effective as a fixture filing remains effective until its  
26 effectiveness terminates under real property law.

27 3. **Lapse.** When the period of effectiveness under subsection (a) or (b)  
28 expires, the effectiveness of the financing statement lapses. Under former Section  
29 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency  
30 proceeding. A few years ago, Bankruptcy Code § 362(b)(3) was amended to permit  
31 a secured party to continue or maintain the perfected status of its security interest  
32 without first obtaining relief from the automatic stay. Accordingly, subsection (c)  
33 deletes the former tolling provision. It also contains bracketed language for the  
34 Drafting Committee's consideration, to the effect that lapse occurs notwithstanding  
35 the debtor's entry into insolvency proceedings. With or without the bracketed

language, this subsection imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The last sentence of the subsection addresses the effect of lapse. Of course, to the extent that federal bankruptcy law dictates the consequences of lapse, the provisions of this Article would be of no effect.

**4. Continuation Statements.** Subsection (d) explains who may file a continuation statement and when it may be filed. A continuation statement filed by a person other than a secured party of record, or at a time other than that prescribed by subsection (d), is ineffective. However, the filing office nevertheless must accept it. See Sections 9-521(a); 9-515(b). Subsection (e) specifies the effect of a continuation statement and provides for successive continuation statements.

**SECTION 9-517. CONTENTS OF CONTINUATION STATEMENT. A**

continuation statement is an amendment of a financing statement that, in addition to complying with the requirements of Section 9-509(a), indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the financing statement.

## Reporters' Comments

**1. Source.** Former Section 9-403(3).

**2. Contents of Continuation Statement.** A continuation statement must comply with the requirements for an amendment, see Section 9-509(a) and, in addition, indicate that it is a continuation statement or that it has been filed to continue the effectiveness of the financing statement to which it relates. Consistent with the medium-neutral approach of Part 5, no signature is required for a continuation statement.

## SECTION 9-518. EFFECT OF INDEXING ERRORS.

(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 which gives value in reasonable reliance upon the apparent absence of the record in the files.

## Reporters' Comments

1. **Source.** New.

1           **2. Protection for Reliance Parties.** Like a record that the filing office  
2 refuses to accept, a record that the filing office accepts but mis-indexes affords no  
3 public notice. This section treats a mis-indexed record much like Section 9-515(d)  
4 treats a record that the filing office wrongfully refuses to accept. Generally, under  
5 subsection (a), the filing office's error does not affect the effectiveness of the filing.  
6 Cf. Section 9-515(a). However, under subsection (b), the filer (who knows how the  
7 record should have been indexed and can verify whether in fact it was indexed  
8 properly) runs the risk that a purchaser of the collateral will give value in reliance  
9 upon the apparent absence of the record in the files. Cf. Section 9-515(d).

10           This section and Section 9-515(d) raise questions that the Drafting  
11 Committee has not yet fully addressed, including how to distinguish reporting or  
12 processing errors, for which the filer should not be responsible, from indexing  
13 errors, and how to deal with mis-indexed records that are re-indexed correctly and  
14 vice versa.

15           **SECTION 9-519. CLAIM CONCERNING INACCURATE OR**  
16 **WRONGFULLY FILED RECORD; ~~CORRECTION STATEMENTS;~~**  
17 **~~TERMINATION REQUESTS; EFFECT OF FAILURE TO OBJECT TO~~**  
18 **~~TERMINATION REQUEST.~~**

19           (a) If a person believes that a record indexed under the person's name with  
20 the filing office is inaccurate or was wrongfully filed, the person may file with the  
21 filing office a correction statement with respect to the record.

22           ~~(b) If a person believes that the secured party of record for a financing~~  
23 ~~statement indexed under the person's name has failed to comply with its duty to file~~  
24 ~~or send to the person a termination statement for the financing statement under~~  
25 ~~Section 9-511, the person may file with the filing office a termination request with~~  
26 ~~respect to the financing statement.~~

27           (b)(c) A correction statement ~~or termination request~~ must:

28           (i) identify the record ~~or the initial financing statement~~ to which it  
29 relates by the file number assigned under Section 9-520(a) or, if the initial financing  
30 statement was filed before the effective date of this article, ~~[Act]~~, by the date of  
31 filing and file number;

1                   (ii) ~~A correction statement must~~ indicate that it is a correction  
2                   statement; and

3                   (iii) provide the basis for the person's belief that a record is inaccurate or  
4                   was wrongfully filed and the manner in which the record should be amended to  
5                   cure any inaccuracy. ~~A termination request must indicate that it is a termination~~  
6                   ~~request and provide the basis for the person's belief that the secured party of record~~  
7                   ~~for a financing statement indexed under the person's name has failed to comply~~  
8                   ~~with its duty to file or send to the person a termination statement for the financing~~  
9                   ~~statement.~~

10                  (c)(d) The filing of a correction statement ~~or a termination request~~ does not  
11                  affect the effectiveness of the initial financing statement or other record to which it  
12                  relates.

13                  ~~—— (e) Promptly upon communicating, pursuant to Section 9-620(a)(6), [the~~  
14                  ~~information contained in a termination request] [the fact that a termination request~~  
15                  ~~has been filed with the filing office] to the secured party of record named in the~~  
16                  ~~financing statement to which a termination statement relates, the filing office shall~~  
17                  ~~create and file a record indicating the date on which it made the communication and~~  
18                  ~~identifying the initial financing statement and the termination request by the file~~  
19                  ~~numbers assigned under Section 9-520(a).~~

20                  ~~—— (f) If a secured party of record believes that it has not failed to comply with~~  
21                  ~~its duty to file or send to the debtor a termination statement as indicated in a~~  
22                  ~~termination request, the secured party of record may file an objection statement.~~

23                  ~~—— (g) An objection statement must identify the initial financing statement to~~  
24                  ~~which it relates by the file number assigned under Section 9-520(a) or, if the initial~~  
25                  ~~financing statement was filed before the effective date of this [Act], by the date of~~  
26                  ~~filing and file number, and must indicate that the secured party of record does not~~

1 believe that it has failed to comply with its duty to file or send to the debtor a  
2 termination statement as indicated in the termination request.

3 ~~—— (h) The filing of an objection statement does not affect the effectiveness of~~  
4 ~~the initial financing statement or other record to which it relates and does not~~  
5 ~~preclude any judicial relief to which the person filing a termination request may be~~  
6 ~~entitled.~~

7 ~~—— (i) If, within [ ] days after the date indicated in the record filed pursuant to~~  
8 ~~subsection (c), the secured party of record does not file an objection statement~~  
9 ~~relating to the termination request, the effectiveness of the initial financing~~  
10 ~~statement to which the termination request relates terminates.]~~

11 Reporters' Comments - June, 1997, Draft

12 Inasmuch as a debtor can file a termination statement in the circumstances  
13 specified in § 9-508(c) and (e), the provisions relating to termination requests have  
14 been deleted from this section.

15 Reporters' Comments

16 1. **Source.** New.

17 2. **The Problem.** This section addresses two concerns that have arisen  
18 under existing law: (1) there is no nonjudicial means for a debtor to correct a  
19 financing statement or other record that is inaccurate or wrongfully filed, and (2)  
20 there is no nonjudicial means for a debtor to correct the public record when a  
21 secured party has failed to file or send to the debtor a required termination  
22 statement.

23 3. **A Partial Solution.** Subsection (a) addresses the first concern by  
24 affording the debtor the right to file a correction statement. Subsection (b)  
25 addresses the second concern by affording the debtor the right to file a termination  
26 request. In each case, subsection (c) provides that the statement or request give the  
27 basis for the debtor's belief that the public record should be corrected. The  
28 statement or request becomes part of the "financing statement, as defined in  
29 Section 9-102; however, subsection (d) provides that the filing does not affect the  
30 effectiveness of the initial financing statement or other record to which it relates.  
31 These provisions resemble the analogous remedy in the Fair Credit Reporting Act.

32 This section does not displace other provisions of this Article that impose  
33 liability for making unauthorized filings or failing to file or send a termination  
34 statement. See Section 9-624(d). Nor does it displace any available judicial  
35 remedies.



1           **4. A More Aggressive Approach.** Subsections (e) through (i) present a  
2 more aggressive approach to the problem of wrongfully filed financing statements  
3 and disappearing secured parties by providing for the automatic termination of  
4 financing statements if the secured party fails to object to a termination request.

5           Section 9-520(a)(6) requires the filing office to inform each secured party of  
6 record of every record affecting the financing statement. Thus, the allegedly  
7 offending secured party of record will be informed that a termination request has  
8 been filed. Subsections (f) and (g) afford the secured party of record the  
9 opportunity to file an objection statement, in which it states its belief that it has not  
10 failed to file or send a required termination statement. If no objection statement is  
11 forthcoming within the prescribed time period, the effectiveness of the initial  
12 financing statement terminates automatically. To enable a searcher to determine  
13 from the public record whether the time for filing an objection statement has  
14 expired, subsection (e) requires the filing office to indicate the date on which the  
15 time began to run, i.e., the date on which the filing office complied with its duty  
16 under Section 9-520(a)(6) to inform the secured party of record.

17           Subsections (e) through (i) are in brackets, to reflect that the Drafting  
18 Committee is divided over its wisdom. All members recognize that “bogus” filings  
19 and disappearing secured parties have caused real problems. However, the  
20 members disagree over whether the likely benefits of subsections (e) through (i)  
21 justify imposing upon the filing offices the costs of the procedures these  
22 subsections contemplate. The Drafting Committee also disagree about the  
23 seriousness of the risk that the bracketed provisions would impose on legitimate  
24 secured parties.

25           **5. Resort to Other Law.** Article 9 is unlikely to provide a satisfactory or  
26 complete solution to problems caused by misuse of the public records. The  
27 problem of “bogus” filings is not limited to the UCC filing system but extends to  
28 the real property records, as well. A summary judicial procedure for correcting the  
29 public record and criminal penalties for those who misuse the filing and recording  
30 systems are likely to be more effective and put less strain on the filing system than  
31 provisions requiring action by the filing office.

32           [SUBPART 2. DUTIES AND OPERATION OF FILING OFFICE]

33           **SECTION 9-520. NUMBERING, MAINTAINING, AND INDEXING**  
34 **RECORDS; COMMUNICATING INFORMATION CONTAINED IN**  
35 **RECORDS.**

36           (a) For each record filed with a filing office, the filing office shall:

37           (1) assign a file number to the record pursuant to Section 9-520A;

1                   (2) create a record that bears the file number and the date and time of  
2     filing;

3                   (3) maintain the filed record for public inspection;

4                   (4) index the record ~~[in accordance with]~~ ~~[under]~~ ~~[pursuant to]~~  
5     subsections (b), (c), and (d);

6                   ~~(5) note in the index the file number and the date and time of filing;~~  
7     and

8                   ~~(5)(6)~~ communicate the [information contained in the record] [the fact  
9     that the record has been filed with the filing office] to each person whose name was  
10    provided as the name of the debtor and or secured party or representative of the  
11    secured party of record named in the financing statement to which the record relates  
12    and to the person that filed the record with the filing office.]

13                  (b) Except as otherwise provided in subsections (c) and (d), the filing office  
14     shall index [an initial financing statement] [and an amendment that changes the  
15    name of the debtor] [a financing statement] according to the name of the debtor and  
16     shall index all filed records relating to the initial financing statement in a manner  
17     that associates with one another an initial financing statement and all filed records  
18     relating to the initial financing statement.

19                  (c) If a financing statement is filed as a fixture filing or covers timber to be  
20    ~~cut, minerals or the like, including oil and gas, or accounts subject to Section~~  
21    ~~9-306, or is filed as a fixture filing, or as-extracted collateral,~~ [it must be filed for  
22    record and] the filing office shall index it under the names of the debtor and of each  
23    owner of record shown on the financing statement as if they were the mortgagors  
24    under a mortgage of the real property described, and, to the extent that the law of  
25    this State provides for indexing of mortgages under the name of the mortgagee,  
26    under the name of the secured party as if the secured party were the mortgagee

1       thereunder, or, if indexing is by description, as if the financing statement were a  
2       mortgage of the real property described.

3               (d) ~~If in the case of a fixture filing, or~~ a financing statement is filed as a  
4       fixture filing or covers ~~covering~~ timber to be cut, ~~minerals or the like, including oil~~  
5       ~~and gas, or accounts subject to Section 9-306, or as-extracted collateral,~~ the filing  
6       office shall index an assignment filed under Section 9-512(a) or an amendment  
7       filed under Section 9-512(b) under the name of the assignor as grantor and, to the  
8       extent that the law of this State provides for indexing the assignment of a real  
9       property mortgage under the name of the assignee, the filing office shall index the  
10      assignment or the amendment under the name of the assignee.

11              (e) The filing office shall maintain a storage and retrieval capability that:

12                      (1) provides for retrieval of a record by the name of the debtor and the  
13      file number assigned to the record; and

14                      (2) associates with one another an initial financing statement and each  
15      filed record relating to the initial financing statement.

16              (f) The filing office shall perform the acts required subsections (a) through  
17      (d) at the time and in the manner prescribed by rule, but not later than two business  
18      days after the filing office receives the record in question.

19      *Legislative Note: In States in which writings will not appear in the real property*  
20      *records and indices unless actually recorded the bracketed language in subsection*  
21      *(c) should be used.*

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1. **Time of Filing.** Subsection (a) and § 9-523 refer to the “date and time of filing. The statutory text does not contain any instructions to a filing office as to how the time of filing is to be determined. The method of determining or assigning a time of filing is an appropriate matter for the administrative rules to address.

2. **Duty to Communicate.** Subsection (a)(5) (formerly (a)(6)) has been placed in square brackets to indicate that the Reporters plan to ask the Drafting Committee to revisit the appropriateness of this duty. Former subsection (a)(5) has been deleted as duplicative and unnecessary (see §§ 9-520(a)(2) and (b); 9-523(a)).

3. **Debtor's Name Change: Indexing.** Subsection (b) has been revised to make it clear that when an amendment changes the name of the debtor the filing office is required to index the financing statement under the new name.

4. **Minerals.** The changes relating to minerals and related accounts in subsections (c) and (d) primarily respond to recommendations of the ABA Oil and Gas Task Force and conform this section to the related provisions in Section 9-502.

5. **4. Conforming Change.** The style of subsection (d) has been conformed to that of subsection (c).

Reporters' Comments

1. **Source.** Former Sections 9-403(4), (7); 9-405(2).

2. **Filing Officer's Office's Duties.** Subsections (a) through (d) set forth the duties of the filing office with respect to filed records. Subsection (e) requires the filing office to maintain appropriate storage and retrieval facilities.

3. **Information from Filing Office.** In an effort to reveal the fact of unauthorized filings as soon as practicable, subsection (a)(6) adds a requirement that the filing office inform affected persons of each record filed. Rather than specify the persons that would be “affected by a particular record, subsection (a) in effect deems all debtors and secured parties of record to be affected by every record relating to a financing statement. This approach is easier to understand and administer.

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, communicated in writing or otherwise:

Please take note that a record was filed with this office as indicated below:

Date and time of filing: January 2, 1999

|   |                         |                 |
|---|-------------------------|-----------------|
| 1 | File No. of initial     |                 |
| 2 | financing statement     | 123456          |
| 3 | Type of record:         | Amendment       |
| 4 | Debtor's name:          | ABC Corp.       |
| 5 | Debtor's address        | XXX XXXX        |
| 6 |                         | YYY, YYYY       |
| 7 | Secured party's name:   | XYZ Finance Co. |
| 8 | Secured party's address | XXX XXXX        |
| 9 |                         | YYY, YYYY       |

10 The details of the information to be specified might be left to the Rules.

11 4. **Standard of Performance.** Subsection (f) is new. It imposes a  
 12 minimum standard of performance. Prompt indexing is crucial to the effectiveness  
 13 of any filing system. An accepted but un-indexed record affords no public notice.

14 **SECTION 9-520A. ASSIGNMENT OF FILE NUMBER.** A file number  
 15 assigned to a record [pursuant to Section 9-520(a)(1)] must be unique and contain  
 16 at least three separate segments in the following order:

- 17 (1) The first segment must indicate, in numbers, the date of filing;
- 18 (2) The second segment must consist of a number that is assigned  
 19 sequentially based on the order in which records are filed on each business day.
- 20 (3) The third segment must consist of [an algorithmically derived] [a]  
 21 verification number based on the numbers assigned pursuant to paragraphs (1) and  
 22 (2).

23 Reporters' Comments

24 1. **Source.** New.

25 2. **File Numbers.** This section prescribes a uniform method of assigning  
 26 file numbers to records. The Drafting Committee has yet to review it.

27 **SECTION 9-521. ACCEPTANCE AND REFUSAL TO ACCEPT**  
 28 **RECORD.**

1           (a) Subject to subsections (c) and (d), a ~~A~~ filing office shall refuse to accept  
2 a record for filing for a reason set forth in Section 9-515(b) and may refuse to  
3 accept a record for filing only for a reason set forth in Section 9-515(b).

4           (b) If a filing office refuses to accept a record for filing, it shall  
5 communicate the fact of and reason for its refusal to the person that presented the  
6 record. The communication must be made at the time and in the manner prescribed  
7 by rule, but in no event more than two business days after the filing office receives  
8 the record.

9           (c) The filing office may not refuse to accept a written initial financing  
10 statement in the following form except for a reason set forth in Section 9-515(b):

1

[INSERT FINANCING STATEMENT FORM]





- 1 (d) The filing office may not refuse to accept a written record in the
- 2 following form except for a reason set forth in Section 9-515(b):

1

[INSERT CHANGE FORM]



**Acceptance of Written Forms.** The qualification added in subsection (a) makes it clear that the filing office must accept the model written forms, which will be based upon the national financing statement and related forms now in use, even if the filing office's administrative rules permit it to reject written communications.

Reporters' Comments

1. **Source.** New.

2. **Refusal to Accept a Record for Filing.** In some States, filing offices have considered themselves obligated to review the form and content of a financing statement and to refuse to accept those that they determine are legally insufficient. Some filing offices impose requirements for or conditions to filing that do not appear in the statute. Under this section, the filing office would not be expected to make legal judgments and would not be permitted to impose additional conditions or requirements.

Subsection (a) both prescribes and limits the bases upon which the filing office must and may reject records by reference to the reasons set forth in Section 9-515(b). For the most part, the bases for rejection are limited to those that prevent the filing office from dealing with a record that it receives—because some the requisite information (e.g., the debtor's name) is missing or cannot be deciphered, because the record is not communicated by an method or medium that the filing office accepts (e.g., it is mime-, rather than uu-encoded), or because the filer fails to tender an amount equal to or greater than the filing fee.

3. **Consequences of Accepting a Rejectable Record.** Section 9-515(b) includes among the reasons for rejection of an initial financing statement the failure to give certain information that is not required as a condition of effectiveness. In conjunction with Section 9-515(b)(5), this section requires Subsection (b)(5) permits the filing office to refuse to accept an otherwise legally sufficient financing statement because it that does not contain a mailing address for the debtor, does not disclose whether the debtor is an individual or an organization (e.g., a partnership or corporation) or, if the debtor is an organization, does not give specific information concerning the organization. The information required by Section 9-515(b)(5) assists requirements assist searchers in weeding out "false positives," i.e., records that a search reveals but which do not pertain to the debtor in question. They assist It assists filers by helping to insure that the debtor's name is correct and that the financing statement is filed in the proper jurisdiction.

If the filing office accepts a financing statement that does not give this information at all, the filing is fully effective. Section 9-515(c). The financing statement generally is effective if the information is incorrect; however, the security interest is subordinate to the rights of a purchaser who gives value in reasonable reliance upon the incorrect information. Section 9-335.

4. **Filing Office's Duties with Respect to Rejected Record.** Subsection (b) requires the filing office to communicate the fact of rejection and the reason therefor within a fixed period of time. Inasmuch as a rightfully rejected record is ineffective and a wrongfully rejected record is not fully effective, prompt communication concerning any rejection is important.

1           5. **“Safe Harbor” Written Forms.** Although subsection (a) limits the  
2 bases upon which the filing office can refuse to accept records, subsections (c) and  
3 (d) provide sample written forms that would be acceptable in every filing office in  
4 the country. By using one of the statutory forms, a secured party could be certain  
5 that the filing office is obligated to accept every record it presents. The formatting  
6 of the forms has been designed to reduce error by both filers and filing offices.

7           The forms in subsection (c) are based upon national financing statement  
8 forms that already are in use. Those forms were developed over an extended period  
9 and reflect the comments and suggestions of filing officers, secured parties and  
10 their counsel (both directly and through organizations such as the American Bar  
11 Association), service companies, and the Drafting Committee. They are widely  
12 available from printers and search companies, and filing offices in a majority of  
13 States have undertaken to accept them, in most cases without any extra or  
14 non-standard filing fee.

15           The multi-purpose form in subsection (d) covers changes with respect to the  
16 debtor, the secured party, the collateral, and the status of the financing statement  
17 (termination and continuation).

18           **SECTION 9-522. LAPSED FINANCING STATEMENTS.** Except to the  
19 extent that a statute governing disposition of public records provides for destruction  
20 at a later time, if a financing statement lapses under Section 9-516(a) with respect  
21 to all secured parties of record, the filing office immediately may destroy any  
22 written record evidencing the financing statement. If the filing office destroys a  
23 written record evidencing a financing statement, it shall maintain another record of  
24 the financing statement which is retrievable by using [the name of the debtor or the]  
25 file number of the destroyed record.

26                               Reporters’ Comments - June, 1997, Draft

27           The new language in square brackets would permit a filing office to locate  
28 lapsed financing statements filed against a specified debtor. See § 9-523(b) and  
29 Reporters’ Comment 3 - June, 1997, Draft.

30                               Reporters’ Comments

31           1. **Source.** Former Section 9-403(3).

32           2. **“Open Drawer” Policy.** This section has been revised to clarify that the  
33 filing office may destroy written records evidencing a financing statement only if it  
34 has lapsed under Section 9-516(a). Until a financing statement lapses under  
35 Section 9-516(a), the filing office remains responsible to maintain the written

1 records and to provide information under Section 9-523, even though the financing  
2 statement has been terminated under Section 9-511.

3           **SECTION 9-523. INFORMATION FROM FILING OFFICE; SALE OR**  
4 **LICENSE OF RECORDS.**

5           (a) If a person filing a written record furnishes a copy to the filing office,  
6 the filing office upon request shall:

7                   (1) note upon the copy the file number and date and time of the filing of  
8 the original and deliver or send the copy to the person; or

9                   (2) send to the person an image of the record showing the file number  
10 and date and time of the filing of the original.

11                                   **Subsection (b)--Alternative A**

12           (b) The filing office shall communicate the following information to any  
13 person that requests it:

14                   (1) whether there is on file on a date and time specified by the filing  
15 office, but not a date earlier than three business days before the filing office  
16 receives the request, any financing statement that:

17                                   (A) designates a particular debtor [or, if the request so states,  
18 designates a particular debtor at the address specified in the request;] and

19                                   (B) ~~that~~ has not lapsed under Section 9-516(a) with respect to all  
20 secured parties of record[, and, if the request so states, has lapsed under Section 9-  
21 516(a)];

22                                   (2) the date and time of filing of each financing statement; and

23                                   (3) the information contained in each financing statement.

24                                   **Subsection (b)--Alternative B**

25                                   (b) The filing office shall communicate the following information to any  
26 person that requests it:



1           (1) whether there is on file on a date and time specified by the filing  
2           office, but not a date earlier than three business days before the filing office  
3           receives the request, any financing statement that:

4           (A) designates a particular debtor [or, if the request so states,  
5           designates a particular debtor at the address specified in the request]; and

6           (B) has not lapsed under Section 9-516(a) with respect to all secured  
7           parties of record[, and, if the request so states, has lapsed under Section 9-516(a)];

8           (2) the date and time of filing of each financing statement; and

9           (3) the information contained in each financing statement, [or, if the  
10          request so states, [with respect to each record included in the financing statement[,  
11          the file number of the record, the names and addresses of the debtor and secured  
12          party provided in the record, and whether the record is an initial financing statement  
13          or an amendment] [a reasonable summary of the information (other than an  
14          indication of collateral) contained in the record].

15               (c) In complying with its duty under subsection (b), the filing office may  
16          communicate ~~the~~ information in any medium. However, if requested, the filing  
17          office shall communicate ~~the~~ information by issuing [its written certificate] [a  
18          record that can be admitted into evidence in the courts of this State without  
19          extrinsic evidence of its authenticity].

20               ~~(d)(e)~~ At least weekly, the [insert appropriate official or governmental  
21          agency] [filing office] shall sell or license to the public on a nonexclusive basis, in  
22          bulk, copies of all records filed with it under this part, in every medium from time  
23          to time available to the filing office.

24               ~~(e)(d)~~ The filing office shall perform the acts required by subsections (a)  
25          and (b) at the time and in the manner prescribed by rule, but not later than two  
26          business days after the filing office receives the request.

1       *Legislative Note: States whose filing office responds to search requests limited to a*  
2       *particular address should adopt the bracketed language in subsection (b)(1).*

3                               Reporters' Comments - June, 1997, Draft

4           1. **Subsection (b) - Alternative A.** Alternative A requires the filing office to  
5       provide "the information contained in each financing statement to a person who  
6       requests it. However, this alternative does not in any manner restrict the filing  
7       office from offering to provide less than all of the information (presumably for a  
8       lower price) to a person who asks for less. The Official Comments could be  
9       expanded to make it quite clear that the statute accommodates the current practice  
10      of providing only the filing number, date and time of filing, and names and  
11      addresses of the debtor and secured party when a requesting person asks for no  
12      more (i.e., when the person does not ask for copies of financing statements).

13          2. **Subsection (b) - Alternative B.** Alternative B provides an explicit statutory  
14      treatment of requests for less than all information contained in a financing  
15      statement. Alternative B itself contains two alternatives. One specifies the more  
16      limited information that the filing office must provide when requested; the other  
17      requires that it provide only a "reasonable summary. In the interest of brevity and  
18      flexibility, we prefer Alternative A with an expanded official comment.

19          3. **Lapsed Financing Statements.** Each alternative of subsection (b) contains  
20      a bracketed provision that would require a filing office to conduct a search and  
21      report as to lapsed financing statements, when requested.

22          4. **Alternatives to a Written Certificate of the Filing Office.** The new,  
23      bracketed language in subsection (c) recognizes that there may be satisfactory  
24      alternatives to a filing office's "written certificate. We are exploring this area with  
25      some experts on evidence; the new language is illustrative only. In addition, by  
26      permitting communication "in any medium, subsection (c) is not inconsistent with  
27      a system (e.g., as in New Mexico) in which persons other than filing office staff  
28      conduct searches of the filing office's (computer) records.

29          5. **Filing Office Noncompliance with Performance Standards.** The Official  
30      Comments will be revised to explain that the failure of the filing office to comply  
31      with performance standards, such as subsection (e), has no effect on the private  
32      rights of persons affected by the filing of records.

33                               Reporters' Comments

34          1. **Source.** Former Section 9-407; subsections (d) and (e) are new.

35          2. **Information from Filing Office.** Former Section 9-407, dealing with  
36      obtaining information from the filing office, was bracketed to suggest to  
37      legislatures that its enactment was optional. Experience has shown that the method  
38      by which interested persons can obtain information concerning the public records  
39      should be uniform. Accordingly, the analogous provisions of this Article are not in  
40      brackets. This section reflects the "open drawer" policy, under which only lapsed  
41      financing statements will be removed from the records; terminated financing

1 statements will remain part of the filing office's data base. See the Comment to  
2 Section 9-522, above.

3 Most of the other changes from former Section 9-407 are for clarification, to  
4 embrace medium-neutral drafting, or to impose standards of performance on the  
5 filing office.

6 **3. Search by Debtor's Address.** Subsection (b)(1) contemplates that, by  
7 making a single request, a searcher will receive the results of a search of the entire  
8 public record maintained by any given filing office. Under current practice, some  
9 filing offices routinely limit their searches (and reports of search results) to  
10 financing statements showing a particular address for the debtor. The bracketed  
11 language in subsection (b)(1) would permit a limited search report of this kind, but  
12 only if the search request is so limited. With or without the bracketed language,  
13 this subsection does not permit the filing office to compel a searcher to limit a  
14 request by address.

15 **4. Performance Standard.** In some States, filing offices take weeks to  
16 respond to requests for information. In some States, requests are filled using  
17 information that is weeks old. The utility of the filing system depends on the ability  
18 of searchers to get current information quickly. Accordingly, subsection (d)  
19 requires that the filing office respond to a request for information no later than two  
20 business days after it receives the request. The information contained in the  
21 response must be current as of a date no earlier than three business days before the  
22 filing office receives the request. See subsection (b)(1).

23 **5. Certificates.** The former statute provides that the filing office respond  
24 to a request for information by providing a certificate. The principle of medium-  
25 neutrality would suggest that the statute not require a written certificate. However,  
26 official written certificates might be introduced into evidence more easily than  
27 official communications in another medium. Under subsection (c), the filing office  
28 may respond to a request for information in any medium; however, it is obligated to  
29 provide its certificate upon request.

30 **6. Sales of Records in Bulk.** Subsection (e), which is new, mandates that  
31 the appropriate official or the filing office sell or license the filing records to the  
32 public in bulk, on a nonexclusive basis, in every medium available to the filing  
33 office. The details of implementation are left to the administrative rules.

34 **SECTION 9-524. DELAY BY FILING OFFICE.** Delay by the filing office  
35 beyond the time limits prescribed in this part is excused if:

36 (1) the delay is caused by interruption of communication or computer  
37 facilities, war, emergency conditions, failure of equipment, or other circumstances  
38 beyond control of the filing office; and

39 (2) the filing office exercises reasonable diligence under the circumstances.

1 Reporters' Comment

2 **Source.** New; derived from Section 4-109.

3 **[SECTION 9-525. REGISTERED AGENT.**

4 [Intentionally omitted]

5 Reporters' Comments

6 1. **Source.** New.

7 2. **Registered Agent.** The Reporters distributed to the Drafting Committee  
8 a proposal under which a State would permit each debtor to select a "registered  
9 agent to maintain financing statements and other Article 9 records pertaining to the  
10 debtor. Pending the Drafting Committee's determination whether it wishes to  
11 pursue that proposal, the Reporters have not prepared the draft statutory text that  
12 would be needed to give effect to the proposal.

13 **[SECTION 9-526. ASSIGNMENT OF FUNCTIONS TO PRIVATE**

14 **CONTRACTOR.** The [insert appropriate official or governmental agency] [filing  
15 office] may contract with a private person to perform some or all of its functions  
16 under this part, other than the adoption of rules under Section 9-528. A contract  
17 under this section is subject to [insert reference to any applicable statute that  
18 regulates government contracting and procurement].]

19 Reporters' Comments

20 1. **Source.** New.

21 2. **Private contractors.** This section explicitly confers on the filing office  
22 or the appropriate government agency the power to make arrangements with a  
23 private contractor for the performance of the functions of the filing office. Of  
24 course, the filing office may not delegate its power to adopt administrative rules.  
25 The section is bracketed to reflect doubt about its need.

26 **[SECTION 9-527. FEES.**

27 (a) The fee for filing and indexing a [record under this part] [financing  
28 statement, amendment, continuation statement, or termination statement] [and for  
29 marking a written copy furnished by the secured party to show the time and place of  
30 filing] is \$ \_\_\_\_\_ if the record is communicated in writing and \$ \_\_\_\_\_ if the

1 record is communicated by another medium authorized by rule, [plus in each case,  
2 if the financing statement is subject to the second sentence of Section 9-502(a), \$  
3 \_\_\_\_]. The fee for each name more than one required to be indexed is \$  
4 \_\_\_\_\_. The fee for filing a financing statement stating an extended period of  
5 effectiveness under Section 9-502(b) is [\$\_\_\_\_, if the period of effectiveness is 10  
6 years, \$\_\_\_\_, if the period of effectiveness is 20 years, and \$\_\_\_\_, if the period of  
7 effectiveness is 30 years]. [The fee for filing a written record in a form other than  
8 as set forth in Sections 9-521(c) and (d) may not be less than the fee charged for  
9 filing a written record of the same kind in the form set forth in those sections.]  
10 [With reference to a mortgage filed as a financing statement a fee is not required  
11 other than the regular recording and satisfaction fees with respect to the mortgage.]

12 (b) The fee for responding to a request for information from the filing  
13 office, including for [issuing a certificate showing] [communicating] whether there  
14 is on file any financing statement naming a particular debtor, is \$ \_\_\_\_ if the  
15 request is communicated in writing and \$ \_\_\_\_ if the request is communicated by  
16 another medium authorized by rule.]

17 *Legislative Note: A State may wish to consolidate the provisions of this section*  
18 *with statutes setting fees for other services.*

#### 19 Reporters' Comments

20 1. **Source.** Various sections of former Part 4.

21 2. **Fees.** This section contains all fee requirements for filing and for  
22 responding to requests for information. The penultimate sentence of subsection (a)  
23 is intended to discourage filing offices from favoring a local "standard form" over  
24 the national forms set forth in subsections (c) and (d) of Section 9-521. The section  
25 is bracketed to indicate that a States may wish to consolidate the provisions of this  
26 section with statutes setting fees for other services.

### 27 SECTION 9-528. ADMINISTRATIVE RULES.

28 (a) The [insert appropriate official or governmental agency] [filing office]  
29 shall adopt rules to carry out the provisions of this article. The rules must be

1 consistent with this article [and must be adopted in accordance with the [insert any  
2 applicable state administrative procedure act].

3 (b) To keep the rules and practices of the filing office in harmony with the  
4 rules and practices of filing offices in other jurisdictions that enact substantially this  
5 part, and to keep the technology used by the filing office compatible with the  
6 technology used by filing offices in other jurisdictions that enact substantially this  
7 part, the filing office, so far as is consistent with the purposes, policies, and  
8 provisions of this article, shall:

9 (1) before adopting, amending, and repealing rules, consult with filing  
10 offices in other jurisdictions that enact substantially this part and consult the most  
11 recent version of the Model Rules promulgated by the International Association of  
12 Corporate Administrators or any successor organization; and

13 (2) in adopting, amending, and repealing rules, take into consideration  
14 the rules and practices of, and the technology used by, filing offices in other  
15 jurisdictions that enact substantially this part.

#### 16 Reporters' Comments

17 1. **Source.** New. Subsection (b) derives in part from the Uniform  
18 Consumer Credit Code (1974).

19 2. **Rules Required.** Operating a filing office is a complicated business,  
20 requiring many more rules and procedures than this Article usefully can provide.  
21 Subsection (a) requires the adoption of administrative rules to carry out the  
22 provisions of Article 9. The rules must be consistent with the provisions of the  
23 statute and adopted in accordance with local procedures.

24 3. **Importance of Uniformity.** In today's national economy, uniformity of  
25 the policies, practices, and technology of the filing offices will reduce the costs of  
26 secured transactions substantially. The International Association of Corporate  
27 Administrators (IACA), referred to in subsection (b), is an organization whose  
28 membership includes filing officers from every State. These individuals are  
29 responsible for the proper functioning of the Article 9 filing system. IACA has  
30 been working with liaisons from the Drafting Committee to develop workable  
31 statutory provisions as well as model administrative rules, all with a view toward  
32 efficiency and uniformity.

**SECTION 9-529. DUTY TO REPORT.** 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.

## Reporters' Comments

1. **Source.** New; derived in part from the Uniform Consumer Credit Code (1974).

**2. Duty to Report.** This section is designed to promote compliance with the standards of performance imposed upon the filing office and with the requirement that the filing office's policies, practices, and technology be consistent and compatible with the policies, practices, and technology of other filing offices.



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**PART 6**  
**DEFAULT**

[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.**

(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 that 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)~~, 9-614(e), 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 applies to an agricultural lien but not to any other statutory lien.

## Reporters' Comments

1. **Source.** Former Section 9-501(1), (2), (5); subsections (d) and (e) are new.

2. **When Remedies Arise.** Under subsection (a) the secured party's remedies arise "[a]fter default. Like former Section 9-501, this Article leaves the agreement of the parties to define the circumstances giving rise to a default. This Article does not determine whether a secured party's post-default conduct can constitute a waiver of default in the face of a security agreement stating that such conduct shall not constitute a waiver. Rather, it continues to leave to the parties' agreement, as supplemented by non-UCC law, the determination whether a default has occurred. See Section 1-103.

3. **Cumulative Remedies.** Former Section 9-501(1) provides that the secured party's remedies are cumulative but does not explicitly provide whether the remedies may be exercised simultaneously. The last sentence of subsection (a) permits the simultaneous exercise of remedies if the secured party acts in good faith. The liability scheme of Subpart 2 affords redress to an aggrieved debtor or obligor. Moreover, subsection (a) does not override non-UCC law, including the law of tort and statutes regulating collection of debts, which would render a creditor liable for abusive behavior or harassment.

4. **Judicial Enforcement.** Subsection (c) generally follows former Section 9-501(5). The principal change provides that a levy relates back to the earlier of the date of filing or the date of perfection. This provides a secured party that enforces its security interest by levy with the benefit of the “first-to-file-or-perfect” priority rule of Section 9-319(a)(1).

**5. Sales of Receivables.** New subsection (d) provides that, except as provided in the sections that it mentions, the duties imposed on secured parties do not apply to buyers of accounts, chattel paper, or payment intangibles. Although denominated “secured parties,” these buyers normally own the entire interest in the property sold and so may enforce their rights without regard to the seller (“debtor”).

1           **6. Consignments.** This Article is inapplicable to the true consignor's  
2 enforcement of its ownership interest. See subsection (d). However, this Article  
3 does govern cases in which the ownership interest of the true consignor is  
4 subordinate to the rights of the consignee's secured party. We have yet to draft a  
5 rule governing this situation. An appropriate rule might be that an enforcing senior  
6 secured party must pay all of the excess proceeds to the junior consignor-owner.

7           **7. Statutory Liens.** Part 6 does not apply to statutory liens other than  
8 agricultural liens. For the most part, this Part provides parallel treatment for the  
9 enforcement of agricultural liens and security interests. Several minor changes to  
10 former Part 6 were necessary to accomplish this result. For example, inasmuch as  
11 there normally would not be a security agreement in connection with an agricultural  
12 lien, subsections (a) and (b) change the references to the "security agreement" to the  
13 "agreement of the parties" as a source of rights and remedies.

14           Because agricultural liens are statutory rather than consensual, this Article  
15 does draw a few distinctions between the liens and security interests. Under  
16 subsection (c), the statute creating an agricultural lien would govern whether and  
17 the date to which an execution lien relates back. Section 9-606 explains when a  
18 "default" occurs in the agricultural lien context.

1           **SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND**  
2           **DUTIES.**

3           (a) To the extent that they give rights to a debtor or an obligor and impose  
4           duties on a secured party, the rules stated in the following sections may not be  
5           waived or varied by a debtor or by a consumer obligor in a consumer goods secured  
6           transaction, except as expressly provided in Section 9-623:

7                   (1) Section 9-607(c)[, which deals with collection and enforcement of  
8                   collateral];

9                   (2) Sections 9-610(b), 9-611, and 9-613[, which deal with disposition of  
10                  collateral];

11                  (3) Section 9-609 insofar as it imposes upon a secured party that takes  
12                  possession of collateral without judicial process the duty to do so without breach of  
13                  the peace;

14                  (4) Sections 9-607(d) and 9-614(c) insofar as they deal with application  
15                  or payment of noncash proceeds of collection, enforcement, or disposition;

16                  (5) Sections 9-607(d), 9-608(a), and 9-614(d) insofar as they require  
17                  accounting for or payment of surplus proceeds of collateral;

18                  (6) Section 9-614(e)[, which deals with calculation of a deficiency or  
19                  surplus when the proceeds of a disposition are unreasonably low];

20                  (7) Section 9-618, 9-619, or 9-620[, which deal with acceptance of  
21                  collateral in satisfaction of obligation];

22                  (8) Section 9-621[, which deals with redemption of collateral];

23                  (9) Section 9-622[, which deals with reinstatement of obligations];

24                  (10) Section 9-623, which deals with permissible waivers;

25                  (11) Sections 9-624, 9-625, and 9-628[, which deal with the secured  
26                  party's liability for failure to comply with this article]; and

(12) Section 9-209[, which deals with requests for an accounting and requests concerning a list of collateral and statement of account].

(b) ~~[Notwithstanding Section 1-102(3), an]~~ ~~[An]~~ An obligor other than a consumer obligor in a consumer goods secured transaction may waive or vary the rules referred to in subsection (a) to the extent and in the manner provided by other law.

#### Reporters' Comments

1. **Source.** Former Section 9-501(3).

2. **Waiver by Debtors.** Subsection (a) contains restrictions on waivers by debtors. In an effort at clarification, this Article uses the term “waive or vary instead of “renounc[e] or modify[]” which appears in former Section 9-504(3). Subsection (a) revises former Section 9-501(3) by restricting the ability to waive or modify additional rights and duties: (i) the duty to collect collateral in a commercially reasonable manner (Section 9-607), (ii) the implicit duty to refrain from a breach of the peace in taking possession of collateral under Section 9-609, (iii) the duty to apply noncash proceeds of collection or disposition in a commercially reasonable manner (Sections 9-602 and 9-614), (iv) the right to reinstate a secured obligation in a consumer goods secured transaction (Section 9-622), (v) the right to limitations on the effectiveness of certain waivers (Section 9-623), and (vi) the right to a response to a request for an accounting, concerning a list of collateral, or concerning a statement of account (Section 9-209). The descriptions of the nonwaivable rights appear in brackets pending resolution of a disagreement over style.

Subsection (a) provides generally that the specified rights and duties “may not be waived or varied. However, the subsection does not restrict the ability of parties to agree to settle or compromise claims for past conduct that may have constituted a violation or breach of those rights and duties, even if the settlement involves an express “waiver.

3. **Waiver by Others.** The restrictions on waiver imposed in subsection (a) relate to waivers by a debtor (defined in Section 9-102 as a person with a property interest, other than a security interest or other lien, in the collateral) and an obligor (whether or not a debtor) in a consumer goods secured transaction. Subsection (b) provides explicitly that a waiver by an obligor other than a consumer obligor in a consumer goods transaction is governed by non-UCC law. This is so notwithstanding the first sentence of Section 1-102(3), which generally prohibits disclaimers of the “obligations of good faith, diligence, reasonableness and care prescribed by this Act. In this way, an obligor’s ability to waive is the same, regardless of whether the obligation is incurred in connection with a secured transaction under this Article.

Secondary obligors enjoy many of the same rights as debtors. However, under subsection (b) a non-debtor obligor may waive all of its rights and all of the

1 secured party's duties under Part 6 in accordance with other law. The waiver of  
2 rights or duties by a secondary obligor does not prejudice the rights of a debtor. For  
3 example, the debtor may assert its claims and defenses arising out of a secured  
4 party's noncompliance with Part 6 in an action brought by the secondary obligor  
5 based on either reimbursement or subrogation. See Restatement (3d), Suretyship  
6 and Guaranty §§ 24(1)(c); 28(1)(a)(1996).

7 To see the operation of subsection (b), consider the following examples:

8 **Example 1:** Corporation grants a security interest in its equipment to secure  
9 a loan. President issues an unsecured guarantee of Corporation's debt.  
10 Corporation is the debtor, and President is the secondary obligor. Under  
11 subsection (b), President ~~is entitled to~~ may effectively waive notification of  
12 disposition to the extent and in the manner prescribed by non-UCC law.

13 **Example 2:** Corporation is obligated to creditor. The debt is secured only  
14 by equipment owned by Parent. Here, although Parent is a secondary  
15 obligor, it also is the debtor. Corporation, the principal obligor, is neither  
16 the debtor nor a secondary obligor. Although subsection (b) permits  
17 Corporation to waive its rights and the secured party's duties to the extent  
18 and in the manner prescribed by non-UCC law, the secured party has no  
19 duty to notify Corporation of a disposition. However, a purported waiver of  
20 notification by Parent would be effective only if in writing after default  
21 under Section 9-623(a).

22 **Example 3:** Child owes creditor a debt for a purchase money loan secured  
23 by Child's automobile. The automobile is used primarily for transportation  
24 between home and the university Child attends. Parent has co-signed the  
25 promissory note. Parent is a secondary obligor. Nevertheless, because  
26 Parent is an obligor in a consumer goods secured transaction, subsection (b)  
27 does not negate the restrictions on waiver imposed by subsection (a).

28 **SECTION 9-603. AGREEMENT ON STANDARDS CONCERNING**  
29 **RIGHTS AND DUTIES.** The parties may determine by agreement the standards  
30 measuring the fulfillment of the rights of a debtor or obligor and the duties of a  
31 secured party, other than duties concerning taking possession of collateral without  
32 breach of the peace under Section 9-609, if the standards are not manifestly  
33 unreasonable.

34 **Reporters' Comments**

35 **1. Source.** Former Section 9-501(3).

36 **2. Limitation on Ability to Set Standards.** This section does not permit  
37 the parties to set standards measuring fulfillment of the secured party's duty to take  
38 collateral without breaching the peace.

1           **SECTION 9-604. PROCEDURE IF SECURITY AGREEMENT COVERS**  
2           **REAL PROPERTY OR FIXTURES.**

3           (a) If a security agreement covers both personal and real property, a secured  
4           party may proceed:

5                   (1) under this part as to the personal property without prejudicing any  
6           rights and remedies with respect to the real property; or

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

10           (b) If a security agreement covers goods that are or become fixtures, a  
11           secured party, subject to subsection (c), may proceed under this part or in  
12           accordance with the rights and remedies with respect to real property, in which case  
13           the other provisions of this part do not apply.

14           (c) If a secured party with a security interest in fixtures has priority over all  
15           owners and encumbrancers of the real property, the secured party may, on default,  
16           subject to the other provisions of this part, remove the collateral from the real  
17           property. [Unless otherwise agreed, a] [A] The secured party that removes  
18           collateral shall promptly reimburse any encumbrancer or owner of the real property,  
19           other than which is not the debtor, and that has not otherwise agreed for the cost of  
20           repair of any physical injury, but not The secured party need not reimburse the  
21           encumbrancer or owner for any diminution in value of the real property caused by  
22           the absence of the goods removed or by any necessity of replacing them. A person  
23           entitled to reimbursement may refuse permission to remove until the secured party  
24           gives adequate assurance for the performance of the obligation to reimburse.

25                                   Reporters' Comments



1. **Source.** Former Section 9-501(4); 9-313(8).

2. **Real-property-related Collateral.** Subsection (a) alters former Section 9-501(4) to make clear that a secured party who exercises rights under Part 6 does not prejudice any rights under real property law.

This Article does not address certain other real-property-related problems. In a number of States, the exercise of remedies by a creditor that is secured by both real property and non-real property collateral is governed by special legal rules. For example, under some anti-deficiency laws, creditors risk loss of rights against personal property collateral if they err in enforcing their rights against the real property. Under a “one-form-of-action” rule (or rule against splitting a cause of action), a creditor that judicially enforces a real property mortgage and does not proceed in the same action to enforce a security interest in personalty may (among other consequences) lose the right to proceed against the personalty. Obviously, statutes of this kind create impediments to Article 9 secured parties. Several approaches are available, including: (i) revise Article 9 to override any limitations contained in other law and (ii) continue to submit to other law. Pending a decision to the contrary by the Drafting Committee, we have opted for the latter approach.

3. **Fixtures.** Subsection (b) is new. It is intended to make clear that a security interest in fixtures may be enforced either under real property law or under any of the applicable provisions of Part 6, including sale or other disposition either before or after removal of the fixtures (see subsection (c)). Subsection (b) also serves to overrule cases holding that a secured party's only remedy after default is the removal of the fixtures from the real property. See, e.g., *Maplewood Bank & Trust v. Sears, Roebuck & Co.*, 625 A.2d 537 (N.J. Super. Ct. App. Div. 1993).

Former Section 9-313(8) affords to the secured party the right to remove fixtures under certain circumstances. This remedy, with minor modifications, now appears in subsection (c).

**SECTION 9-605. UNKNOWN DEBTOR OR SECONDARY OBLIGOR.**

A secured party owes no duty under this article to a person, or to a secured party or lienholder that has filed a financing statement against the person, unless the 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.

## Reporters' Comments

1. **Source.** New.

**2. Duties to Unknown Persons.** This section relieves a secured party from duties to a debtor or secondary obligor and to a secured party or lienholder who has filed a financing statement against the debtor, if the secured party does not know about the debtor or secondary obligor. For example, a secured party may be unaware that the original debtor has sold the collateral subject to the security

1 interest and that the new owner now is the debtor. This subsection should be read  
2 in conjunction with the exculpatory provisions in Section 9-627.

3 **SECTION 9-606. TIME OF DEFAULT FOR AGRICULTURAL LIEN.**

4 For purposes of this part, a default occurs in connection with an agricultural lien at  
5 the earlier of the time provided by agreement of the parties and the time at which  
6 the secured party becomes entitled to enforce the lien in accordance with the statute  
7 under which it was created.

8 Reporters' Comments

9 1. **Source.** New.

10 2. **Time of Default.** Remedies under this part become available upon the  
11 debtor's "default." See Section 9-601. This section explains when "default" occurs  
12 in the agricultural lien context. It requires one to consult the enabling statute to  
13 determine when the lienholder is entitled to enforce the lien.

14 **SECTION 9-607. COLLECTION AND ENFORCEMENT BY SECURED**  
15 **PARTY.**

16 (a) If so agreed, and in any event on default, a secured party may:

17 (1) notify an account debtor or other person obligated on collateral to  
18 make payment or otherwise render performance to or for the benefit of the secured  
19 party, whether or not a debtor had been making collections on or enforcing the  
20 collateral;

21 (2) take any proceeds to which the secured party is entitled under  
22 Section 9-313; and

23 (3) enforce the obligations of an account debtor or other person  
24 obligated on collateral[, including by exercising the rights and remedies of the  
25 debtor with respect to the obligation of the account debtor or other person obligated  
26 on collateral to make payment or otherwise render performance to the debtor, and

1 with respect to any property that secures the obligations of the account debtor or  
2 other person obligated on the collateral].

3 [(b) In order to exercise under subsection (a)(3) the rights of a debtor to  
4 enforce nonjudicially any [mortgage/deed of trust] covering real property, a secured  
5 party may [file/record] in the office in which the [mortgage/deed of trust] is  
6 [filed/recorded] a copy of the security agreement that entitles the secured party to  
7 exercise those rights and an affidavit authenticated by the secured party stating that  
8 a default has occurred and that the secured party is entitled to enforce nonjudicially  
9 the [mortgage/deed of trust].]

10 (c) If so agreed, and in any event on default:

11 (1) a secured party that holds a security interest in a deposit account  
12 perfected by control under Section 9-109(a)(1) may apply the funds in the account  
13 to the obligation secured by the deposit account; and

14 (2) a secured party that holds a security interest in a deposit account  
15 perfected by control under Section 9-109(a)(2) or (3) may instruct the depository  
16 institution to pay the funds in the account to or for the benefit of the secured party.

17 (d) A secured party that is entitled [by agreement] to charge back  
18 uncollected collateral or otherwise to full or limited recourse against the debtor or  
19 against a secondary obligor and that undertakes to collect from or enforce an  
20 obligation of an account debtor or other person obligated on collateral shall proceed  
21 in a commercially reasonable manner. The secured party may deduct from the  
22 collections reasonable expenses of collection and enforcement, including  
23 reasonable attorney's fees and legal expenses incurred by the secured party.

24 Reporters' Comments

25 1. **Source.** Former Section 9-502; subsections (b) and (c) are new.

26 2. **Scope.** As a general matter Part 6 deals with the rights and duties of  
27 debtors and secured parties following default. However, this section applies to the

1 collection and enforcement rights of secured parties whether or not a default has  
2 occurred. Although seemingly anomalous, in practice it is not unusual for debtors  
3 to agree that secured parties are entitled to collect and enforce rights against  
4 account debtors prior to default.

5 This section permits a secured party to collect and enforce obligations  
6 included in collateral in its capacity as a secured party. It is not necessary for a  
7 secured party first to become the owner of the collateral pursuant to a disposition or  
8 acceptance. However, the secured party's rights to collect from and enforce  
9 collateral against account debtors and others obligated on collateral under  
10 subsection (a) are subject to Sections 9-404, 9-405, 9-406, 9-406A and other  
11 applicable law. Neither this Article nor former Section 9-502 should be understood  
12 to regulate the duties of an account debtor or other person obligated on collateral.  
13 For example, the secured party may be unable to exercise the debtor's rights under  
14 an instrument if the debtor is in possession of the instrument, or under a non-  
15 transferable letter of credit if the debtor is the beneficiary. Unless a secured party  
16 has control over a letter of credit and is entitled to receive payment or performance  
17 from the issuer or a nominated person under Article 5, its remedies with respect to  
18 the letter of credit may be limited to the recovery of any identifiable proceeds from  
19 the debtor. ~~This Instead, this~~ section establishes only the baseline rights of the  
20 secured party ~~vis-a-vis the debtor~~ *vis-a-vis the debtor*—the secured party is entitled  
21 to enforce and collect upon default or earlier if so agreed.

22 **3. Primary Changes.** The primary substantive changes to this section are:  
23 (i) expansion of its application to collection and enforcement against all persons  
24 obligated on collateral, not just account debtors; (ii) explicit provision for the  
25 secured party's enforcement of the debtor's rights in respect of the account debtor's  
26 (and other third parties') obligations; and (iii) provision for the secured party's  
27 enforcement of support obligations with respect to those obligations (support  
28 obligations are components of the collateral, see Section 9-203(d)).

29 **4. Rights Against Third Parties.** The rights of a secured party against an  
30 account debtor or other third party under subsection (a) include the right to enforce  
31 claims that the debtor may enjoy against others. The claims might include a breach  
32 of warranty claim arising out of a defect in equipment that is collateral or a secured  
33 party's action for an injunction against infringement of a patent that is collateral.  
34 Those claims typically would be proceeds of original collateral under Section  
35 9-313(a).

36 **5. Rights Against Real Property Mortgagor.** Subsection (b) addresses  
37 the situation in which the collateral consists of a mortgage note. After the debtor's  
38 (mortgagee's) default, the secured party (assignee) may wish to proceed with a  
39 nonjudicial foreclosure of the real property mortgage securing the note but may be  
40 unable to do so because it has not become the assignee of record. The  
41 assignee/secured party may not have taken a recordable assignment at the  
42 commencement of the transaction; perhaps the mortgage note in question was one  
43 of hundreds assigned to the secured party as collateral. Having defaulted, the  
44 mortgagee may be unwilling to sign a recordable assignment. This section enables  
45 the secured party (assignee) to become the assignee of record by recording the  
46 security agreement and an affidavit certifying default in the applicable real property  
47 records. Of course, the secured party's rights derive from those of its debtor.

1 Subsection (b) would not entitle the secured party to proceed with a foreclosure  
2 unless the mortgagor also is in default or the debtor (mortgagee) otherwise enjoyed  
3 the right to foreclose. Brackets around the subsection indicate some doubt about  
4 the desirability of the provision.

5 **6. Deposit Account Collateral.** New subsection (c) sets forth the self-help  
6 remedy for a secured party whose collateral is a deposit account. Subsection (c)(1)  
7 addresses the rights of a secured party that is the depository institution with which  
8 the deposit account is maintained. That secured party automatically has control  
9 under Section 9-109(a)(1). On default, and otherwise if so agreed, the depository  
10 institution/secured party may apply the funds on deposit to the secured obligation.

11 If a security interest of a third party is perfected by control (Section  
12 9-109(a)(2) or (a)(3)), the secured party may on default, and otherwise if so agreed,  
13 instruct the depository institution to pay out the funds in the account. If the third  
14 party has control under Section 9-109(a)(3), the depository institution is obliged to  
15 obey the instruction because the secured party is its customer. See Section 4-401.  
16 If the third party has control under Section 9-109(a)(2), the control agreement  
17 determines the depository institution's obligation to obey.

18 If a security interest in a deposit account is unperfected, or is perfected by  
19 filing under Section 9-313, the depository institution ordinarily owes no obligation  
20 to obey the secured party's instructions. See Section 9-338. To reach the funds, the  
21 secured party must use an available judicial procedure.

22 **7. Commercial Reasonableness.** Subsection (d) provides that the secured  
23 party's collection and enforcement rights under subsection (a) must be exercised in  
24 a commercially reasonable manner, ~~unless the underlying transaction is a sale of~~  
25 ~~accounts, chattel paper, or payment intangibles and the secured party (buyer) has no~~  
26 ~~right of recourse against the debtor or a secondary obligor. The secured party's~~  
27 ~~rights to collect and enforce~~ These rights include the right to settle and compromise  
28 claims against the account debtor, subject to the standard of commercial  
29 reasonableness. The secured party's failure to observe the standard of commercial  
30 reasonableness could render it liable to an aggrieved person under Section 9-624,  
31 and the secured party's recovery of a deficiency would be subject to Section 9-625.  
32 Subsection (d) does not apply if, as is characteristic of most sales of accounts,  
33 chattel paper, and payment intangibles, the secured party (buyer) has no right of  
34 recourse against the debtor (seller) or a secondary obligor.

35 **8. Attorney's Fees and Legal Expenses.** The phrase "reasonable  
36 attorney's fees and legal expenses, which appears in subsection (d), includes only  
37 those fees and expenses incurred in proceeding against account debtors or other  
38 third parties. The secured party's right to recover these expenses arises  
39 automatically under this section. The secured party also may incur other attorney's  
40 fees and legal expenses in proceeding against the debtor or obligor. Whether the  
41 secured party has a right to recover those fees and expenses depends on whether the  
42 debtor or obligor has agreed to pay them, as is the case with respect to attorney's  
43 fees and legal expenses under Sections ~~9-608(a)(1)(a)~~ 9-608(a)(1)(A) and 9-  
44 614(b)(1). ~~9-614(a)(1).~~ The parties also may agree to allocate a portion of the  
45 secured party's overhead to collection and enforcement under subsection (d) or  
46 Section 9-608(a).



1           **SECTION 9-608. APPLICATION OF PROCEEDS OF COLLECTION**  
2           **OR ENFORCEMENT; LIABILITY FOR DEFICIENCY AND RIGHT TO**  
3           **SURPLUS.**

4           (a) If a security interest or agricultural lien secures payment or performance  
5 of an obligation, the following rules apply:

6           (1) A secured party shall apply or pay over for application the cash  
7 proceeds of collection or enforcement under this section in the following order to:

8           (A) the reasonable expenses of collection and enforcement and, to  
9 the extent provided for by agreement and not prohibited by law, reasonable  
10 attorney's fees and legal expenses incurred by the secured party;

11           (B) the satisfaction of obligations secured by the security interest or  
12 agricultural lien under which the collection or enforcement is made; and

13           (C) the satisfaction of obligations secured by any subordinate  
14 security interest in or other lien on the collateral subject to the security interest or  
15 agricultural lien under which the collection or enforcement is made if the secured  
16 party receives an authenticated demand for proceeds before distribution of the  
17 proceeds is completed.

18           (2) If requested by a secured party, a holder of a subordinate security  
19 interest or other lien shall furnish reasonable proof of the interest or lien within a  
20 reasonable time. Unless the holder complies, the secured party need not comply  
21 with the holder's demand under paragraph (1)(C).

22           (3) A secured party need not apply or pay over for application the  
23 noncash proceeds (Section 9-313) of collection and enforcement under this section.  
24 A secured party that applies or pays over for application noncash proceeds shall do  
25 so in a commercially reasonable manner.



1 (4) A secured party shall account to and pay a debtor for any surplus  
2 notwithstanding any agreement to the contrary, and, unless otherwise agreed, the  
3 obligor is liable for any deficiency. Recovery of a deficiency under this subsection  
4 is subject to Section 9-625.

5 (b) If the underlying transaction is a sale of accounts, chattel paper, or  
6 payment intangibles, the debtor is entitled to any surplus, and the obligor is liable  
7 for any deficiency, only if its agreement so provides. Recovery of a deficiency  
8 under this subsection is subject to Section 9-625.

9 Reporters' Comments

10 1. **Source.** Subsection (a) is new. Subsection (b) derives from former  
11 Section 9-502(2).

12 2. **Modifications of Prior Law.** Subsection (a) modifies former Section  
13 9-502(2) by (i) explicitly providing for the application of proceeds recovered by the  
14 secured party in substantially the same manner as provided in Section 9-614(a) and  
15 (c) for dispositions of collateral; and (ii) referring to the applicability of Section  
16 9-625 in the event of the secured party's failure to comply with the commercial  
17 reasonableness requirement.

18 3. **Noncash Proceeds.** Subsection (a)(3) addresses the situation in which  
19 an enforcing secured party receives noncash proceeds.

20 ***Example:*** An enforcing secured party receives a promissory note from the  
21 account debtor. The secured party may wish to credit the debtor with the  
22 principal amount of the note upon receipt of the note or may wish to credit  
23 the debtor only as and when the note is paid. Under subsection (a)(3), the  
24 secured party is under no duty to apply the note or its value to the  
25 outstanding obligation. If the secured party elects to apply the note to the  
26 outstanding obligation, however, it must do so in a commercially reasonable  
27 manner. The parties may provide for the method of application of noncash  
28 proceeds in the security agreement, if the method is not manifestly  
29 unreasonable. See Section 9-603.

30 Although the secured party is not required to "apply or pay over for application  
31 noncash proceeds, the proceeds nonetheless remain collateral subject to this  
32 Article. If the secured party were to dispose of them, for example, appropriate  
33 notification would be required (see Section 9-611), and the disposition would  
34 subject to the standards provided in this part (see Section 9-610). Moreover, a  
35 secured party in possession of the noncash proceeds would have the duties specified  
36 in Section 9-207.

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1 section in the contract for disposition by giving a purchaser an authenticated  
2 statement that contains specific language disclaiming or modifying the warranties.  
3 Language in an authenticated statement is sufficient to disclaim warranties under  
4 this section if it states “There is no warranty relating to title, possession, quiet  
5 enjoyment, or the like in this disposition, or words of similar import.

6 (b) Every aspect of a disposition of collateral, including the method,  
7 manner, time, place, and other terms, must be commercially reasonable. If  
8 commercially reasonable, a secured party may dispose of collateral by public or  
9 private proceedings, by one or more contracts, as a unit or in parcels, and at any  
10 time and place and on any terms. A secured party may buy at a public sale. A  
11 secured party may buy at a private sale only if the collateral is of a kind customarily  
12 sold on a recognized market or is of a kind that is the subject of widely distributed  
13 standard price quotations.

#### 14 Reporters’ Comments

15 1. **Source.** Former Section 9-504(1), (3)

16 2. **Warranties.** Subsection (a) affords the transferee at a disposition under  
17 this section the benefit of any title, possession, quiet enjoyment, and similar  
18 warranties that would have accompanied the disposition by operation of non-Article  
19 9 law had the disposition been conducted under ordinary circumstances. For  
20 example, the Article 2 warranty of title would apply to a sale of goods, the  
21 analogous warranties of Article 2A would apply to a lease of goods, and any  
22 common law warranties of title would apply to dispositions of other types of  
23 collateral. See, e.g., Restatement (2d) Contracts § 333 (warranties of assignor).

24 Subsection (a) explicitly contemplates that these warranties can be  
25 disclaimed. It provides a sample of wording that will effectively exclude the  
26 warranties in a disposition under this section, whether or not the exclusion would  
27 be effective under non-Article 9 law.

28 The warranties incorporated by subsection (a) are those relating to “title,  
29 possession, quiet enjoyment, and the like. Non-Article 9 law determines whether  
30 other statutory or implied warranties, e.g., warranties of quality or fitness for  
31 purpose, apply to a disposition under this section. It also determines issues relating  
32 to disclaimer of such warranties. For example, a foreclosure sale of a car by a car  
33 dealer would give rise to a an implied warranty of merchantability (Revised Section  
34 2-404) ~~2-405~~ unless effectively disclaimed or modified (Revised Section 2-406).  
35 ~~2-407~~).

1 This section's approach to these warranties conflicts with Official Comment  
2 5 to Section 2-312: "Subsection (2) [of Section 2-312] recognizes that sales by . . .  
3 foreclosing lienors and person similarly situated are so out of the ordinary  
4 commercial course that their peculiar character is immediately apparent to the buyer  
5 and therefore no personal obligation is imposed upon the seller that is purporting to  
6 sell only an unknown or limited right. This Article rejects the baseline assumption  
7 that commercially reasonable dispositions under this section are "out of the  
8 ordinary commercial course or "peculiar. Any conflict between this Article and  
9 Revised Article 2 will be worked out between the Drafting Committees.

10 **3. Pre-disposition Preparation and Processing.** Former Section 9-504(1)  
11 appears to give the secured party the choice of disposing of collateral either "in its  
12 then condition or following any commercially reasonable preparation or  
13 processing. Many courts have held that the "commercially reasonable standard of  
14 Section 9-504(3) nevertheless may impose an affirmative duty on the secured party  
15 to process or prepare the collateral prior to sale. The Drafting Committee was  
16 concerned that if the quoted language were added to the second sentence of  
17 subsection (b), list in subsection (f), courts might be unnecessarily quick to impose  
18 a duty of preparation or processing on the secured party. Accordingly, the Drafting  
19 Committee chose to retain the language in subsection (a). Subsection (a) does not  
20 grant the secured party the right to dispose of the collateral "in its then condition  
21 under all circumstances. A secured party may not dispose of collateral "in its then  
22 condition when, taking into account the costs and probable benefits of preparation  
23 or processing and the fact that the secured party would be advancing the costs at its  
24 risk, it would be commercially unreasonable to dispose of the collateral in its then  
25 condition.

26 **4. Disposition by Junior Secured Party.** Subsection (a) is not limited to  
27 first-priority security interests. Rather, any secured party as to which there has been  
28 a default enjoys the right to dispose of collateral under this subsection. The  
29 exercise of this right by a secured party whose security interest is subordinate to  
30 that of another secured party does not of itself constitute a conversion or otherwise  
31 give rise to liability in favor of the holder of the senior security interest. Section  
32 9-614 addresses application of the proceeds of a disposition by a junior secured  
33 party. Under Section 9-614(b), a junior secured party owes no obligation to apply  
34 the proceeds of disposition to the satisfaction of obligations secured by a senior  
35 security interest. Section 9-614(g) builds on this general rule by protecting certain  
36 juniors from claims of a senior concerning cash proceeds of the disposition. Even  
37 if a senior were to have a non-Article 9 claim to proceeds of a junior's disposition,  
38 Section 9-614(g) would protect a junior that acts in good faith and without  
39 knowledge that its actions violate the rights of a senior party. Because the  
40 disposition by a junior would not cut off a senior's security interest or lien (see  
41 Section 9-615), in many (probably most) cases the junior's receipt of the cash  
42 proceeds would not violate the rights of the senior.

43 The holder of a senior security interest is entitled, by virtue of its priority, to  
44 take possession of collateral from the junior secured party and conduct its own  
45 disposition, provided that the senior enjoys the right to take possession of the  
46 collateral from the debtor. See Section 9-609. The holder of a junior security  
47 interest normally must notify the senior secured party of an impending disposition.  
48 See Section 9-611. Regardless of whether the senior receives a notification from

1 the junior, the junior's disposition does not of itself discharge the senior's security  
2 interest. See Section 9-615. Unless the senior secured party has authorized the  
3 disposition free and clear of its security interest, the senior's security interest  
4 ordinarily will survive the disposition by the junior and continue under Section  
5 9-313(c). If the senior enjoys the right to repossess the collateral from the debtor,  
6 the senior likewise may recover the collateral from the transferee.

7 When a secured party's collateral is encumbered by another security interest  
8 or by a lien, one of the claimants may seek to invoke the equitable doctrine of  
9 marshaling. As explained by the Supreme Court, that doctrine "rests upon the  
10 principle that a creditor having two funds to satisfy his debt, may not by his  
11 application of them to his demand, defeat another creditor, who may resort to only  
12 one of the funds. *Meyer v. United States*, 375 U.S. 233, 236 (1963), quoting  
13 *Sowell v. Federal Reserve Bank*, 268 U.S. 449, 456-57 (1925). The purpose of the  
14 doctrine is "to prevent the arbitrary action of a senior lienor from destroying the  
15 rights of a junior lienor or a creditor having less security. *Id.* at 237. Because it is  
16 an equitable doctrine, marshaling "is applied only when it can be equitably  
17 fashioned as to all of the parties having an interest in the property. *Id.* This  
18 Article leaves courts free to determine whether marshaling is appropriate in any  
19 given case. See Section 1-103.

20 **5. Security Interests of Equal Rank.** Sometimes two security interests  
21 enjoy the same priority. This situation may arise by contract, e.g., pursuant to  
22 "equal and ratable" provisions in indentures, or by operation of law. See Section  
23 9-324(3); 9-325(2); 9-326(2). This Article treats a security interest having equal  
24 priority like a senior security interest in many respects. Assume, for example, that  
25 SP-X and SP-Y enjoy equal priority, SP-W is senior to them, and SP-Z is junior. If  
26 SP-X disposes of the collateral under this section, then (1) SP-W's and SP-Y's  
27 security interests survive the disposition but SP-Z's does not, see Section 9-615,  
28 and (2) neither SP-W nor SP-Y is entitled to receive a distribution of proceeds but  
29 SP-Z is. See Section 9-614(b)(3).

30 When one considers the ability to obtain possession of the collateral, a  
31 secured party with equal priority is unlike a senior secured party. As the senior  
32 secured party, SP-W should enjoy the right to possession as against SP-X. See  
33 Section 9-609, Comments. If SP-W takes possession and disposes of the collateral  
34 under this section, it is entitled to apply the proceeds to satisfy its secured claim.  
35 SP-Y, however, should not have such a right to take possession from SP-X;  
36 otherwise, once SP-Y took possession from SP-X, SP-X would have the right to get  
37 possession from SP-Y, which would be obligated to redeliver possession to SP-X,  
38 and so on. Resolution of this problem is left to the parties and, if necessary, the  
39 courts.

40 **6. Public vs. Private Dispositions.** This Article maintain three distinctions  
41 between "public" and other dispositions: (i) the secured party may buy at the  
42 former, but not at the latter (Section 9-610(b)); (ii) the debtor is entitled to  
43 notification of "the time and place of a public sale" and notification of "the time  
44 after which" a private sale or other intended disposition is to be made (Section  
45 9-613(a)(1)(E)); (iii) the section is less protective of transferees in a noncomplying  
46 public sale than in other noncomplying dispositions (Section 9-615(a)). As used in  
47 this Article, a "public sale" is one at which the price is determined after the public

1 has had a meaningful opportunity for competitive bidding. “Meaningful  
2 opportunity is meant to imply that some form of advertisement or public notice  
3 must precede the sale and that the public (or the commercially relevant segment of  
4 the public) must have access to the sale.

5       **7. Investment Property.** Dispositions of investment property may be  
6 regulated by the federal securities laws. Although the “public sale” of securities  
7 under this Article may implicate the registration requirements of the Securities Act  
8 of 1933, it need not do so. A disposition that qualifies for deviations from the rules  
9 for “private placement” exemptions under the Securities Act of 1933 in connection  
10 with public advertising nevertheless may constitute a “public sale” within the  
11 meaning of this section. Moreover, the “commercially reasonable” requirements of  
12 subsection (b) need not prevent a secured party from conducting a foreclosure sale  
13 without first complying with federal registration requirements. To eliminate any  
14 doubt, a secured party whose collateral consists of unregistered securities may wish to  
15 include in the security agreement an undertaking by the debtor to cause the  
16 securities to be registered under the 1933 Act upon the secured party’s request. The  
17 debtor’s failure to comply with such a requirement should free the secured party  
18 (insofar as Article 9 is concerned) to dispose of the unregistered securities in an  
19 otherwise commercially reasonable manner. An agreement along these lines would  
20 be enforceable as a “standard[]” that is not “manifestly unreasonable” under Section  
21 9-603.

22       **8. “Recognized Market.”** A “recognized market,” as used in subsection  
23 (b) and Section 9-611(b), is one in which the items sold are fungible and prices are  
24 not subject to individual negotiation. For example, the New York Stock Exchange  
25 is a recognized market, whereas the markets for used automobiles and livestock are  
26 not.

27       **9. Wholesale vs. Retail Dispositions.** A disposition at wholesale is not per  
28 se commercially unreasonable. Regarding whether disposition at wholesale is  
29 commercially reasonable when retail facilities are readily available, this Article  
30 leaves the courts free to resolve each case on its own facts.

31       **10. Relevance of Price.** The amount of proceeds received in a disposition  
32 (e.g., the cash price if the disposition is by way of sale) is not a term that must be  
33 commercially reasonable. See the Comments to ~~Section~~ Section 9-614 and 9-626.

## 34       **SECTION 9-611. PERSONS ENTITLED TO NOTIFICATION BEFORE** 35 **DISPOSITION OF COLLATERAL.**

36       (a) In this section, “notification date” means the earlier of the date on which  
37 a secured party sends to the debtor and any secondary obligor an authenticated  
38 notification of disposition and the date on which the debtor and any secondary  
39 obligor waive the right to notification.



1 (b) A secured party shall send to a debtor and any secondary obligor a  
2 reasonable authenticated notification of disposition under Section 9-613 unless  
3 collateral is perishable or threatens to decline speedily in value or is of a type  
4 customarily sold on a recognized market. In the case of consumer goods, another  
5 notification need not be sent. In other cases a secured party shall send an  
6 authenticated notification of disposition to:

7 (1) any other person from which the secured party has received, before  
8 the notification date, an authenticated notification of a claim of an interest in the  
9 collateral;

10 (2) any other secured party that, [ ] days before the notification date,  
11 held a security interest or agricultural lien in the collateral perfected by the filing of  
12 a financing statement that identified the collateral, was indexed under the debtor's  
13 name as of that date, and was filed in the office in which to file a financing  
14 statement against the debtor covering the collateral as of that date; and

15 (3) any other secured party that, [ ] days before the notification date,  
16 held a security interest in the collateral perfected by compliance with a statute or  
17 treaty described in Section 9-309A(a).

18 (c) A secured party complies with the notification requirement specified in  
19 subsection (b)(2) if:

20 (1) not later than [ ] days before the notification date, the secured party  
21 requests, in a commercially reasonable manner, information concerning financing  
22 statements indexed under the debtor's name in the office indicated in subsection  
23 (b)(2); and

24 (2) before the notification date the secured party:

25 (A) did not receive a response to the request for information; or



(B) received a response to the request for information and sent an authenticated notification of disposition to each secured party named in that response and whose financing statement covered the collateral.

#### Reporters' Comments

1. **Source.** Former Section 9-504(3).

2. **Notification to Debtors and Secondary Obligors.** This section imposes a duty to send notification of a disposition not only to the debtor but also to a secondary obligor. It resolves an uncertainty under former Article 9 by providing that secondary obligors (sureties) will be entitled to receive notification of an intended disposition of collateral, regardless of who created the security interest in the collateral. If the surety created the security interest, it would be the debtor. If it did not, it would be a secondary obligor. (This Article also resolves the question of the secondary party's ability to waive the right to notification. See Section 9-602.) Section 9-605 relieves a secured party from any duty to send notification to a debtor or secondary obligor unknown to the secured party.

Under subsection (b), the principal obligor (borrower) is not always entitled to notification of disposition.

**Example:** Mooney borrows on an unsecured basis, and Harris grants a security interest in his car to secure the debt. Mooney is a primary obligor, not a secondary obligor. As such, he is not entitled to notification of disposition under this section.

3. **Notification to Other Secured Parties.** Prior to the 1972 amendments, Section 9-504(3) required the enforcing secured party to send reasonable notification of the sale:

except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this State or who is known by the secured party to have a security interest in the collateral.

The 1972 amendments eliminated the duty to give notice to secured parties other than those from whom the foreclosing secured party had received written notice of a claim of an interest in the collateral.

Many of the problems arising from dispositions of collateral encumbered by multiple security interests can be ameliorated or solved by informing all secured parties of an intended disposition and affording them the opportunity to work with one another. To this end, subsection (b)(2) expands the duties of the foreclosing secured party to include the duty to notify (and the corresponding burden of searching the files to discover) certain competing secured parties. The subsection imposes a search burden that in some cases may be greater than the pre-1972 burden on foreclosing secured parties but certainly is more modest than that faced by a new lender.

1 To determine who is entitled to notification, the foreclosing secured party  
2 must determine the proper office for filing a financing statement as of a particular  
3 date, measured by reference to the “notification date” as defined in subsection (a).  
4 This determination requires reference to the choice-of-law provisions of Part 3.  
5 The secured party must ascertain whether any financing statements covering the  
6 collateral and indexed under the debtor’s name, as the name existed as of that date,  
7 in fact were filed in that office. The foreclosing secured party generally need not  
8 notify secured parties whose effective financing statements have become more  
9 difficult to locate because of changes in the location of the debtor, proceeds rules,  
10 or changes in the debtor’s name.

11 Under subsection (b)(3), the secured party also must notify a secured party  
12 that has perfected a security interest by complying with a statute or treaty described  
13 in Section 9-309A(a), such as a certificate-of-title act.

14 Subsection (c) provides a “safe harbor” that takes into account the inevitable  
15 delays attendant to receiving information from the public filing offices. It provides,  
16 generally, that the secured party will be deemed to have satisfied its notification  
17 duties under subsection (b)(2) if it requests search(es) from the proper office(s) at  
18 least [] days before sending notification to the debtor and it also sends a notification  
19 to all secured parties reflected on the search report(s). The secured party’s duties  
20 under subsection (b)(2) also will be satisfied if the secured party does not receive  
21 any search report(s) before the notification is sent to the debtor.

22 In considering the extent, if any, to which expansion of the notification  
23 requirement is desirable, one should keep in mind the consequences of failing to  
24 send notification to the holder of a competing security interest: the aggrieved  
25 secured party has the burden of establishing its loss. See Section 9-624. Also  
26 relevant are Section 9-614(g), under which senior secured parties ordinarily are not  
27 entitled to share in proceeds of a junior’s disposition, Section 9-615(a), under  
28 which a disposition cuts off junior security interests, and Section 9-614(b), under  
29 which junior secured parties are not entitled to receive excess proceeds from the  
30 disposing secured party unless they demand them.

31 **4. Authentication Requirement.** Subsection (b) explicitly provides that  
32 notification of disposition must be “authenticated.” Some cases read former  
33 Section 9-504(3) as validating oral notification.

34 **5. Second Try.** This Article leaves to judicial resolution, based upon the  
35 facts of each case, the question whether the requirement of “reasonable  
36 notification” requires a “second try,” i.e., whether a secured party that sends  
37 notification and learns that the debtor did not receive it must attempt to locate the  
38 debtor and send another notification.

39 **6. Failure to Conduct Notified Disposition.** Nothing in this Article  
40 prevents a secured party from not conducting a disposition after sending notice or  
41 sending a revised notification if its plans for disposition change; provided, however,  
42 that the secured party acts in good faith, the revised notification is reasonable, and  
43 the revised plan for disposition and any attendant delay are commercially  
44 reasonable.



1 (D) states that the debtor [or secondary obligor] is entitled to an  
2 accounting of the unpaid indebtedness and states the charge, if any for an  
3 accounting; and

4 (E) states the time and place of a public sale or the time after which  
5 any other disposition is to be made, whether or not the notification contains  
6 additional information.

7 (2) Whether a notification that lacks any of the information set forth in  
8 paragraph (1) is nevertheless sufficient is a question of fact.

9 (3) A particular phrasing of the notification is not required. A  
10 notification substantially complying with the requirements of this subsection is  
11 sufficient, even if it contains minor errors that are not seriously misleading.

12 (4) The following form of notification, when completed, contains  
13 sufficient information:

14 **NOTIFICATION OF DISPOSITION OF COLLATERAL**

15 To: [Name of debtor, obligor, or other person to which the  
16 notification is sent]

17 From: [Name, address, and telephone number of secured  
18 party]

19 Name of Debtor(s): [Include only if debtor(s) are not an addressee]  
20 [For a public disposition:]

21 We will sell [or lease or license, *as applicable*] the [describe collateral]  
22 [to the highest qualified bidder] in public as follows:

23 Day and Date: \_\_\_\_\_

24 Time: \_\_\_\_\_

25 Place: \_\_\_\_\_

26 [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 goods 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 collateral 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:

## NOTIFICATION OF OUR PLAN TO SELL PROPERTY

1 To: [Name of debtor or obligor to whom the notification is sent]  
2 From: [Name, address, and telephone number of secured party]  
3 Name of Debtor(s): [Include only if debtor(s) are not an addressee]  
4 [You] [name of obligor, if different] owe(s) us money on a debt and [you  
5 have] [has] not paid it to us on time. We have [your] [the debtor's] [describe  
6 collateral] because we took it from [you] [the debtor] or [you] [the debtor]  
7 voluntarily gave it to us. [You] [name of debtor, if different] agreed to let us  
8 do that when [you] [name of obligor, if different] created the debt.  
9 [For a public disposition:]  
10 We plan to sell [or lease or license, as applicable] the [describe collateral]  
11 [to the highest qualified bidder] in public. The sale [or lease or license, as  
12 applicable] will be held as follows:  
13 Day and Date: \_\_\_\_\_  
14 Time: \_\_\_\_\_  
15 Place: \_\_\_\_\_  
16 You can bring bidders to the sale if you want.  
17 [For a private disposition:]  
18 We will sell [or lease or license, as applicable] the [describe collateral]  
19 privately sometime after [day and date].  
20 The money that we get from the sale [or lease or license, as applicable] (after  
21 paying our costs) will be paid on the debt that [you] [name of obligor, if  
22 different] owe(s) to us. [Include the following sentence only if the addressee is  
23 obligated on the secured debt.] IF WE GET LESS MONEY THAN YOU OWE,  
24 YOU WILL STILL OWE US THE DIFFERENCE, and we may sue you and take  
25 part of your wages or other property. [Include the following sentence only if the  
26 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]**

## Reporters' Comments

1. **Source.** New.

**2. Contents of Notification.** To comply with the “reasonable authenticated notification” requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a consumer goods secured transaction, the contents of a notification that includes the information set forth in subsection (a) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to “time of disposition” means here, as it does in former Section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor’s rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in subsection (a)(1) nevertheless may be sufficient if found to be so by the trier of fact. See subsection (a)(2). A properly completed sample form of notification in subsection (a)(4) is one example of a notification that would contain the information set forth in subsection (a)(1). No particular phrasing of the notification is required, however.

**3. Consumer Goods Secured Transactions.** Subsection (b)(1) sets forth the information required for an effective notification in a consumer goods secured transaction. A notification that lacks any of the information set forth in subsection (b)(1) is insufficient as a matter of law. Compare subsection (a)(2), under which the trier of fact may find a notification to be sufficient even if it lacks some information listed in subsection (a)(1). However, under subsection (b)(3), a notification that is substantially complying is sufficient, even if it contains minor errors that are not seriously misleading.

**SECTION 9-614. APPLICATION OF PROCEEDS OF DISPOSITION;  
LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS.**

(a) In this section, “affiliate” means [a person controlling, controlled by, or under common control with another person].

(b) A secured party shall apply or pay over for application the cash proceeds 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

1 and not prohibited by law, reasonable attorney's fees and legal expenses incurred by  
2 the secured party;

3 (2) the satisfaction of obligations secured by the security interest or  
4 agricultural lien under which the disposition is made;

5 (3) the satisfaction of obligations secured by any subordinate security  
6 interest in or other lien on the collateral if the secured party receives an  
7 authenticated demand for proceeds before distribution of the proceeds is completed.

8 (c) If requested by a secured party, a holder of a subordinate security  
9 interest or other lien shall furnish reasonable proof of the interest or lien within a  
10 reasonable time. Unless the holder does so, the secured party need not comply with  
11 the holder's demand under subsection ~~(b)(1)~~ (b)(3).

12 (d) A secured party need not apply or pay over for application noncash  
13 proceeds of disposition under this section. A secured party that applies or pays over  
14 for application noncash proceeds shall do so in a commercially reasonable manner.

15 (e) If the security interest under which a disposition is made secures  
16 payment or performance of an obligation, after making the payments and  
17 applications required by subsection (b) the secured party shall account to and pay a  
18 debtor for any surplus, and, unless otherwise agreed, the obligor is liable for any  
19 deficiency. If the underlying transaction is a sale of accounts, chattel paper, or  
20 payment intangibles, the debtor is entitled to any surplus, and the obligor is liable  
21 for any deficiency, only if its agreement so provides. Recovery of any deficiency  
22 under this subsection is subject to Section 9-625.

23 (f) This subsection applies to a disposition at which the transferee is the  
24 secured party, an affiliate of the secured party, or a secondary obligor. If the  
25 amount of proceeds of the disposition is unreasonably low, the surplus or deficiency  
26 under subsection (e) is calculated based on the amount of proceeds that would have

been realized in a commercially reasonable disposition to a transferee other than the secured party, an affiliate of the secured party, or a secondary obligor.

(g) 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.

## Reporters' Comments

1. **Source.** former Section 9-504(1), (2).

**2. Application of Proceeds.** This section contains the rules governing application of proceeds and the debtor’s liability for a deficiency. Subsection (b) provides a “safe harbor” for a secured party that complies with its terms. However, a secured party that does not comply with subsection (b) is liable only as provided in Section 9-624.

3. **Noncash Proceeds.** Subsection (d) addresses the application of noncash proceeds of a disposition, such as a note or lease. The explanation in the Comments to Section 9-608 generally applies to this subsection. Under subsection (d), if a disposition produces noncash proceeds, such as a promissory note, the secured party is under no duty to apply the proceeds or their value to the secured obligation. If a secured party elects to apply the note to the outstanding obligation, however, it must do so in a commercially reasonable manner. One would expect that where noncash proceeds are or may be material, the parties would agree to more specific standards in the security agreement or in an agreement entered into after default. The parties may provide for the method of application of noncash proceeds in the security agreement, if the method is not manifestly unreasonable. See Section 9-603.

**4. Surplus and Deficiency.** Subsection (e) deals with surplus and deficiency. It revises former Section 9-504(2) by imposing an explicit requirement that the secured party “pay the debtor for any surplus, while retaining the secured party’s duty to “account. Inasmuch as the debtor may not be an obligor, subsection (e) now provides that the obligor (not the debtor) is liable for the deficiency. The special rule governing surplus and deficiency when receivables

1 have been sold likewise has been revised to take into account the new distinction  
2 between debtor and obligor.

3       **5. Collateral Under New Ownership.** When the debtor sells collateral  
4 subject to a security interest, the original debtor (creator of the security interest) is  
5 no longer a debtor inasmuch as it no longer has a property interest in the collateral;  
6 the buyer is the debtor. See Section 9-102. As between the debtor (buyer of the  
7 collateral) and the original debtor (seller of the collateral), the debtor (buyer)  
8 normally would be entitled to the surplus. Subsection (d) therefore requires the  
9 secured party to pay the surplus to the debtor (buyer), not to the original debtor  
10 (seller) with which it has dealt. But, because this situation arises as a result of the  
11 debtor's wrongful act, this Article does not expose the secured party to the risk of  
12 determining ownership of the collateral. If the secured party does not know about  
13 the new debtor and accordingly pays the surplus to the original debtor, the  
14 exculpatory provisions of this Article exonerate the secured party from liability to  
15 the new debtor. See Section 9-627(a), (b). If a debtor sells collateral *free* of a  
16 security interest, such as a sale to a buyer in ordinary course of business (see  
17 Section 9-316(a)), the property is no longer collateral and the buyer is not a debtor.

18       **6. "Low Price" Dispositions.** Subsection (f) provides a special method for  
19 calculating a deficiency or surplus when the secured party, an affiliate of the  
20 secured party (as defined in subsection (a)), or a secondary obligor acquires the  
21 collateral at a foreclosure disposition. It recognizes that when the foreclosing  
22 secured party or a related party is the transferee of the collateral, the secured party  
23 sometimes lacks the incentive to maximize the proceeds of disposition. As a  
24 consequence, the disposition may comply with the procedural requirements of this  
25 Article (e.g., it is conducted in a commercially reasonable manner following  
26 reasonable notice) but nevertheless fetch a price that is unreasonably low.

27       Subsection (f) adjusts for this lack of incentive. If the proceeds of a  
28 disposition of collateral to a secured party, an affiliate, or a secondary obligor are  
29 "unreasonably low," then instead of calculating a deficiency (or surplus) based on  
30 the actual net proceeds, the calculation is based upon the amount that would have  
31 been received in a commercially reasonable disposition to an unrelated person.  
32 Subsection (f) thus rejects the view that the secured party's receipt of an  
33 unreasonably low amount constitutes noncompliance with Part 6.

34       The term "unreasonably low" is not susceptible to precise definition. An  
35 amount of proceeds is "unreasonably low" if it is less than the "reasonably  
36 equivalent value" of the collateral as that term was construed in the context of  
37 fraudulent transfer law prior to the opinion in *BFP v. Resolution Trust Corp.*, 511  
38 U.S. 531 (1994).

39       **7. "Affiliate."** The Drafting Committee has yet to consider the definition  
40 of "affiliate," for purposes of the special rule in subsection (f). The bracketed  
41 definition in subsection (a) is from the Uniform Franchise and Business  
42 Opportunities Act.

1           **SECTION 9-614A. NOTIFICATION OF CALCULATION OF SURPLUS**  
2           **OR DEFICIENCY.**

3           (a) This section applies to a consumer goods secured transaction in which  
4           the debtor is entitled to a surplus or a consumer obligor is liable for a deficiency  
5           under Section 9-614(e).

6           (b) Before or when the secured party accounts to the debtor and pays any  
7           surplus or first makes demand on the obligor for payment of the deficiency, the  
8           secured party shall send to the debtor or obligor a written notification:

9                   (1) stating the amount of the surplus or deficiency; and

10                  (2) providing a reasonable explanation of how the secured party  
11           calculated the surplus or deficiency, including an indication of:

12                   (A) the amount of the obligation secured, calculated as of a date not  
13           more than [ ] days before disposition of the collateral;

14                   (B) the components of the obligation secured, including, as  
15           applicable, the unpaid balance of principal or purchase price, interest or other  
16           finance charges, delinquency, default, deferral, or other additional charges, and  
17           reasonable expenses and attorney's fees described in Section ~~9-614(a)(1)~~ 9-  
18           614(b)(1); and

19                   (C) the amount of credit applied to the obligation secured, made  
20           after the date of calculation, and its components, including, as applicable,  
21           payments, rebates, and proceeds of a disposition of collateral.

22           (c) A particular phrasing of the notification is not required. A notification  
23           complying substantially with the requirements of this subsection is sufficient even  
24           if it contains minor errors that are not seriously misleading.

25                                   Reporters' Comments

26           1. **Source.** New.

1           **2. Information Concerning Deficiency.** This section reflects the view  
2 that, in every consumer goods secured transaction, the obligor should be entitled to  
3 know the amount of the deficiency claimed by the secured party and the basis upon  
4 which the deficiency was calculated. A secured party is obligated to provide this  
5 information no later than the time it first attempts to collect the deficiency. The  
6 obligor need not make a request for an accounting in order to receive it. A secured  
7 party that fails to comply with the requirement of this section is liable for loss  
8 caused plus \$500. See Section ~~9-624(b)~~ 9-624(d). A secured party that does not  
9 attempt to collect a deficiency has no obligation to send notification under this  
10 section and, consequently, cannot be liable for noncompliance.

11           **3. Information Concerning Surplus.** This section also requires the  
12 secured party to explain to the debtor in a consumer goods secured transaction how  
13 a surplus was calculated.

## 14           **SECTION 9-615. RIGHTS OF TRANSFEREE OF COLLATERAL.**

15           (a) A secured party's disposition of collateral after default transfers to a  
16 transferee for value all of a debtor's rights in the collateral and discharges the  
17 security interest under which the disposition is made and any subordinate security  
18 interest or other lien [other than liens created under] [cite acts or statutes providing  
19 for liens, if any, that are not to be discharged]. The transferee takes free of those  
20 rights and interests, even if the secured party fails to comply with the requirements  
21 of this article or any judicial proceedings:

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

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

26           (b) If a transferee does not take free of the rights and interests described in  
27 subsection (a), the transferee takes the collateral subject to the debtor's rights in the  
28 collateral and subject to any security interest or agricultural lien under which the  
29 disposition is made and any [subordinate] security interest or other lien.

1                   (c) Except as otherwise provided in this subsection or elsewhere in this  
2 article, a secured party's disposition of collateral does not discharge any security  
3 interest or other lien.



1. **Source.** Former Section 9-504(4).

2. **Title Taken by Transferee.** Subsection (a) sets forth the rights acquired by persons that qualify under paragraphs (1) or (2). Such a person is a “transferee, inasmuch as a buyer at a foreclosure sale does not meet the definition of “purchaser” in Section 1-201. By virtue of the expanded definition of the term “debtor” in Section 9-102, subsection (a) makes clear that the ownership interest of a person that bought the collateral subject to the security interest is terminated. Such a person is a debtor under this Article. Under the former Article, the result arguably is the same, but the statute is not clear. Under subsection (a), a disposition normally discharges the security interest being foreclosed on any subordinate security interests. Subsection (c) makes clear that a disposition does not discharge senior interests or interests of equal rank unless they would be discharged under other provisions of Article 9.

Subsection (b) specifies the consequences for a transferee that does not qualify for protection (e.g., a transferee with knowledge of defects in a public sale).

3. **Disposition by Third Party.** Secured parties may utilize the services of third persons to dispose of repossessed collateral.

*Example:* Secured Party (SP) takes possession of goods collateral after default and entrusts the goods to Merchant. Merchant then wrongfully sells the collateral to a buyer in ordinary course of business (Buyer). That disposition would transfer to Buyer all of SP’s rights and the rights that SP had the power to transfer (including those of the debtor). Sections 2-403(1); 9-615(a). The sale would constitute a disposition under this Article and, as such, would give rise to the consequences specified in this Part. SP would have a conversion claim against Merchant, and the debtor could assert its rights under Part 6 arising out of SP’s (probably) noncomplying disposition.

## **SECTION 9-616. RIGHTS AND DUTIES OF CERTAIN PERSONS LIABLE TO SECURED PARTY.**

(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

1 (3) is subrogated to the rights of a secured party.

2 (b) An assignment, transfer, or subrogation described subsection (a) is not a  
3 disposition of collateral under this article and does not relieve the secured party of  
4 its duties under this article.

5 Reporters' Comments

6 1. **Source.** Former Section 9-504(5).

7 2. **Assignments and Repurchase Agreements.** Under this section,  
8 assignments of secured obligations and other transactions (regardless of form) that  
9 function like assignments of secured obligations are not dispositions to which Part  
10 6 applies. Rather, they constitute assignments of rights and (occasionally)  
11 delegations of duties. Application of this section may require an investigation into  
12 the agreement of the parties, which may not be reflected in the words of the  
13 repurchase agreement (e.g., when the agreement requires a recourse party to  
14 "purchase the collateral but contemplates that the purchaser will then conduct an  
15 Article 9 foreclosure sale).

16 This section, like former Section 9-504(5), does not constitute a general and  
17 comprehensive rule for allocating rights and duties upon assignment of a secured  
18 obligation. Rather, it applies only in recourse situations. Whether the assignee of a  
19 secured obligation acquires the rights and duties of the secured party in other  
20 contexts is determined by other law.

## 21 **SECTION 9-617. TRANSFER OF RECORD OR LEGAL TILE.**

22 (a) In this section, "transfer statement" means a record authenticated by a  
23 secured party stating:

24 (1) that the debtor has defaulted in connection with an obligation  
25 secured by specified collateral;

26 (2) that the secured party has exercised its post-default remedies with  
27 respect to the collateral;

28 (3) that, by reason of the exercise, a transferee has acquired the rights of  
29 the debtor in the collateral; and

30 (4) the name and mailing address of the secured party, the debtor, and  
31 the transferee.

1 (b) A transfer statement entitles the transferee to the transfer of record of all  
2 rights of the debtor in the collateral specified in the statement in any official filing,  
3 recording, registration, or certificate-of-title system covering the collateral. If a  
4 transfer statement is presented with the applicable fee and request form to the  
5 official or office responsible for maintaining the system, the official or office must  
6 accept the transfer statement, promptly amend its records to reflect the transfer, and,  
7 if applicable, issue a new appropriate certificate of title in the name of transferee.

8 (c) A transfer of the record or legal title to collateral to a secured party is  
9 not of itself a disposition of collateral under this article and does not of itself relieve  
10 the secured party of its duties under this article.

11 Reporters' Comments

12 1. **Source.** New.

13 2. **Transfer of Record or Legal Title.** Potential buyers of collateral that is  
14 covered by a certificate of title (e.g., an automobile) or is subject to a registration  
15 system (e.g., a copyright) typically require as a condition of their purchase that the  
16 certificate or registry reflect their ownership. In many cases, this condition can be  
17 met only with the consent of the record owner. If the record owner is the debtor  
18 and, as often is the case after the default, the debtor refuses to cooperate, the  
19 secured party may have great difficulty disposing of the collateral. Applicable non-  
20 UCC law (e.g., a certificate-of-title act, federal registry, or the like) may provide a  
21 means by which the secured party obtains record or legal title for the purpose of a  
22 subsequent disposition of the property under this Article.

23 Subsection (b) provides a simple ~~title-clearing~~ mechanism for obtaining  
24 record or legal title, for use primarily when other law does not provide one. Of  
25 course, use of this mechanism will not be effective to clear title to the extent that  
26 subsection (b) is preempted by federal law. The Drafting Committee has not yet  
27 considered whether this mechanism should be available if other law provides a  
28 separate title-clearing mechanism. Subsection (c) acknowledges that ~~clearing title~~  
29 obtaining record or legal title under subsection (b) or under other law merely puts  
30 the secured party in a position to pass legal or record title to a transferee at  
31 foreclosure. ~~After title has been cleared, the A~~ secured party that has obtained  
32 record or legal title retains its duties with respect to enforcement of its security  
33 interest, and the debtor retains its rights as well.

1           **SECTION 9-618. ACCEPTANCE OF COLLATERAL IN FULL OR**  
2           **PARTIAL SATISFACTION OF OBLIGATION; COMPULSORY**  
3           **DISPOSITION OF COLLATERAL.**

4           (a) In this section and in ~~Section~~ Sections 9-619 and 9-620, “proposal  
5           means a [written] statement authenticated by a secured party containing the terms  
6           on which the secured party is willing to accept collateral in full or partial  
7           satisfaction of the obligation it secures.

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

10                 (1) the debtor consents to the acceptance under subsection (d);

11                 (2) the secured party does not receive, within the time set forth in  
12           subsection (e), a notification of objection to the proposal authenticated by a person  
13           to which the secured party was required to send a proposal under Section 9-619 or  
14           any other person holding an interest in the collateral subordinate to the security  
15           interest that is the subject of the proposal; and

16                 (3) if the collateral is consumer goods, the collateral is not in the  
17           possession of the debtor when the debtor consents to the acceptance.

18           (c) A purported or apparent acceptance of collateral under this section is  
19           ineffective unless the secured party:

20                 (1) consents to the acceptance in an authenticated record or sends to the  
21           debtor a proposal; and

22                 (2) the conditions of subsection (b) are met.

23           (d) For purposes of this section:

24                 (1) a debtor consents to an acceptance of collateral in partial satisfaction  
25           of the obligation it secures only if the debtor agrees to the terms of the acceptance  
26           in a record authenticated after default; and

(2) a debtor consents to an acceptance of collateral in full satisfaction of the obligation it secures only if the debtor agrees to the terms of the acceptance in a record authenticated 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 notification of objection authenticated by 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 which the proposal was sent pursuant to Section 9-619, within 20 days after notification was sent to that person; and

(2) in other cases, within 20 days after the last notification was sent pursuant to Section 9-619 or, if a notification was 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.

## Reporters' Comments

1                   1. **Source.** Former Section 9-505, completely rewritten.

2                   2. **Overview and Organization.** This section and the two sections  
3 following deal with strict foreclosure, a procedure by which the secured party  
4 acquires the debtor's interest in the collateral without the need for a sale or other  
5 disposition under Section 9-610. The provisions have been entirely reorganized  
6 and substantially rewritten. The more straightforward approach taken in this  
7 Article eliminates the fiction that the secured party always will present a "proposal  
8 for the retention of collateral and the debtor will have a fixed period to respond. By  
9 eliminating the need (but preserving the possibility) for proceeding in this fashion,  
10 this section eliminates much of the awkwardness of former Section 9-505. It  
11 reflects the belief that strict foreclosures should be encouraged and often will  
12 produce better results than a disposition for all concerned. This Comment explains  
13 how the three sections are organized. The following Comments contain a  
14 subsection-by-subsection analysis of the text.

15                   Subsection (b) sets forth the conditions necessary to an effective acceptance  
16 (formerly, retention) of collateral in full or partial satisfaction of the secured  
17 obligation. The first condition is that the debtor must consent to the acceptance.  
18 Subsection (d) provides that this consent must be manifested either by the debtor's  
19 post-default, authenticated agreement to the acceptance or, in the case of an  
20 acceptance in full satisfaction, by the debtor's 20-day silence after receipt of an  
21 authenticated "proposal (as defined in subsection (a)). Subsection (c) conditions  
22 the effectiveness of an apparent acceptance on the secured party's authenticated  
23 acceptance or its sending a proposal; "constructive" or "deemed" acceptances are  
24 not effective.

25                   The second condition necessary to an effective acceptance of collateral is  
26 the absence of a timely objection from a person that holds an interest subordinate to  
27 the security interest in question. Subsection (e) indicates when an objection is  
28 timely. If either of these conditions is not met, any purported or apparent  
29 acceptance in satisfaction is ineffective.

30                   The third condition applies only in a consumer goods secured transaction:  
31 the collateral may not be in the possession of the debtor when the debtor consents  
32 to the acceptance.

33                   In addition to the conditions described above, Section 9-619 requires that a  
34 secured party that wishes to proceed under this section notify certain other persons  
35 that have or that claim an interest in the collateral. Unlike the failure to meet the  
36 conditions in subsection (b), under Section 9-620(b) the failure to comply with the  
37 notification requirement of Section 9-619 does not render the acceptance of  
38 collateral ineffective. Rather, the acceptance can take effect notwithstanding the  
39 secured party's noncompliance. Section 9-620(b) indicates that a person to which  
40 the required notice was not sent has the right to recover damages under Section  
41 9-624(b). Section 9-620(a) sets forth the effect of an acceptance of collateral.

42                   3. **Proposals.** Subsection (a) defines the term "proposal. A "proposal" is  
43 necessary only if the debtor does not agree to an acceptance in an authenticated  
44 record as described in subsection (d)(1) or (d)(2). A proposal under subsection (a)  
45 need not take any particular form as long as it sets forth the terms under which the

secured party is willing to accept collateral in satisfaction. A proposal to accept collateral should specify the amount (or a means of calculating the amount, such as by including a per diem accrual figure) of the secured obligations to be satisfied, state the conditions (if any) under which the proposal may be revoked, and describe any other applicable conditions. Note, however, that a conditional proposal generally requires the debtors agreement in order to take effect. See subsection (d), discussed in the following Comment.

**4. Conditions to Effective Acceptance.** Subsection (b) contains the conditions necessary to the effectiveness of an acceptance of collateral. Subsection (b)(1) requires the debtor's consent. Under subsections (d)(1) and (d)(2), the debtor may consent by agreeing to the acceptance in writing after default. Subsection (d)(2) contains an alternative method by which to satisfy the debtor's-consent condition in subsection (b)(1). It follows the proposal-and-objection model found in former Section 9-505: The debtor consents if the secured party sends a proposal to the debtor and does not receive an objection within 20 days. Subsection (d)(1) provides that silence is not deemed to be consent with respect to acceptances in partial satisfaction. Thus, a secured party that wishes to conduct a "partial strict foreclosure" must obtain the debtor's agreement in an record authenticated after default. In all other respects, the conditions necessary to an effective partial strict foreclosure are the same as those governing acceptance of collateral in full satisfaction.

The time when a debtor consents to a strict foreclosure is significant in several circumstances under this section and the following one. See Sections 9-618(b)(1), (b)(3), (e)(2); 9-619(a)(1), (a)(2), (a)(3). For purposes of determining the time of consent, a debtor's conditional consent constitutes consent.

Subsection (b)(2) contains the second condition to the effectiveness of an acceptance under this section—the absence of an objection from a person holding a junior interest in the collateral or from a secondary obligor. Any junior party—secured party or lienholder—is entitled to lodge an objection to a proposal, even if that person was not entitled to notification under Section 9-619. Subsection (e), discussed below, indicates when an objection is timely.

In a consumer goods secured transaction, an acceptance is not effective unless the collateral is not in the possession of the debtor when the debtor consents to the acceptance. Subsection (b)(3).

**5. Secured Party's Agreement.** The conditions of subsection (b) relate to actual or implied consent by the debtor and any secondary obligor or holder of a junior security interest or lien. To insure that the debtor cannot unilaterally cause an acceptance of collateral, subsection (c) provides that compliance with these conditions is necessary but not sufficient to cause an acceptance of collateral. Rather, under subsection (c), acceptance does not occur unless, in addition, the secured party consents to the acceptance in an authenticated record or sends to the debtor a proposal.

**6. When Acceptance Occurs.** This section does not impose any formalities or identify any steps that a secured party must take in order to accept collateral once the conditions of subsections (b) and (c) have been met. Absent



1 facts or circumstances indicating a contrary intention, the fact that the conditions  
2 have been met provides a sufficient indication that the secured party has accepted  
3 the collateral on the terms to which the debtor has agreed or failed to object.  
4 Acceptance of the collateral normally is automatic upon the secured party's  
5 becoming bound and the time for objection passing. As a matter of good business  
6 practice, an enforcing secured party may wish to memorialize its acceptance, such  
7 as by notifying the debtor that the strict foreclosure is effective or by placing a  
8 written record to that effect in its files. The secured party's agreement to accept  
9 collateral is self-executing and cannot be breached. The secured party is bound by  
10 its agreement to accept collateral and by any proposal to which the debtor consents.

11 **7. No Possession Requirement.** This section eliminates the former  
12 requirement that the secured party be "in possession of collateral. Intangible  
13 collateral, which cannot be possessed, may be subject to a strict foreclosure under  
14 this section. However, under subsection (b)(3), if the collateral is consumer goods,  
15 acceptance does not occur unless the debtor is not in possession.

16 **8. No Constructive Strict Foreclosure.** Under subsection (c), a delay in  
17 collection or disposition of collateral does not constitute a "constructive strict  
18 foreclosure. Instead, a delay that is unreasonable may be a factor relating to  
19 whether the secured party acted in a commercially reasonable manner for purposes  
20 of Section 9-607 or 9-610. A debtor's voluntary surrender of collateral to a secured  
21 party and the secured party's acceptance of possession of the collateral raises no  
22 implication whatsoever that the secured party intends or is proposing to accept the  
23 collateral in satisfaction of the secured obligation under this section.

24 **9. When Objection Timely.** Subsection (e) explains when an objection is  
25 timely and thus prevents an acceptance of collateral from taking effect. An  
26 objection by a person to which notification was sent under Section 9-619 is  
27 effective if it is received by the secured party within 20 days from the date the  
28 notification was sent to that person. Other objecting parties (i.e., third parties that  
29 are not entitled to notification) may object at any time within 20 days after the last  
30 notification is sent under Section 9-619. If no such notification is sent, third parties  
31 must object before the debtor agrees to the acceptance in writing or is deemed to  
32 have consented by silence. The former may occur any time after default, and the  
33 latter requires a 20-day waiting period.

34 **10. Applicability of Other Law.** This section does not purport to regulate  
35 all aspects of the transaction by which a secured party may become the owner of  
36 collateral previously owned by the debtor. For example, a secured party's  
37 acceptance of a motor vehicle in satisfaction of secured obligations may require  
38 compliance with the applicable motor vehicle certificate-of-title law. State  
39 legislatures should conform those laws so that they mesh well with this section and  
40 Section 9-610, and courts should construe those laws and this section  
41 harmoniously. A secured party's acceptance of collateral in the possession of the  
42 debtor also may implicate statutes dealing with a seller's retention of possession of  
43 goods sold. See, e.g., Cal. Civ. Code § 3440.1-9.

44 **11. Accounts, Chattel Paper, and Payment Intangibles.** If the collateral  
45 is accounts, chattel paper, or payment intangibles, then a secured party's acceptance  
46 of the collateral in satisfaction of secured obligations would constitute a sale to the

secured party. That sale would give rise to a new security interest (the ownership interest) under Sections 1-201(37) and 9-112. The new security interest would remain perfected by a filing that was effective to perfect the secured party's original security interest. However, the procedures for acceptance of collateral under this section satisfy all necessary formalities and a new security agreement authenticated by the debtor would not be necessary.

12. **Obligation to Dispose of Consumer Goods.** Subsection (f) imposes an obligation on the secured party to dispose of consumer goods under certain circumstances. Regarding the 60% test, see the Comments to Section 9-622.

## SECTION 9-619. NOTIFICATION OF PROPOSAL TO ACCEPT

**COLLATERAL.** A secured party that desires to accept collateral in partial satisfaction of the obligation it secures shall send its proposal to any secondary obligor, and a secured party that desires to accept collateral in full or partial satisfaction of the obligation it secures shall send its proposal also to:

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

(2) any other secured party or lienholder that, [ ] days before the debtor consented to the acceptance, held a security interest in or other lien on 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 or offices in which to file a financing statement against the debtor covering the collateral as of that date; and

(3) any other secured party that, [ ] days before the debtor consented to the acceptance, held a security interest in the collateral perfected by compliance with a statute or treaty described in Section 9-309A(a).

### Reporters' Comments

1. **Source.** Former Section 9-505, substantially expanded.

2. **Notification.** This section specifies three classes of competing claimants to which the secured party must send notification of its proposal: (i) those that

1 notify the secured party that they claim an interest in the collateral, (ii) holders of  
2 certain security interests and liens which have filed against the debtor, and (iii)  
3 holders of certain security interests and liens which have perfected by compliance  
4 with a certificate-of-title statute. With regard to (ii), see the Comment to Section  
5 9-611. This section also requires notification to any secondary obligor if the  
6 proposal is for acceptance in partial satisfaction.

## 7 **SECTION 9-620. EFFECT OF ACCEPTANCE OF COLLATERAL.**

8 (a) A secured party's acceptance of collateral in full or partial satisfaction  
9 of the obligation it secures:

10 (1) discharges the obligation to the extent consented to by the debtor,  
11 but recovery of a deficiency is subject to Section 9-625;

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

13 (3) discharges the security interest or agricultural lien that is the subject  
14 of the debtor's consent and any subordinate security interest or other lien; and

15 (4) terminates any other subordinate interest.

16 (b) A subordinate interest is discharged or terminated under subsection (a)  
17 whether or not the secured party is required to send or does send ~~notification~~ its  
18 proposal to the holder ~~thereof~~ of the interest. However, any person to which the  
19 secured party was required to send, but did not send, ~~notification~~ its proposal has  
20 the remedy provided by Section 9-624(b).

### 21 Reporters' Comments

22 1. **Source.** New.

23 2. **Effect of Acceptance.** Subsection (a) specifies the effect of an  
24 acceptance of collateral in full or partial satisfaction of the secured obligation.  
25 Paragraph (1) expresses the fundamental consequence of accepting collateral in full  
26 or partial satisfaction of the secured obligation—the obligation is discharged to the  
27 extent consented to by the debtor. Paragraphs (2) ~~though~~ through (4) indicate the  
28 effects of an acceptance on various property rights and interests. Paragraph (2)  
29 follows Section 9-615(a) in providing that the secured party acquires “all of a  
30 debtor's rights in the collateral. Under paragraph (3), the effect of strict  
31 foreclosure on holders of junior security interests and liens is the same regardless of  
32 whether the collateral is accepted in full or partial satisfaction of the secured  
33 obligation: all junior encumbrances are discharged. Subsection (b) makes clear  
34 that this is the effect regardless of whether a ~~notification~~ a proposal was required to

be sent or, if required, was sent. Paragraph (4) provides for the termination of other subordinate interests. Given the breadth of the definition of the term debtor, however, paragraph (2) may render paragraph (4) superfluous.

**SECTION 9-621. RIGHT TO REDEEM COLLATERAL.** 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 described in Section ~~9-614(a)(1)~~ 9-614(b)(1).

## Reporters' Comments

**1. Source.** Former Section 9-506.

2. **Redemption.** Subsection (a) follows former Section 9-506 but extends the right of redemption to holders of nonconsensual liens. Most of the other changes are not substantive.

3. **Effect of “Repledging.”** Section 9-207 generally permits a secured party to create a security interest in the collateral. As explained in the Comments to that section, the debtor’s right (as opposed to its practical ability) to redeem collateral is not affected by, and does not affect, the priority of a security interest created by the debtor’s secured party.

**SECTION 9-622. REINSTATEMENT OF OBLIGATION SECURED WITHOUT ACCELERATION.**

(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 goods secured transaction, a debtor or a secondary obligor who 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

1 secured obligation due at the time of tender, without acceleration, including charges  
2 for delinquency, default, or deferral, and reasonable expenses and attorney's fees  
3 described in Section ~~9-614(a)(1)~~ 9-614(b)(1).

4 (b) A tender of payment under subsection (a) is ineffective to cure a default  
5 or reinstate a secured obligation unless made before the later of:

6 (1) 21 days after the secured party sends a notification of disposition  
7 under Section 9-611(b) to the debtor and any consumer obligor who is a secondary  
8 obligor; and

9 (2) the time the secured party disposes of collateral or enters into a  
10 contract for its disposition under Section 9-610 or accepts collateral in full or partial  
11 satisfaction of the obligation it secures under Section 9-618.

12 (c) A tender of payment under subsection (a) restores to the debtor and a  
13 consumer obligor who is a secondary obligor their respective rights as if the default  
14 had not occurred and all payments had been made when scheduled, including the  
15 debtor's right, if any, to possess the collateral. Promptly upon the tender, the  
16 secured party shall take all steps necessary to cause any judicial process affecting  
17 the collateral to be vacated and any pending action based on the default to be  
18 dismissed.

19 (d) A secured obligation may be reinstated under subsection (a) only once.

20 Reporters' Comments

21 1. **Source.** New.

22 2. **Reinstatement.** This section provides a one-time right to reinstatement  
23 of a debt following a default. It applies only in a consumer goods secured  
24 transaction in which 60 percent or more of the cash price or secured obligation has  
25 been paid. Application of the 60 percent test is straightforward when an item of  
26 collateral secures only its purchase price or a single obligation. In the less typical  
27 case in which an item of collateral secures several obligations, its application is  
28 more difficult. In the interest of avoiding unnecessary statutory complexity,  
29 however, the statute leaves it to the [agreement of the parties and the] courts to  
30 work out sensible approaches. For example, if an item secures its own purchase  
31 money debt as well as other obligations, the 60 percent test should take into account

1 only the purchase money debt. The debtor could elect to cure a default on that debt  
2 which, in turn, also would cure defaults on other debt arising out of “cross-defaults  
3 based on the purchase money debt. On the other hand, if an item secures several  
4 non-purchase money obligations, the 60 percent test should be applied to the  
5 aggregate amount of the obligations at the time of the debtor’s or secondary  
6 obligor’s tender.

7       **3. Waiver or Variance.** The debtor’s rights under this section may not be  
8 waived or varied by agreement, see Section 9-602(a)(9), except as otherwise  
9 provided in Section 9-623(a)(~~t~~). Likewise, this section overrides any contrary  
10 agreement adversely affecting the debtor’s rights, such as a provision for a higher  
11 finance charge following a reinstatement. However, this section does not prevent a  
12 secured party from making an enforceable agreement granting the debtor additional  
13 reinstatement rights, which may be more generous than those that this section  
14 provides.

## 15       **SECTION 9-623. WAIVER.**

16       (a) Subject to subsection (c), a debtor or a consumer obligor in a consumer  
17 goods secured transaction may waive the right to notification of disposition of  
18 collateral under Section 9-611, the right to redeem the collateral under Section  
19 9-621, or the right to reinstate a secured obligation under Section 9-622 only by  
20 signing a record containing a statement to that effect after default.

21       (b) Subject to subsection (c), a consumer obligor in a consumer goods  
22 secured transaction may waive the obligor's rights and the secured party's duties  
23 under Section 9-618 or 9-619 only by signing a record containing a statement to  
24 that effect after default.

25       [(c) In a consumer goods secured transaction, a statement authenticated by  
26 the debtor or a consumer obligor is ineffective under subsection (a) or (b) unless the  
27 secured party establishes by clear and convincing evidence that the debtor or  
28 consumer obligor expressly agreed to its terms.]

### 29                               Reporters’ Comments

30       **1. Source.** Former Sections 9-504(3); 9-505; 9-506.

31       **2. Waiver.** This section is a limited exception to Section 9-602, which  
32 generally prohibits waiver by debtors or by consumer obligors in consumer goods  
33 secured transactions. It makes no provision for waiving the rule prohibiting a

1 secured party from buying at its own private sale. Transactions of this kind are  
2 equivalent to “strict foreclosures” and are governed by Section 9-619.

3 The brackets around subsection (c) indicate division among the Drafting  
4 Committee as to whether the secured party should bear the burden of proving that a  
5 debtor expressly agreed to the terms of a purported waiver in consumer goods  
6 secured transactions.

7 [SUBPART 2. NONCOMPLIANCE WITH ARTICLE.]

8 **SECTION 9-624. REMEDIES FOR SECURED PARTY'S FAILURE TO**  
9 **COMPLY WITH THIS ARTICLE.**

10 (a) If it is established that a secured party is not proceeding in accordance  
11 with this article, a court may order or restrain collection, enforcement, or  
12 disposition of collateral on appropriate terms and conditions.

13 (b) A secured party is liable for damages in the amount of any loss caused  
14 by a failure to comply with this article. Except as otherwise provided in Section  
15 9-627, a person that, at the time of the failure, was a debtor, was a secondary  
16 obligor, or held a security interest in or other lien on the collateral has a right to  
17 recover damages for its loss under this subsection. A debtor whose deficiency is  
18 eliminated under Section 9-625 may recover damages for the loss of any surplus,  
19 but a debtor or consumer obligor whose deficiency is eliminated or reduced under  
20 Section 9-625 may not otherwise recover under this subsection for noncompliance  
21 with [Sections 9-607 through 9-614] [the provisions of this part relating to  
22 collection, enforcement, disposition, or acceptance].

23 (c) Except as otherwise provided in Section 9-627, in a consumer goods  
24 secured transaction, a person that was a debtor at the time a secured party failed to  
25 comply with this part has a right to recover from the noncomplying secured party an  
26 amount equal to the interest or finance charges plus 10 percent of the principal



1 amount of the obligation, less the sum of any amount by which any consumer  
2 obligor's personal liability for a deficiency is eliminated or reduced under Section  
3 9-625 and any amount for which the secured party is liable under subsection (b).  
4 This subsection does not apply if the only failure to comply is a failure to send a  
5 written notification pursuant to Section 9-614A.

6 (d) A secured party that fails to comply with Section 9-208, a person that  
7 files an initial financing statement or an amendment in violation of Section  
8 9-508(a), a secured party of record that fails to file or send a termination statement  
9 as required by Section 9-511(c), or a secured party that fails to comply with Section  
10 9-614A is liable to the debtor in each case for \$500 and, in addition, for any  
11 damages under subsection (b).

12 (e) A person that, without reasonable excuse, fails to comply with a request  
13 under Section 9-209 is liable to the debtor for \$500, for damages in the amount of  
14 any loss resulting from the debtor's inability to obtain, or increased costs of,  
15 alternative financing, and, in addition, for any damages under subsection (b). A  
16 recipient of a request under Section 9-209 which never claimed an interest in the  
17 collateral or obligations that are the subject of a request under that section has a  
18 reasonable excuse for failure to comply with the request.

19 (f) As against a person reasonably misled by a secured party's failure to  
20 comply with a request regarding a list of collateral or a statement of account under  
21 Section 9-209, the secured party may claim a security interest only as shown in the  
22 statement contained in the request.

#### 23 Reporters' Comments

24 1. **Source.** Former Section 9-507.

25 2. **Scope.** Subsections (a) and (b) no longer are limited to noncompliance  
26 with provisions of this part of Article 9; rather they apply to noncompliance with  
27 any provision of this Article. The change makes this section applicable to  
28 noncompliance with Sections 9-207 (duties of secured party in possession of

1 collateral); 9-208 (duties of secured party having control over deposit account);  
2 9-209 (duty to comply with request for accounting, etc.); 9-508(a) (duty to refrain  
3 from filing unauthorized financing statement); and 9-511(c) (duty to provide  
4 termination statement). Subsections (d), (e), and (f) impose supplemental damages  
5 for violation of those sections. Subsection (c), which gives a minimum damage  
6 recovery in consumer goods secured transactions, applies only to noncompliance  
7 with the provisions of this part.

8           **3. Injunctions.** Subsection (a) modifies the first sentence of former  
9 subsection (1) by adding the references to “collection” and “enforcement.”

10           **4. Damages for Noncompliance with this Article.** Subsection (b) sets  
11 forth the basic remedy for failure to comply with the requirements of this Article: a  
12 damage recovery in the amount of loss caused by the noncompliance. This  
13 subsection affords a remedy to any aggrieved person that is a secondary obligor or  
14 that holds a competing security interest or lien, regardless of whether the aggrieved  
15 person is entitled to notification under Part 6. The remedy is available even to  
16 holders of senior security interests and liens. The exercise of this remedy is subject  
17 to the normal rules of pleading and proof. A person that has delegated the duties of  
18 a secured party but that remains obligated to perform them is liable under this  
19 subsection. The last sentence of subsection (b) eliminates the possibility of double  
20 recovery or other over-compensation arising out of noncompliance with [Sections  
21 9-607 through 9-614] [the provisions of this part relating to collection,  
22 enforcement, disposition, or acceptance]. Assuming no double recovery, a debtor  
23 whose deficiency is reduced or eliminated under Section 9-625 can pursue a claim  
24 for a surplus.

25           **5. Supplemental Damages.** Subsection (d) imposes an additional \$500  
26 liability upon a person who makes an unauthorized filing in violation of Section  
27 9-508(a). It imposes the same sanction on a person who fails to relinquish control  
28 over investment property, a deposit account, or a letter of credit under Section  
29 9-208, fails to file or send a termination statement as required by Section 9-511(c),  
30 or fails to provide notification of calculation of surplus or deficiency under Section  
31 9-614A.

32           Under subsection (e), a person that fails to comply with a request for an  
33 accounting or a request regarding a list of collateral or statement of account under  
34 Section 9-209 is liable not only for the loss caused (subsection (b)) but also for  
35 \$500 and for damages in the amount of any loss resulting from the debtor’s  
36 inability to obtain, or increased costs of, alternative financing.

37           **6. Estoppel.** Subsection (f) limits the extent to which a secured party who  
38 fails to comply with a request regarding a list of collateral or statement of account  
39 may claim a security interest.

40           **7. Minimum Damages in Consumer Goods Secured Transactions.**  
41 Subsection (c) provides a minimum damage recovery for debtors in a consumer  
42 goods secured transaction. It is designed to insure that every noncompliance with  
43 the requirements of Part 6 results in liability, regardless of any injury that may have  
44 resulted. If an aggrieved person is entitled to recover damages under subsection (b)  
45 or a reduction of personal liability for a deficiency under Section 9-625, those

1 amounts are deducted from the amount available under this subsection. Regarding  
2 calculation of the principal amount of the obligation for purposes of this subsection,  
3 see the Comments to Section 9-622.

4 **Alternative A**  
5 **(“Absolute Bar” Rule for Consumer Goods Secured Transactions;**  
6 **“Rebuttable Presumption” Rule for Other Transactions)**

7 **SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS**  
8 **IN ISSUE.** In an action in which the amount of a deficiency or surplus is in issue,  
9 the following rules apply:

10 (1) A secured party need not establish compliance with [Sections 9-607  
11 through 9-614] [the provisions of this part relating to collection, enforcement,  
12 disposition, or acceptance] unless the debtor or a secondary obligor places the  
13 secured party's compliance in issue. In that case, the secured party has the burden  
14 of establishing that the collection, enforcement, disposition, or acceptance was  
15 conducted in accordance with [Sections 9-607 through 9-614, as applicable] [the  
16 applicable provisions of this part].

17 (2) Except as otherwise provided in Section 9-627, if a secured party fails  
18 to ~~establish~~ ~~[meet the burden of establishing]~~ prove that the collection,  
19 enforcement, disposition, or acceptance was conducted in accordance with  
20 [Sections 9-607 through 9-614] [the provisions of this part relating to collection,  
21 enforcement, disposition, or acceptance]:

22 (A) In a consumer goods secured transaction for which no other  
23 ~~collateral~~ property remains to secure the obligation, neither the debtor nor a  
24 secondary obligor is liable for a deficiency.

25 (B) In other cases, the liability of a debtor or a secondary obligor for a  
26 deficiency is limited to an amount by which the sum of the secured obligation,  
27 expenses, and attorney's fees exceeds the greater of the proceeds of the collection,

1 enforcement, disposition, or acceptance or the amount of proceeds that would have  
2 been realized had the noncomplying secured party proceeded in accordance with  
3 [Sections 9-607 through 9-614] [the provisions of this part relating to collection,  
4 enforcement, disposition, or acceptance]. However, the amount that would have  
5 been realized is equal to the sum of the secured obligation, expenses, and attorney's  
6 fees unless the secured party ~~[establishes]~~ ~~[meets the burden of establishing]~~ proves  
7 that the amount is less than that sum.

8 (C) In a consumer goods secured transaction, liability under paragraph  
9 (B) is not a personal liability of a consumer obligor but may be satisfied only by  
10 enforcing a security interest or other consensual lien against property securing the  
11 obligation.

12 **Alternative B**  
13 **("Rebuttable Presumption" Rule for All Transactions)]**

14 **SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS**  
15 **IN ISSUE.** In an action in which the amount of a deficiency or surplus is in issue,  
16 the following rules apply:

17 (1) A secured party need not establish compliance with [Sections 9-607  
18 through 9-614] [the provisions of this part relating to collection, enforcement,  
19 disposition, or acceptance] unless the debtor or a secondary obligor places the  
20 secured party's compliance in issue. In that case, the secured party has the burden  
21 of establishing that the collection, enforcement, disposition, or acceptance was  
22 conducted in accordance with [Sections 9-607 through 9-614, as applicable] [the  
23 applicable provisions of this part].

24 (2) Except as otherwise provided in Section 9-627, if a secured party fails  
25 to ~~[establish]~~ ~~[meet the burden of establishing]~~ prove that the collection,  
26 enforcement, disposition, or acceptance was conducted in accordance with

1 [Sections 9-607 through 9-614,] [the provisions of this part relating to collection,  
2 enforcement, disposition, or acceptance,] the liability of a debtor or a secondary  
3 obligor for a deficiency is limited to an amount by which the sum of the secured  
4 obligation, expenses, and attorney's fees exceeds the greater of the proceeds of the  
5 collection, enforcement, disposition, or acceptance or the amount of proceeds that  
6 would have been realized had the noncomplying secured party proceeded in  
7 accordance with [Sections 9-607 through 9-614] [the provisions of this part relating  
8 to collection, enforcement, disposition, or acceptance]. However, the amount that  
9 would have been realized is equal to the sum of the secured obligation, expenses,  
10 and attorney's fees unless the secured party ~~[establishes]~~ ~~[meets the burden of~~  
11 ~~establishing]~~ proves that the amount is less than that sum.

1. **Source.** New.

2. **Scope.** The basic damage remedy under Section 9-624(b) is subject to the special rules contained in this section. This section addresses situations in which the amount of a deficiency or surplus is in issue, i.e., situations in which the secured party has collected, enforced, disposed of, or accepted the collateral. It contains special rules applicable to a determination of the amount of a deficiency or surplus. The rules in this section apply only to noncompliance under [Sections 9-607 through 9-614, as applicable] [the applicable provisions of this part]. For other types of noncompliance with Part 6, the general rule liability rule, recovery of actual damages under Section 9-624(b), applies. Consider, for example, a repossession that does not comply with Section 9-609 for want of a default. The debtor's remedy is under Section 9-624(b). In a proper case the secured party also may be liable for conversion under non-UCC law. If the secured party thereafter disposed of the collateral, however, it would violate Section 9-610 at that time, and this section would apply.

3. **Alternative Versions of Section 9-625.** Courts construing former Section 9-507 have disagreed about the consequences of a secured party's failure to comply with the requirements of former Part 5. Three general approaches have emerged. Some courts have held that a noncomplying secured party may not recover a deficiency (the "absolute bar" rule). Other courts have held that the debtor can offset against a claim to a deficiency all damages recoverable under former Section 9-507 resulting from the secured party's noncompliance (the "offset" rule). A plurality of courts considering the issue has held that the noncomplying secured party is barred from recovering a deficiency unless it overcomes a rebuttable presumption that compliance with former Part 5 would have yielded an amount sufficient to satisfy the secured debt (the "rebuttable presumption" rule). In addition to the nonuniformity resulting from court decisions, some States have adopted special rules governing the availability of deficiencies.

This Article adopts a version of the rebuttable presumption rule for transactions other than consumer goods secured transactions. The Article leaves to each legislature the decision whether to adopt the rebuttable presumption rule for consumer goods secured transactions as well (Section 9-625 Alternative B), or to adopt the absolute bar rule for consumer goods secured transactions (Section 9-625 Alternative A).

4. **Rebuttable Presumption Rule.** Under paragraph (1), the secured party need not prove compliance with [Sections 9-607 through 9-614, as applicable] [the applicable provisions of this part] as part of its prima facie case. If, however, the debtor raises the issue (in accordance with the forum's rules of pleading and practice), then the secured party bears the burden of proving that the collection, enforcement, or disposition complied. In the event the secured party is unable to meet this burden, then paragraph (2) explains how to calculate the deficiency. In cases other than consumer goods secured transactions (Alternative A), or in all cases (Alternative B), the rebuttable presumption rule applies. Under this rule, the debtor or obligor is to be credited with the greater of the actual proceeds of the disposition and the proceeds that would have been realized had the secured party

1 complied with [Sections 9-607 through 9-614, as applicable] [the applicable  
2 provisions of this part]. If a deficiency remains, then the secured party is entitled to  
3 recover it. The references to “the secured obligation, expenses, and attorney’s fees  
4 in paragraph (2) (Alternative A) and paragraph (2)(B) (Alternative B) embrace the  
5 application rules in Sections 9-608(a) and 9-614(a).

6 Unless the secured party proves that compliance with Part 6 would have  
7 yielded a smaller amount, the amount that a complying collection, enforcement, or  
8 disposition would have yielded is deemed to be equal to the amount of the secured  
9 obligation, together with expenses and attorney’s fees. Thus, the secured party may  
10 not recover any deficiency unless it meets this burden of proof. (The UCC does not  
11 generally use the terms “prove” or “establish.” Rather, it defines “burden of  
12 establishing” to mean “the burden of persuading the triers of fact that the existence  
13 of the fact is more probable than its non-existence.” Section 1-201(8).)

14 **5. Consumer Goods Secured Transactions.** Paragraph (2)(A) of  
15 Alternative A provides an “absolute bar” rule for consumer goods secured  
16 transactions in which no other ~~collateral~~ property remains to secure the obligation.  
17 If other ~~collateral~~ property remains, then the debtor remains liable for a deficiency  
18 as calculated under the rebuttable presumption rule (paragraph (2)(B)), but the  
19 secured party may collect the deficiency only from other property subject to a  
20 security interest or other consensual lien (e.g., real property mortgage). The  
21 deficiency may not be collected as a personal liability of the debtor. See paragraph  
22 (2)(C).

23 **6. Delay in Applying This Section.** There is an inevitable delay between  
24 the time a secured party engages in noncomplying collections or dispositions and  
25 the time of a subsequent judicial determination that the secured party did not  
26 comply with Part 6. During the interim, the secured party, believing that the  
27 secured debt is larger than it ultimately is determined to be, may continue to make  
28 collections on and dispositions of collateral. If the secured indebtedness is  
29 discharged thereafter by the operation of the rebuttable presumption rule, a  
30 reasonable application of this section would impose liability on the secured party  
31 for the amount of the excess, unwarranted recoveries.

## 32 **SECTION 9-626. DETERMINATION OF WHETHER CONDUCT WAS** 33 **COMMERCIALLY REASONABLE.**

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



1 (b) A disposition of collateral is made in a commercially reasonable manner  
2 if the disposition is made:

- 3 (1) in the usual manner on any recognized market therefor;  
4 (2) at the price current in any recognized market at the time of the  
5 disposition; or  
6 (3) otherwise in conformity with reasonable commercial practices  
7 among dealers in the type of property that was the subject of the disposition.

8 (c) A collection, enforcement, disposition, or acceptance that has been  
9 approved in any judicial proceeding or by any [court appointed] bona fide creditors'  
10 committee[,] [or] [court appointed] representative of creditors[, or assignee for the  
11 benefit of creditors] is commercially reasonable. However, approval need not be  
12 obtained, and lack of approval does not mean that the collection, enforcement,  
13 disposition, or acceptance is not commercially reasonable.

14 Reporters' Comments

15 1. **Source.** Former Section 9-507(2).

16 2. **Relationship of Price to Commercial Reasonableness.** Some  
17 observers have found the notion contained in subsection (a) (former Section  
18 9-507(2)) (the fact that a better price could have been obtained does not establish  
19 lack of commercial reasonableness) to be inconsistent with that found in Section  
20 9-610(b) (former Section 9-504(3) (every aspect of the sale, including its terms,  
21 must be commercially reasonable). The Drafting Committee perceives no  
22 inconsistency, but it favors an explanation of the relationship between price and  
23 commercial reasonableness in the Official Comments. In most cases there is a  
24 range of commercially reasonable prices that collateral will fetch. Disposing of  
25 collateral for a price within that range may be commercially reasonable even though  
26 the particular price is not the best price.

27 The law long has grappled with the problem of dispositions of personal and  
28 real property that comply with applicable procedural requirements (e.g., advertising,  
29 notice to interested persons, etc.) but which yield an extremely low price. This  
30 Article addresses that issue in Section 9-614. That section contains a special rule  
31 for determining deficiencies in complying dispositions that yield an unreasonably  
32 low price. The section applies only when the transferee is the secured party, its  
33 affiliate, or a secondary obligor.

34 This Article thus rejects the view that the price is one of the "terms that,  
35 under Section 9-610(b), must be commercially reasonable. Rather, except as

1 otherwise provided in Section 9-614(b), a low price is relevant to whether a  
2 disposition has been commercially reasonable only to the extent that a low price  
3 suggests the need for careful judicial scrutiny of other aspects of the disposition. In  
4 fact, where the price is extremely low, other aspects of the disposition (e.g., the  
5 time and manner) might well have been commercially unreasonable. But if they  
6 were not, then the disposition complies with the requirements of this Article.

7 ~~A secured party may credit the obligor with an amount that is greater than~~  
8 ~~the actual net proceeds that otherwise would be used to calculate a deficiency. A~~  
9 ~~secured party might wish to do so, for example, if a procedurally commercially~~  
10 ~~reasonable disposition yields a nominal price.~~

11 3. **“Recognized Market.”** The concept of a “recognized market” in  
12 subsections (b)(1) and (2) is quite limited; it applies only to markets where there are  
13 standardized price quotations for property that is essentially fungible, such as stock  
14 exchanges.

1           **SECTION 9-627. NONLIABILITY AND LIMITATION ON LIABILITY**  
2           **OF SECURED PARTY; LIABILITY OF SECONDARY OBLIGOR.**

3           (a) Unless a secured party knows that a person is a debtor or a secondary  
4           obligor, knows the identity of the person, and knows how to communicate with the  
5           person:

6                   (1) the secured party is not liable to the person or to a secured party or  
7           lienholder that has filed a financing statement against the person for failure to  
8           comply with this article; and

9                   (2) the secured party's failure to comply with this article does not affect  
10          the liability of the person for a deficiency.

11          (b) A secured party is not liable to any person and a person's liability for a  
12          deficiency is not affected because of any act or omission, other than the failure to  
13          send a notification required by Section 9-611(b)(2), that occurs before the secured  
14          party knows that the person is a debtor or a secondary obligor or knows that the  
15          person has a security interest or other lien in the collateral.

16          (c) A secured party is not liable to any person and a person's liability for a  
17          deficiency is not affected because of any act or omission arising out of the secured  
18          party's reasonable belief that a transaction is not a consumer goods secured  
19          transaction or a consumer secured transaction or that goods are not consumer  
20          goods, if the secured party's belief is based on its reasonable reliance on a debtor's  
21          representation concerning the purpose for which collateral was to be used, acquired,  
22          or held, or an obligor's representation concerning the purpose for which a secured  
23          obligation was incurred.

24          (d) A secured party is not liable to any person under Section 9-624(c) if the  
25          secured party ~~[establishes] [meets the burden of establishing]~~ proves that its failure  
26          to comply with this part was not intentional and resulted from a good-faith error

1 notwithstanding the secured party's maintenance of procedures reasonably adapted  
2 to avoid the failure. Examples of a good-faith error include clerical, calculation,  
3 computer malfunction, programing, and printing errors. An error of legal judgment  
4 concerning the secured party's rights and duties under this part is not a good-faith  
5 error.

6 (e) The total recovery under Section 9-624(c) in a class action or a series of  
7 class actions arising out of the same noncompliance by the same secured party shall  
8 not be more than the lesser of \$500,000 or one percent of the net worth of the  
9 secured party.

10 Reporters' Comments

11 1. **Source.** New.

12 2. **Exculpatory Provisions.** Subsections (a), (b), and through (c) contain  
13 exculpatory provisions that should be read in conjunction with Section 9-605.  
14 Without this group of provisions, a secured party could incur liability to unknown  
15 persons and under circumstances that would not allow the secured party to protect  
16 itself. The broadened definition of the term "debtor" underscores the need for these  
17 provisions.

18 3. **Bona Fide Error.** Subsection (d) immunizes a noncomplying secured  
19 party from liability only for the minimum damages imposed under Section  
20 9-624(c). The standard for "intentional" under this subsection is whether the  
21 secured party actually intended to fail to comply with the Article, as is the case  
22 under § 130(c) of the Truth in Lending Act, 15 U.S.C. § 1640(c).

23 **SECTION 9-628. ATTORNEY'S FEES IN CONSUMER GOODS**

24 **SECURED TRANSACTIONS.** If the secured party's compliance with this article  
25 is placed in issue in an action with respect to a consumer goods secured transaction,  
26 the following rules apply:

27 (1) If the secured party would have been entitled to attorney's fees as the  
28 prevailing party, the court shall award to a consumer debtor or consumer obligor  
29 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.

## Reporters' Comments

1. **Source.** New.

**2. Attorney's Fees.** In an action involving a secured party's compliance with Article 9, this section requires a court to award attorney's fees to a prevailing consumer debtor or consumer obligor if the secured party would have been entitled to attorney's fees had it prevailed. For purposes of awarding attorney's fees, a consumer debtor or consumer obligor is a prevailing party if it is determined that the secured party failed to comply with Article 9, even though Section 9-627(d) excuses the secured party from liability under Section 9-624(c).

1  
2

**PART 7**  
**TRANSITION**

3       **SECTION 9-701. EFFECTIVE DATE.** This [Act] takes effect .....

4       **SECTION 9-702. SAVINGS CLAUSE.**

5               [To be added]

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(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.

\* \* \*

## Reporters' Comments

1. **“Buyer in Ordinary Course of Business.”** Many of the revisions to the definition of “buyer in ordinary course of business” in subsection (9) are for clarification and style. The second sentence of the subsection is new. It provides that the “ordinary course” requirement is met only if the sale is in the ordinary course of the seller’s business. The third sentence, which tracks Section 6-102(1)(m), explains when a sale is in the ordinary course of the seller’s business.

The penultimate sentence of subsection (9) also is new. It prevents a buyer that does not have the right to possession against the seller from taking free of the rights of third parties. The Article 2 sections referred to would be Sections 2-807 (specific performance) and 2-824 (prepaying buyer) of the May 16, 1997, Article 2 draft.

2. **“Security Interest.”** The definition of “security interest” in subsection (37) has been revised to turn the interests of all “consignors (as defined in ~~draft~~ Section ~~[2-102]~~ 9-102) into “security interests. See generally the Comments to Section 9-112.

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**SECTION 5-118. SECURITY INTEREST OF ISSUER OR**  
**NOMINATED PERSON IN DOCUMENTS, INSTRUMENTS, AND**  
**CERTIFICATED SECURITIES ACCOMPANYING PRESENTATION AND**  
**PROCEEDS.**

(a) An issuer or a nominated person has a security interest in a certificated security, chattel paper, a negotiable document, instrument, or negotiable document presented under a letter of credit and its any identifiable proceeds of the collateral:

~~\_\_\_\_\_ (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 or nominated person honors or gives has given value by honoring a for the presentation or nominated person has given value in connection with the letter of credit.~~

(b) As 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)]; and

(2) if the security interest is perfected [by possession under Section 9-311] it has priority over conflicting perfected security interests in the collateral or its proceeds].

## Reporters' Comments

1. **Source.** New.

2. **Article 5 Security Interest.** This section gives the issuer of a letter of credit or a nominated person thereunder a security interest in a negotiable document, instrument, or certificated security, if the issuer or nominated person takes delivery of the document, instrument, or security certificate, to the extent of

1 the value that is given. This security interest is analogous to that awarded to a  
2 collecting bank under Section 4-210. Under subsection (b)(2), which appears in  
3 square brackets, the The security interest would have first priority if it is perfected.  
4 Alternative bracketed language would limit the special priority to cases of  
5 perfection The section contemplates that The secured party normally would perfect  
6 The security interest by possession under Section ~~9-305~~ 9-311. Unlike Section  
7 4-210, this section does not affirmatively absolve the secured party from filing.  
8 The draft remains necessarily is a very preliminary effort; persons interested in  
9 letter of credit law continue to review ~~have not yet reviewed~~ this provision.

10 It is arguable that this section is not necessary because ~~that~~ the same results  
11 would be reached under a proper interpretation of Sections 2-506 and 4-210 and the  
12 good-faith-purchaser rules of Articles 3, 7, and 8. See Section 9-328.. We have  
13 solicited further input on this point from specialists in the transactions that this  
14 section addresses.

## 15 SECTION 8-106. CONTROL.

16 \* \* \*

### 17 [Revised] Official Comment 18 [marked to show changes from Official Comment]

19 1. The concept of "control" plays a key role in various provisions dealing  
20 with the rights of purchasers, including secured parties. See Sections 8-303  
21 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510  
22 (purchasers of security entitlements from entitlement holders); ~~9-115(4)~~ 9-312  
23 (perfection of security interests); ~~9-115(5)~~ 9-324 (priorities among conflicting  
24 security interests).

25 Obtaining "control" means that the purchaser has taken whatever steps are  
26 necessary, given the manner in which the securities are held, to place itself in a  
27 position where it can have the securities sold, without further action by the owner.

28 \* \* \*

29 Example 8. Able & Co. a securities dealer, holds a wide range of securities  
30 through its account at Clearing Corporation. Able enters into an arrangement  
31 with Alpha Bank pursuant to which Alpha provides financing to Able secured  
32 by securities identified as the collateral on lists provided by Able to Alpha on a  
33 daily or other periodic basis. Able, Alpha, and Clearing Corporation enter into  
34 an agreement under which Clearing Corporation agrees that if at any time Alpha  
35 directs Clearing Corporation to do so, Clearing Corporation will transfer any  
36 securities from Able's account at Alpha's instructions. Because Clearing  
37 Corporation has agreed to act on Alpha's instructions with respect to any  
38 securities carried in Able's account, at the moment that Alpha's security interest  
39 attaches to securities listed by Able, Alpha obtains control of those securities  
40 under subsection (d)(2). There is no requirement that Clearing Corporation be  
41 informed of which securities Able has pledged to Alpha.

42 \* \* \*

1           7. The term "control" is used in a particular defined sense. The  
2 requirements for obtaining control are set out in this section. The concept is not to  
3 be interpreted by reference to similar concepts in other bodies of law. In particular,  
4 the requirements for "possession" derived from the common law of pledge are not  
5 to be used as a basis for interpreting subsection (c)(2) or (d)(2). Those provisions  
6 are designed to supplant the concepts of "constructive possession" and the like. A  
7 principal purpose of the "control" concept is to eliminate the uncertainty and  
8 confusion that results from attempting to apply common law possession concepts to  
9 modern securities holding practices.

10           The key to the control concept is that the purchaser has the ~~present~~ ability to  
11 have the securities sold or transferred without further action by the transferor.  
12 There is no requirement that the powers held by the purchaser be exclusive. For  
13 example, in a secured lending arrangement, if the secured party wishes, it can allow  
14 the debtor to retain the right to make substitutions, or to direct the disposition of the  
15 uncertificated security or security entitlement. Subsection (f) is included to make  
16 clear the general point stated in subsection (c) that the test of control is whether the  
17 purchaser has obtained the requisite power, not whether the debtor has retained  
18 other powers. There is no implication that retention by the debtor of powers other  
19 than those mentioned in subsection (f) is inconsistent with the purchaser having  
20 control. Moreover, the purchaser's right to direct the intermediary may be subject  
21 to conditions. For example, a purchaser may have present control of a security  
22 entitlement even though the purchaser's right to give entitlement orders to the  
23 securities intermediary is conditioned on the entitlement holder's default or the  
24 purchaser's informing the securities intermediary that the entitlement holder is in  
25 default. Better practice for both the intermediary and the purchaser would be to  
26 insist that any conditions be effective only as between the purchaser and the  
27 entitlement holder. That would avoid the risk that the intermediary could be caught  
28 between conflicting assertions of the entitlement holder and the purchaser as to  
29 whether the conditions in fact have been met. Nonetheless, the existence of  
30 unfulfilled conditions effective against the intermediary would not preclude the  
31 purchaser from having control.

## 32           **SECTION 8-110. APPLICABILITY; CHOICE OF LAW.**

33           \* \* \*

34           (e) The following rules determine a "securities intermediary's jurisdiction"  
35 for purposes of this section:

36           (1) If an agreement between the securities intermediary and its  
37 entitlement holder expressly specifies ~~that it is governed by the law of a particular~~  
38 ~~jurisdiction~~, the securities intermediary's jurisdiction for purposes of this part, this  
39 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.

## Reporters' Comments

This section has been revised to provide more flexibility for the parties to select the security intermediary's jurisdiction. See also Sections 9-304(1) (depository institution's jurisdiction); 9-305(a)(4)(A) (commodity intermediary's jurisdiction).