

D R A F T

FOR DISCUSSION ONLY

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

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MARCH, 1998

WITH PREFATORY NOTE AND SELECTED COMMENTS

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ON UNIFORM STATE LAWS

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* The Drafting Committee has proposed to the Executive Committee that the bracketed portion of the title be omitted.

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

TABLE OF CONTENTS

| | |
|--|----|
| REPORTERS' PREFATORY NOTE | 1 |
| PART 1. GENERAL PROVISIONS | |
| SUBPART 1. SHORT TITLE, DEFINITIONS, AND GENERAL CONCEPTS | |
| SECTION 9-101. SHORT TITLE | 4 |
| SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS | 4 |
| SECTION 9-103. DEFINITIONS: "ACCOUNT ; "GENERAL INTANGIBLES ; " <u>HEALTHCARE INSURANCE RECEIVABLE</u> ; "PAYMENT INTANGIBLE. | 21 |
| SECTION 9-104. DEFINITIONS: "PURCHASE-MONEY SECURITY INTEREST-; "PURCHASE-MONEY COLLATERAL-; PURCHASE-MONEY OBLIGATION-; APPLICATION OF PAYMENTS; BURDEN OF ESTABLISHING PURCHASE-MONEY SECURITY INTEREST | 23 |
| [MODEL SECTION 9-104A. DEFINITIONS: "PRODUCTION-MONEY SECURITY INTEREST-; "PRODUCTION-MONEY CROPS-; "PRODUCTION-MONEY OBLIGATION-; -PRODUCTION OF CROPS-; BURDEN OF ESTABLISHING PRODUCTION-MONEY SECURITY INTEREST | 28 |
| SECTION 9-105. | 30 |
| SECTION 9-106. CLASSIFICATION OF GOODS: "CONSUMER GOODS ; "EQUIPMENT ; "FARM PRODUCTS ; "INVENTORY. | 30 |
| SECTION 9-107. DEFINITIONS: "COMMODITY ACCOUNT ; "COMMODITY CONTRACT ; "COMMODITY CUSTOMER ; "COMMODITY INTERMEDIARY ; "INVESTMENT PROPERTY. ... | 32 |
| SECTION 9-108. CONTROL OVER INVESTMENT PROPERTY | 33 |
| SECTION 9-109. CONTROL OVER DEPOSIT ACCOUNT | 34 |
| SECTION 9-110. CONTROL OVER LETTER-OF-CREDIT RIGHT | 35 |
| SECTION 9-110A. CONTROL OVER INTANGIBLE CHATTEL PAPER | 35 |
| SECTION 9-111. SUFFICIENCY OF DESCRIPTION | 36 |
| SUBPART 2. APPLICABILITY OF ARTICLE | |
| SECTION 9-112. SCOPE | 38 |
| SECTION 9-113. [deleted] | 42 |
| SECTION 9-114. [deleted] | 42 |
| SECTION 9-115. APPLICABILITY OF OTHER STATUTES | 42 |

SECTION 9-116. SECURITY INTERESTS ARISING SOLELY UNDER ~~ARTICLES~~ ARTICLE 2 OR 2A. . . . 43

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 EFFECTIVENESS OF SECURITY AGREEMENT. 45

SECTION 9-202. TITLE TO COLLATERAL IMMATERIAL 46

SECTION 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS;
SUPPORT OBLIGATIONS; FORMAL REQUISITES 46

SECTION 9-204. AFTER-ACQUIRED PROPERTY; FUTURE ADVANCES 49

SECTION 9-205. USE OR DISPOSITION OF COLLATERAL WITHOUT ACCOUNTING PERMISSIBLE . 50

SECTION 9-206. SECURITY INTEREST ARISING IN PURCHASE OR DELIVERY OF FINANCIAL ASSETS 50

SUBPART 2. RIGHTS AND DUTIES

SECTION 9-207. RIGHTS AND DUTIES OF SECURED PARTY HAVING POSSESSION OF OR CONTROL
OVER COLLATERAL 52

SECTION 9-208. ADDITIONAL DUTIES OF SECURED PARTY HAVING CONTROL OVER COLLATERAL 56

SECTION 9-208A. DUTIES OF SECURED PARTY IF ACCOUNT DEBTOR HAS BEEN NOTIFIED OF
ASSIGNMENT 58

SECTION 9-209. REQUEST FOR ACCOUNTING; REQUEST REGARDING LIST OF COLLATERAL OR
STATEMENT OF ACCOUNT 58

PART 3. PERFECTION AND PRIORITY OF SECURITY INTERESTS

SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY

SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS 62

SECTION 9-302. LAW GOVERNING FILING, PERFECTION, AND PRIORITY OF AGRICULTURAL LIENS 68

SECTION 9-303. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN
GOODS COVERED BY A CERTIFICATE OF TITLE 63

SECTION 9-304. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN
DEPOSIT ACCOUNTS 64

SECTION 9-304A. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN
LETTER-OF-CREDIT RIGHTS 66

SECTION 9-305. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS IN
INVESTMENT PROPERTY 66

SECTION 9-306. [deleted] 68

SECTION 9-307. LOCATION OF DEBTOR 68

SUBPART 2. PERFECTION

| | |
|--|-----|
| SECTION 9-308. WHEN SECURITY INTEREST OR AGRICULTURAL LIEN IS PERFECTED; CONTINUITY OF PERFECTION | 71 |
| SECTION 9-308A. SECURITY INTEREST PERFECTED UPON ATTACHMENT | 72 |
| SECTION 9-309. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST OR AGRICULTURAL LIEN; SECURITY INTERESTS AND AGRICULTURAL LIENS TO WHICH FILING PROVISIONS DO NOT APPLY | 74 |
| SECTION 9-309A. PERFECTION OF SECURITY INTERESTS IN PROPERTY SUBJECT TO CERTAIN STATUTES, REGULATIONS, AND TREATIES | 75 |
| SECTION 9-310. PERFECTION OF SECURITY INTERESTS IN INSTRUMENTS, CHATTEL PAPER, INVESTMENT PROPERTY, DOCUMENTS, MONEY, DEPOSIT ACCOUNTS, LETTER-OF-CREDIT RIGHTS, AND GOODS COVERED BY DOCUMENTS; PERFECTION BY PERMISSIVE FILING; TEMPORARY PERFECTION WITHOUT FILING OR TRANSFER OF POSSESSION | 77 |
| SECTION 9-311. WHEN POSSESSION BY SECURED PARTY PERFECTS SECURITY INTEREST WITHOUT FILING | 79 |
| SECTION 9-312. PERFECTION BY CONTROL | 82 |
| SECTION 9-313. "PROCEEDS ; SECURED PARTY'S RIGHTS ON DISPOSITION OF COLLATERAL AND IN PROCEEDS | 84 |
| SECTION 9-314. [CONTINUED] PERFECTION OF SECURITY INTEREST OR AGRICULTURAL LIEN FOLLOWING CHANGE IN APPLICABLE LAW | 88 |
| SUBPART 3. PRIORITY | |
| SECTION 9-315. INTERESTS THAT TAKE PRIORITY OVER AND TAKE FREE OF UNPERFECTED SECURITY INTEREST OR AGRICULTURAL LIEN | 93 |
| SECTION 9-315A. RIGHTS AND TITLE OF CONSIGNEE AND SELLER OF ACCOUNT OR CHATTEL PAPER WITH RESPECT TO CREDITORS AND PURCHASERS | 94 |
| SECTION 9-316. BUYER OF GOODS | 95 |
| SECTION 9-317. LESSEE OF GOODS IN ORDINARY COURSE OF BUSINESS | 96 |
| SECTION 9-318. LICENSEE IN ORDINARY COURSE OF BUSINESS | 96 |
| SECTION 9-319. PRIORITIES AMONG CONFLICTING SECURITY INTERESTS AND AGRICULTURAL LIENS IN SAME COLLATERAL | 96 |
| SECTION 9-319A. [deleted]..... | 98 |
| SECTION 9-320. FUTURE ADVANCES | 98 |
| <i>[MODEL SECTION 9-320A. PRIORITY OF PRODUCTION-MONEY SECURITY INTERESTS AND AGRICULTURAL LIENS</i> | 100 |
| SECTION 9-321 [deleted]. | 103 |
| SECTION 9-322. PRIORITY OF PURCHASE-MONEY SECURITY INTERESTS | 103 |

| | |
|--|-----|
| SECTION 9-323. PRIORITY OF SECURITY INTERESTS IN TRANSFERRED COLLATERAL | 108 |
| SECTION 9-323A. PRIORITY OF SECURITY INTERESTS CREATED BY NEW DEBTOR | 108 |
| SECTION 9-324. PRIORITY OF SECURITY INTERESTS IN INVESTMENT PROPERTY | 109 |
| SECTION 9-325. PRIORITY OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS | 110 |
| SECTION 9-326. PRIORITY OF SECURITY INTERESTS IN LETTER-OF-CREDIT RIGHTS | 111 |
| SECTION 9-327. PURCHASE OF CHATTEL PAPER AND INSTRUMENTS | 112 |
| SECTION 9-328. PRIORITY OF RIGHTS OF PURCHASERS OF INSTRUMENTS, DOCUMENTS, AND SECURITIES UNDER OTHER ARTICLES | 114 |
| SECTION 9-329. TRANSFER OF MONEY; TRANSFER OF FUNDS FROM DEPOSIT ACCOUNT | 116 |
| SECTION 9-330. PRIORITY OF CERTAIN LIENS ARISING BY OPERATION OF LAW | 116 |
| SECTION 9-331. PRIORITY OF SECURITY INTERESTS IN FIXTURES | 117 |
| SECTION 9-332. ACCESSIONS | 121 |
| SECTION 9-333. COMMINGLED GOODS | 122 |
| SECTION 9-334. PRIORITY OF SECURITY INTERESTS IN GOODS COVERED BY CERTIFICATE OF TITLE | 123 |
| SECTION 9-335. PRIORITY OF SECURITY INTEREST OR AGRICULTURAL LIEN PERFECTED BY EFFECTIVE FINANCING STATEMENT CONTAINING INCORRECT INFORMATION | 124 |
| SECTION 9-336. PRIORITY SUBJECT TO SUBORDINATION. | 125 |
| SUBPART 4. RIGHTS OF BANK | |
| SECTION 9-337. EFFECTIVENESS OF RIGHT OF RECOUPMENT OR SET-OFF AGAINST DEPOSIT ACCOUNT | 125 |
| SECTION 9-338. BANK'S RIGHT TO DISPOSE OF FUNDS IN DEPOSIT ACCOUNT | 126 |
| SECTION 9-339. BANK'S RIGHT TO REFUSE TO ENTER INTO OR DISCLOSE EXISTENCE OF CONTROL AGREEMENT | 126 |
| PART 4. RIGHTS OF THIRD PARTIES | |
| SECTION 9-401. ALIENABILITY OF DEBTOR'S RIGHTS | 127 |
| SECTION 9-402. SECURED PARTY NOT OBLIGATED ON CONTRACT OF DEBTOR | 127 |
| SECTION 9-403. AGREEMENT NOT TO ASSERT DEFENSES AGAINST ASSIGNEE | 128 |
| SECTION 9-404. RIGHTS ACQUIRED BY ASSIGNEE; DEFENSES AGAINST ASSIGNEE; MODIFICATION OF CONTRACT; DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; TERM PROHIBITING ASSIGNMENT INEFFECTIVE | 130 |

| | |
|--|-----|
| SECTION 9-405. RESTRICTIONS ON CREATION OR ENFORCEMENT OF SECURITY INTEREST IN LEASEHOLD INTEREST OR IN LESSOR'S RESIDUAL INTEREST | 135 |
| SECTION 9-406. RESTRICTIONS ON ASSIGNMENT OF CERTAIN GENERAL INTANGIBLES INEFFECTIVE | 136 |
| SECTION 9-406A. RESTRICTIONS ON ASSIGNMENT OF LETTERS <u>LETTER-OF-CREDIT RIGHTS</u> INEFFECTIVE | 138 |

PART 5. FILING
SUBPART 1. FILING OFFICE; CONTENTS AND
EFFECTIVENESS OF FINANCING STATEMENT

| | |
|---|-----|
| SECTION 9-501. FILING OFFICE | 140 |
| SECTION 9-502. CONTENTS OF FINANCING STATEMENT; MORTGAGE AS FINANCING STATEMENT; TIME OF FILING FINANCING STATEMENT | 141 |
| SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY | 144 |
| SECTION 9-504. INDICATION OF COLLATERAL | 145 |
| SECTION 9-505. FILING AND COMPLIANCE WITH OTHER STATUTES AND TREATIES FOR CONSIGNMENTS, LEASES, BAILMENTS, AND OTHER TRANSACTIONS | 146 |
| SECTION 9-506. EFFECT OF INSUFFICIENCY <u>MINOR ERRORS OR OMISSIONS</u> | 146 |
| SECTION 9-507. EFFECT OF CERTAIN CHANGES ON EFFECTIVENESS OF FINANCING STATEMENT | 147 |
| SECTION 9-508. WHEN RECORD MAY BE FILED | 148 |
| SECTION 9-508A. EFFECTIVENESS OF FILED RECORD | 149 |
| SECTION 9-509. AMENDMENT OF FINANCING STATEMENT | 150 |
| SECTION 9-510. EFFECTIVENESS OF FINANCING STATEMENT IF NEW DEBTOR BECOMES BOUND BY SECURITY AGREEMENT | 151 |
| SECTION 9-511. TERMINATION STATEMENT | 152 |
| SECTION 9-512. ASSIGNMENT OF POWERS OF SECURED PARTY OF RECORD | 154 |
| SECTION 9-513. [deleted] | 156 |
| SECTION 9-514. [deleted] | 156 |
| SECTION 9-515. WHAT CONSTITUTES FILING; EFFECTIVENESS OF FILING | 156 |
| SECTION 9-516. DURATION AND EFFECTIVENESS OF FINANCING STATEMENT; EFFECT OF LAPSED FINANCING STATEMENT | 159 |
| SECTION 9-517. <u>[Deleted]</u> CONTENTS OF CONTINUATION STATEMENT | 162 |
| SECTION 9-518. EFFECT OF INDEXING ERRORS | 162 |

| | |
|---|-----|
| SECTION 9-519. CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD | 162 |
|---|-----|

SUBPART 2. DUTIES AND OPERATION OF FILING OFFICE

| | |
|--|-----|
| SECTION 9-520. NUMBERING, MAINTAINING, AND INDEXING RECORDS; COMMUNICATING INFORMATION CONTAINED IN RECORDS | 163 |
| SECTION 9-520A. FILE NUMBER | 166 |
| SECTION 9-521. ACCEPTANCE AND REFUSAL TO ACCEPT RECORD | 167 |
| SECTION 9-522. LAPSED FINANCING STATEMENTS | 173 |
| SECTION 9-523. INFORMATION FROM FILING OFFICE; SALE OR LICENSE OF RECORDS | 173 |
| SECTION 9-524. DELAY BY FILING OFFICE | 177 |
| SECTION 9-525. [deleted] | 177 |
| SECTION 9-526. [deleted] | 177 |
| [SECTION 9-527. FEES] | 177 |
| SECTION 9-528. ADMINISTRATIVE RULES | 179 |
| SECTION 9-529. DUTY TO REPORT | 180 |

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 | 182 |
| SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND DUTIES | 184 |
| SECTION 9-603. AGREEMENT ON STANDARDS CONCERNING RIGHTS AND DUTIES | 185 |
| SECTION 9-604. PROCEDURE IF SECURITY AGREEMENT COVERS REAL PROPERTY OR FIXTURES | 86 |
| SECTION 9-605. UNKNOWN DEBTOR OR SECONDARY OBLIGOR | 187 |
| SECTION 9-606. TIME OF DEFAULT FOR AGRICULTURAL LIEN | 187 |
| SECTION 9-607. COLLECTION AND ENFORCEMENT BY SECURED PARTY | 188 |
| SECTION 9-608. APPLICATION OF PROCEEDS OF COLLECTION OR ENFORCEMENT; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS | 190 |
| SECTION 9-609. SECURED PARTY'S RIGHT TO TAKE POSSESSION AFTER DEFAULT. | 192 |
| SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT | 192 |
| SECTION 9-611. PERSONS ENTITLED TO NOTIFICATION BEFORE DISPOSITION OF COLLATERAL | 194 |
| SECTION 9-612. TIMELINESS OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL | 196 |

| | |
|--|----------------|
| SECTION 9-613. CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL; <u>GENERAL</u> | 197 |
| <u>SECTION 9-613A. CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL: CONSUMER-GOODS TRANSACTION.</u> | 199 |
| SECTION 9-614. APPLICATION OF PROCEEDS OF DISPOSITION; LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS | 203 |
| SECTION 9-614A. EXPLANATION OF <u>CALCULATION OF</u> SURPLUS OR DEFICIENCY | 208 |
| SECTION 9-615. RIGHTS OF TRANSFEREE OF COLLATERAL | 211 |
| SECTION 9-616. RIGHTS AND DUTIES OF CERTAIN [SECONDARY OBLIGORS] [PERSONS LIABLE TO SECURED PARTY] | 212 |
| SECTION 9-617. TRANSFER OF RECORD OR LEGAL <u>TITLE</u> THE | 213 |
| SECTION 9-618. ACCEPTANCE OF COLLATERAL IN FULL OR PARTIAL SATISFACTION OF OBLIGATION; COMPULSORY DISPOSITION OF COLLATERAL | 214 |
| SECTION 9-619. NOTIFICATION OF PROPOSAL TO ACCEPT COLLATERAL | 217 |
| SECTION 9-620. EFFECT OF ACCEPTANCE OF COLLATERAL | 218 |
| SECTION 9-621. RIGHT TO REDEEM COLLATERAL | 219 |
| SECTION 9-622. [Deleted.] REINSTATEMENT OF OBLIGATION SECURED WITHOUT ACCELERATION | 220 |
| SECTION 9-623. WAIVER | 221 |
| SUBPART 2. NONCOMPLIANCE WITH ARTICLE | |
| SECTION 9-624. REMEDIES FOR SECURED PARTY'S FAILURE TO COMPLY WITH THIS ARTICLE .. | 223 |
| SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS IN ISSUE | 226 |
| SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS IN ISSUE | 228 |
| SECTION 9-626. DETERMINATION OF WHETHER CONDUCT WAS COMMERCIALY REASONABLE | 232 |
| SECTION 9-627. NONLIABILITY AND LIMITATION ON LIABILITY OF SECURED PARTY; LIABILITY OF SECONDARY OBLIGOR | 234 |
| SECTION 9-628. [Deleted.] ATTORNEY'S FEES IN CONSUMER GOODS SECURED TRANSACTIONS .. | 236 |
| PART 7. TRANSITION | |
| SECTION 9-701. EFFECTIVE DATE | 238 |
| SECTION 9-702. SAVINGS CLAUSE | 238 |

| | |
|---|-----|
| SECTION 1-201. GENERAL DEFINITIONS | 239 |
| SECTION 2-210. DELEGATION OF PERFORMANCE; ASSIGNMENT OF RIGHTS. | 241 |
| SECTION 2-326. SALE ON APPROVAL AND SALE OR RETURN; CONSIGNMENT SALES AND RIGHTS OF CREDITORS. | 242 |
| SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S <u>REPUDIATION, FAILURE TO DELIVER OR</u> INSOLVENCY. | 244 |
| SECTION 2-716. BUYER'S RIGHT TO SPECIFIC PERFORMANCE OR REPLEVIN. | 246 |
| SECTION 5-118. SECURITY INTEREST OF ISSUER OR NOMINATED PERSON | 247 |
| SECTION 8-102. DEFINITIONS. | 248 |
| SECTION 8-106. CONTROL | 249 |
| SECTION 8-110. APPLICABILITY; CHOICE OF LAW | 256 |
| SECTION 8-302. RIGHTS OF PURCHASER | 258 |
| SECTION 8-502. ASSERTION OF ADVERSE CLAIM AGAINST ENTITLEMENT HOLDER | 259 |
| SECTION 8-510. RIGHTS OF PURCHASER OF SECURITY ENTITLEMENT FROM ENTITLEMENT HOLDER | 264 |

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

REPORTERS’ PREFATORY NOTE
MARCH, 1998, DRAFT

1. **General.** This draft is marked to reflect changes from the January, 1998, Draft. Additions are underlined and deletions appear in ~~strikeout~~. We have not marked some minor style changes, such as the change from “purchase money security interest” to “purchase-money security interest.” The terms “consumer secured transaction” and “consumer goods secured transaction” have been changed throughout the draft to “consumer transaction” and “consumer-goods transaction,” respectively. These changes have not been marked. Also, we have not marked the deletion of the phrase *[MINOR STYLE CHANGES ONLY]* from the few captions in which it remained.

2. **Consumer Transactions.** During the February, 1998, meeting of the Drafting Committee in Rosemont, Illinois, the Drafting Committee approved in principle, and asked the Reporters to incorporate in this draft, a list of proposed revisions relating to consumer transactions. Most of the proposals, but not all, relate to Part 6, Default. The chair of the Drafting Committee presented the proposals as a compromise, explaining that if the package of proposals were accepted by the Drafting Committee and its sponsors, representatives of consumer creditors involved in the process would actively support, and advocates of consumer interests involved in the process would not oppose, enactment of revised Article 9. The chair explained further that the alternative would be widespread opposition, with pitched battles in the various legislatures during the enactment process. This controversy could delay or inhibit enactment of the revisions. The compromise grew out of discussions among creditor and consumer representatives, a special consumer subcommittee organized by the NCCUSL leadership, and the chair of the Drafting Committee.

Under the proposal, several provisions of the prior draft would be deleted: Sections 9-104(d) and (e) (allocation of payments for determining purchase-money status in consumer transaction); 9-613(b)(3) (notice of disposition containing minor errors not seriously misleading is sufficient); 9-622 (reinstatement rights of consumer debtor or secondary obligor); 9-624(d) and (e) (reduction of secured party’s liability for statutory damages by amount of loss of deficiency or actual damages awarded to consumer); 9-625, Alternative A (absolute bar rule alternative for consumer transactions); 9-627(d) (bona-fide error defense to statutory damages); 9-627(e) (limitation on recoveries in class actions); 9-628 (reciprocal attorney’s fees in consumer transactions).

1 The proposal also calls for revision of several other provisions. Sections 9-
2 104(f) and (g) (approving “dual status” rule and setting burden of proof) would be
3 applicable only to non-consumer transactions, as would Section 9-625, Alternative
4 B (rebuttable presumption rule). Either the definition of “buyer in ordinary course
5 of business” would not be revised to provide that BIOCOP status depends on a
6 possessory right as against the seller, or the proposed provisions in revised Article 2
7 would accompany revised Article 9 to provide protection for a prepaying buyer.
8 (We have chosen the latter approach. See the Appendix.) The comment to Section
9 9-111 would contain no examples of sufficient collateral descriptions in consumer
10 transactions (e.g., the previous approval of “all jewelry” would be deleted).
11 Sections 9-403 and 9-404 would be expanded to make effective the FTC’s anti-
12 holder-in-due-course rule (when applicable) even in the absence of the required
13 legend. Section 9-614A (post-disposition notice) would be revised to provide for a
14 somewhat more general statement of how a deficiency or surplus was calculated.
15 The comments to Section 9-614 would be modified to delete any statement that
16 “price” is not a term of a disposition that is required to be commercially reasonable,
17 and an explanatory comment would be added to the effect that a low price mandates
18 enhanced judicial scrutiny of the terms of a disposition. Finally, Section 9-618
19 would be revised to prohibit partial strict foreclosure for consumer goods.

20 In implementing these changes, we generally have drawn the line between
21 “consumer-goods transactions” and other transactions. As defined, if the secured
22 obligation was incurred for personal, family, or household purposes and any of the
23 collateral is consumer goods, then the transaction is a “consumer-goods
24 transaction” even if other collateral is not consumer goods. Occasionally, as in
25 Section 9-624(c)(2), we have drawn the line between consumer-goods and other
26 types of collateral.

27 This draft, like most earlier drafts, includes explanations of changes from
28 the prior draft and Reporters’ Comments. Also as in the earlier drafts, we offer in
29 these Comments and explanations our analyses of the pros and cons of proposed
30 changes and the likely effects on litigation and transactions in practice. We assume
31 that this approach is especially important in connection with the compromise
32 proposals, inasmuch as most of the members of the Drafting Committee did not
33 participate in the discussions and, consequently, may be unaware of the various
34 considerations that were discussed.

35 We have done our best to implement the compromise. However, inasmuch
36 as we did not participate in the discussions that culminated in the list of terms from
37 which we worked, the draft and our Comments may not always capture the
38 intended compromise completely and accurately. Although we sought and obtained
39 guidance from the consumer subcommittee and selected officials of NCCUSL, time
40 did not suffice to enable us to incorporate comments from representatives of

1 consumer and creditor interests. We plan to solicit comments from the
2 representatives before the meeting and will present to the Drafting Committee any
3 suggested changes arising from those comments.

4 **3. Relationship to Articles 2 and 2A.** For the first time, this draft attempts
5 to clarify the relationship between Article 9 and security interests arising under
6 Article 2 or 2A. In revising Sections 9-116 and 1-201(37), we received helpful
7 suggestions from Richard Speidel and Linda Rusch, the Reporter and Associate
8 Reporter for the Drafting Committee to Revise Uniform Commercial Code Article
9 2. They generally are content with the draft and have circulated it to the Article 2
10 Drafting Committee. Professor Rusch plans to attend the Article 9 Drafting
11 Committee meeting and share her thoughts and those of the Article 2 Drafting
12 Committee.

13 In evaluating these changes, please take into account that they are designed
14 as a stop-gap measure, to coordinate revised Article 9 with current Article 2. When
15 Article 2 is revised, conforming amendments to Article 9 will be necessary.

16 **4. Relationship to Article 3.** At the February, 1998, meeting, the Drafting
17 Committee appointed a task force to consider various aspects of the relationship
18 between Article 3 and Article 9, including (i) the extent to which, if any, Article 9
19 should govern sales of instruments and (ii) the rules applicable to discharge of
20 mortgage notes that have been assigned. Because of time constraints, this draft
21 does not incorporate the task force's recommendations.

22 **5. Healthcare Insurance Receivables.** Following the directions of the
23 Drafting Committee, this draft addresses healthcare insurance receivables. The
24 definition of "account" in Section 9-103 has been revised to include a "healthcare
25 insurance receivable, which also is defined in that section. As with any other right
26 to payment that is an account, sales of healthcare insurance receivables are within
27 the scope of Article 9, and filing is the means of perfection. However, healthcare
28 insurance receivables are not subject to the usual account debtor rules under Section
29 9-404. Instead, Section 9-406 applies to healthcare insurance receivables.

- 1 (A) which secures payment or performance of an obligation for:
2 (i) goods or services furnished in connection with a debtor's
3 farming operation; or
4 (ii) rent on real property leased by a debtor in connection with its
5 farming operation;
- 6 (B) which is created by statute in favor of a person that:
7 (i) in the ordinary course of its business furnished goods or
8 services to a debtor in connection with a debtor's farming operation; or
9 (ii) leased real property to a debtor in connection with the
10 debtor's farming operation; and
- 11 (C) the effectiveness of which does not depend on the person's
12 possession of the personal property.

13 ~~(B) The term does not include a security interest.~~

14 (4) "As-extracted collateral" means:

15 (A) oil, gas, or other minerals that are subject to a security interest
16 that:

17 (i) ~~that~~ is created by a debtor having an interest in the minerals
18 before extraction; and

19 (ii) ~~that~~ attaches to the minerals as extracted; ~~and~~ or

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

22 (5) "Authenticate" means to:

1 (A) sign; or
2 (B) execute or adopt a symbol, or encrypt a record in whole or in
3 part, with present intent to:

4 (i) identify the authenticating party; and

5 (ii) either:

6 _____ (I) adopt or accept a record or term; or

7 (II) ~~(iii)~~ establish the authenticity of a record or term that
8 contains the authentication or to which a record containing the authentication refers.

9 (6) “Bank” means an organization that is engaged in the business of
10 banking. The term includes a savings bank, savings and loan association, credit
11 union, and trust company.

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

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

22 (9) “Collateral” means the property subject to a security interest or

1 agricultural lien. The term includes:

2 (A) proceeds to which a security interest attaches under Section
3 9-313;

4 (B) proceeds as to which
5 an agricultural lien becomes effective; and

6 (C) accounts, chattel paper, and payment intangibles that have been
7 sold.

8 (10) “Commercial tort claim means a claim arising in tort [which is
9 generally assignable under applicable law] if:

10 (A) the claimant is an organization; or

11 (B) the claimant is an individual and the claim:

12 (i) arose in the course of the claimant’s business or profession;
13 and

14 (ii) does not include damages arising out of personal injury to or
15 the death of an individual.

16 (11) “Communicate means to:

17 (A) send a written or other tangible record;

18 (B) transmit a record by any means agreed upon by the persons
19 sending and receiving the record; or

20 (C) in the case of transmission of a record to or by a filing office,
21 transmit a record by any means prescribed by the rules.

22 (12) “Consignee means a merchant to which goods are delivered in a

1 consignment.

2 (13) “Consignment means a transaction, regardless of its form, in
3 which a person delivers goods to a merchant for the purpose of sale and:

4 (A) the merchant:

5 (i) deals in goods of that kind under a name other than the name
6 of the person making delivery;

7 (ii) is not an auctioneer; and

8 (iii) is not generally known by its creditors to be substantially
9 engaged in selling the goods of others;

10 (B) the aggregate value of the goods is \$[1,000] or more at the time
11 of delivery;

12 (C) the goods are not consumer goods immediately before delivery;
13 and

14 (D) the transaction does not create a security interest that secures an
15 obligation.

16 (14) “Consignor means a person that delivers goods to a consignee in a
17 consignment.

18 (15) “Consumer debtor means a debtor in a consumer transaction.

19 (16) “Consumer-goods transaction means a transaction in which:

20 (A) an individual incurs an obligation primarily for personal, family,
21 or household purposes; and

22 (B) a security interest in consumer goods secures the obligation.

1 (17) “Consumer obligor” means an obligor who is an individual and
2 who incurred the obligation as part of a transaction entered into primarily for
3 personal, family, or household purposes.

4 (18) “Consumer transaction” means a transaction in which:

5 (A) an individual incurs an obligation primarily for personal, family,
6 or household purposes;

7 (B) a security interest secures the obligation; and

8 (C) the collateral is held or acquired primarily for personal, family,
9 or household purposes.

10 (19) “Debtor” means:

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

13 (B) a seller of accounts, chattel paper, or payment intangibles; ~~and~~
14 ~~for~~

15 (C) a consignee.

16 (20) “Deposit account” means a demand, time, savings, passbook, or
17 similar account maintained with a bank. The term does not include investment
18 property or an account evidenced by an instrument.

19 ~~(20) “Bank” means an organization that is engaged in the business of~~
20 ~~banking. The term includes a savings bank, savings and loan association, credit~~
21 ~~union, and trust company.~~

22 (21) “Document” means a document of title or a receipt of the type

1 described in Section 7-201(2).

2 (22) “Encumbrance means a right, other than an ownership interest, in
3 real property. The term includes a ~~real property mortgage ; and~~ other lien on real
4 property, ~~and any other right in real property other than an ownership interest.~~

5 (23) “Farming operation means raising, cultivating, propagating,
6 fattening, grazing, or any other farming, livestock, or aquacultural operation.

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

10 (25) “Financing statement means an initial financing statement and
11 any record on file relating to the initial financing statement.

12 (26) ~~(A)~~ “Fixture filing means the a filing of a financing statement: ~~(i)~~
13 covering goods that are or are to become fixtures ; and ~~(ii)~~ satisfying the
14 requirements of Section 9-502(a) and (b). ~~(B)~~ The term includes the filing of a
15 financing statement covering goods of a transmitting utility which are or are to
16 become fixtures.

17 (27) “Fixtures means goods that have become so related to particular
18 real property that an interest in them arises under real property law.

19 (28) “Good faith means honesty in fact and the observance of
20 reasonable commercial standards of fair dealing.

21 (29) ~~(A)~~ “Goods means all things that are movable when a security
22 interest attaches, ~~including: (i)~~ The term includes fixtures, ~~(ii)~~ standing timber

1 that is to be cut and removed under a conveyance or contract for sale, ~~;(iii)~~ the
2 unborn young of animals, and ~~(iv)~~ crops grown, growing, or to be grown, including
3 even if the crops are produced on trees, vines, and or bushes. ~~(B)~~ The term does not
4 include accounts, chattel paper, deposit accounts, documents, general intangibles,
5 instruments, investment property, ~~letters of credit,~~ letter-of-credit rights, money, or
6 oil, gas, or other minerals before extraction.

7 ~~(30) “Governmental entity means the United States, a State, a foreign~~
8 ~~country, or a governmental unit.~~

9 (30) “Governmental unit means a subdivision, agency, department,
10 county, parish, municipality, or other unit of the government of the United States, a
11 State, or a foreign country. The term includes ~~does not include~~ an ~~[governmental]~~
12 organization with a separate corporate existence only if the organization is eligible
13 to issue debt obligations on which interest is exempt from income taxation under
14 the laws of the United States ~~even if its name includes “authority, “board, or the~~
15 ~~like.~~

16 (31) ~~(A)~~ “Instrument :

17 ~~(A)~~ means:

18 (i) a negotiable instrument; or

19 (ii) any other writing that:

20 (I) evidences a right to the payment of money;

21 (II) is not itself a security agreement or lease; and

22 (III) is of a type that in ordinary course of business is

1 transferred by delivery with any necessary indorsement or assignment; and

2 (B) ~~The term~~ does not include:

3 (i) investment property; or

4 (ii) a writing that evidences a right to payment arising out of the
5 use of a credit or charge card or information contained on or for use with the card.

6 (32) “Intangible chattel paper means chattel paper evidenced by a
7 record or records consisting of information that is not inscribed on a tangible
8 medium that are not written.

9 (33) “Jurisdiction of organization, with respect to a registered
10 organization, means the jurisdiction under whose law the ~~entity~~ organization is
11 organized.

12 (34) “Letter-of-credit right means a right to payment and performance
13 under a letter of credit. The term does not include the right of a beneficiary to
14 demand payment or performance under a letter of credit.

15 (35) “Lien creditor means a creditor that has acquired a lien on the
16 property involved by attachment, levy, or the like. The term includes:

17 (A) an assignee for benefit of creditors from the time of assignment;

18 (B) a trustee in bankruptcy from the date of the filing of the petition;

19 and

20 (C) a receiver in equity from the time of appointment.

21 (36) “Manufactured home means a structure, transportable in one or
22 more sections, which in the traveling mode, is eight body feet or more in width or

1 forty body feet or more in length, or, when erected on site, is three hundred twenty
2 or more square ~~feet~~ feet, and which is built on a permanent chassis and designed to
3 be used as a dwelling with or without a permanent foundation when connected to
4 the required utilities, and includes the plumbing, heating, air-conditioning, and
5 electrical systems contained therein; except that such term shall include any
6 structure which meets all the requirements of this paragraph except the size
7 requirements and with respect to which the manufacturer voluntarily files a
8 certification required by the United States Secretary of Housing and Urban
9 Development and complies with the standards established under Title 42, United
10 States Code.

11 (37) “Manufactured-home transaction” means a secured transaction:

12 (A) that creates a purchase-money security interest in a
13 manufactured home; or

14 (B) in which a manufactured home is the primary collateral.

15 (38) “Mortgage” means a consensual interest in real property, including
16 fixtures, which is created by a real property mortgage, a trust deed on real property,
17 or ~~the like.~~ similar transaction.

18 (39) “New debtor” means a person that becomes bound as debtor under
19 Section 9-203(c) by a security agreement previously entered into by another person.

20 (40) ~~(A)~~ “New value” :

21 (A) means:

22 (i) money;

1 (ii) money's worth in property, services, or new credit; or

2 (iii) release by a transferee of an interest in property previously
3 transferred to the transferee; and

4 (B) ~~The term~~ does not include an obligation substituted for another
5 obligation.

6 (41) ~~(A)~~ "Obligor :

7 (A) means a person that, with respect to an obligation secured by a
8 security interest in or an agricultural lien on the collateral:

9 (i) owes payment or other performance of the obligation;

10 (ii) has provided property other than the collateral to secure
11 payment or other performance of the obligation; or

12 (iii) is otherwise accountable in whole or in part for payment or
13 other performance of the obligation; and

14 (B) ~~The term~~ does not include an issuer or a nominated person
15 under a letter of credit.

16 (42) "Original debtor" means a person that, as debtor, entered into a
17 security agreement to which a new debtor has become bound under Section
18 9-203(c).

19 (43) "Public-finance transaction" means a secured transaction in
20 connection with which:

21 (A) bonds, debentures, certificates of participation or similar debt
22 securities are issued;

1 (B) all or a portion of the securities issued have an initial stated
2 maturity of at least 20 years; and

3 (C) the debtor, the obligor, the secured party, the account debtor or
4 other person obligated on collateral, the assignor or assignee of a secured
5 obligation, or the assignor or assignee of a security interest is a State or a
6 governmental unit of a State [to come].

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

12 (45) “Record means information that is inscribed on a tangible
13 medium or that is stored in an electronic or other medium and is retrievable in
14 perceivable form.

15 (46) “Registered organization means an organization organized under
16 the law of a State or the United States and as to which the State or the United States
17 must maintain ~~maintains~~ a public record showing the organization to have been
18 organized.

19 (47) “Rule means a rule adopted pursuant to Section 9-528.

20 (48) “Secondary obligor means an obligor to the extent that a any
21 portion of the obligor’s ~~whose~~ obligation is secondary.

1 (49) “Secured party means:

2 (A) a person in whose favor a security interest is created or provided
3 for under a security agreement, whether or not any obligation to be secured is
4 outstanding;

5 (B) a person that holds an agricultural lien;

6 (C) a consignor;

7 (D) a person to which accounts, chattel paper, or payment
8 intangibles have been sold; ~~and~~ or

9 (E) if a security interest [or agricultural lien] is created or provided
10 for in favor of a trustee, indenture trustee, agent, collateral agent, or other
11 representative, ~~the~~ that representative.

12 (50) “Security agreement means an agreement that creates or provides
13 for a security interest.

14 (51) “State means a State of the United States, the District of
15 Columbia, Puerto Rico, the United States Virgin Islands, ~~and~~ or any territory or
16 insular possession subject to the jurisdiction of the United States.

17 (52) “Support obligation means a secondary obligation or letter-of-
18 credit right that supports the payment or performance of an account, chattel paper,
19 general intangible, document, [insurance policy,] instrument, or investment
20 property.

21 (53) “Tangible chattel paper means chattel paper evidenced by a

1 ~~written~~ record or records consisting of information that is inscribed on a tangible
2 medium.

3 (54) “Transmitting utility” means a person primarily engaged in the
4 business of:

5 (A) operating a railroad, subway, street railway, or trolley bus;

6 (B) transmitting electric or electronic communications;

7 (C) transmitting goods by pipeline or sewer; or

8 (D) transmitting or producing and transmitting electricity, steam,
9 gas, or water.

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

12 “Account” Section 9-103.

13 “Applicant” Section 5-102.

14 “Attach” Section 9-203.

15 “Becomes Bound” Section 9-203.

16 “Beneficiary” Section 5-102.

17 “Cash proceeds” Section 9-313.

18 “Commodity account” Section 9-107.

19 “Commodity contract” Section 9-107.

20 “Commodity customer” Section 9-107.

21 “Commodity intermediary” Section 9-107.

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|----|--|-------------------------|
| 1 | “Construction mortgage | Section 9-331. |
| 2 | “Consumer goods | Section 9-106. |
| 3 | “Control (deposit account) | Section 9-109. |
| 4 | “Control (investment property) | Section 9-108. |
| 5 | “Control (letter-of-credit right) | Section 9-110. |
| 6 | “Crops | Section 9-106. |
| 7 | “Equipment | Section 9-106. |
| 8 | “Farm products | Section 9-106. |
| 9 | “General intangibles | Section 9-103. |
| 10 | <u>“Healthcare insurance receivable</u> | <u>Section 9-103.</u> |
| 11 | “Inventory | Section 9-106. |
| 12 | “Investment property | Section 9-107. |
| 13 | “Issuer | Section 5-102. |
| 14 | “Livestock | Section 9-106. |
| 15 | “Nominated Person | Section 5-102. |
| 16 | “Noncash proceeds | Section 9-313. |
| 17 | “Payment intangible | Section 9-103. |
| 18 | “Proceeds | Section 9-313. |
| 19 | <i>[“Production-money crops”</i> | <i>Section 9-104A.]</i> |
| 20 | <i>[“Production-money obligation”</i> | <i>Section 9-104A.]</i> |
| 21 | <i>[“Production-money security interest”</i> | <i>Section 9-104A.]</i> |

| | | |
|----|--|-------------------------|
| 1 | <i>["Production of crops"</i> | <i>Section 9-104A.]</i> |
| 2 | "Purchase-money security interest | Section 9-104. |
| 3 | "Purchase-money collateral | Section 9-104. |
| 4 | "Purchase-money obligation | Section 9-104. |
| 5 | "Request for an accounting | Section 9-209. |
| 6 | "Request regarding a list of collateral | Section 9-209. |
| 7 | "Request regarding a statement of | |
| 8 | account | Section 9-209. |
| 9 | "Secured party of record | Section 9-509A. |
| 10 | "Transfer statement | Section 9-617. |
| 11 | (c) The following definitions in other articles apply to this article: | |
| 12 | "Applicant | Section 5-102. |
| 13 | "Beneficiary | Section 5-102. |
| 14 | "Broker | Section 8-102. |
| 15 | "Certificated security | Section 8-102. |
| 16 | "Check | Section 3-104. |
| 17 | "Clearing corporation | Section 8-102. |
| 18 | "Contract for sale | Section 2-106. |
| 19 | "Customer | Section 4-104. |
| 20 | "Delivery | Section 8-301. |
| 21 | "Entitlement holder | Section 8-102. |

| | | |
|----|--|-----------------|
| 1 | “Financial asset | Section 8-102. |
| 2 | “Holder in due course | Section 3-302. |
| 3 | “Issuer | Section 5-102. |
| 4 | “Lease | Section 2A-103. |
| 5 | “Lease agreement | Section 2A-103. |
| 6 | “Lease contract | Section 2A-103. |
| 7 | “Leasehold interest | Section 2A-103. |
| 8 | “Lessee | Section 2A-103. |
| 9 | “Lessee in ordinary course of business | Section 2A-103. |
| 10 | “Lessor | Section 2A-103. |
| 11 | “Lessor’s residual interest | Section 2A-103. |
| 12 | “Letter of credit | Section 5-102. |
| 13 | “Negotiable instrument | Section 3-104. |
| 14 | “Nominated person | Section 5-102. |
| 15 | “Note | Section 3-104. |
| 16 | “Proceeds of a letter of credit | Section 5-114. |
| 17 | “Prove | Section 3-103. |
| 18 | “Sale | Section 2-106. |
| 19 | “Securities intermediary | Section 8-102. |
| 20 | “Security | Section 8-102. |
| 21 | “Security certificate | Section 8-102. |

1 (C) for a policy of insurance issued or to be issued;
2 (D) for a suretyship obligation incurred or to be incurred;
3 (E) for energy provided or to be provided;
4 (F) arising out of the use of a credit or charge card or information
5 contained on or for use with the card; ~~or~~
6 (G) for the use or hire of a vessel under a charter or other contract; or
7 (H) for winnings in a lottery or a similar game operated or sponsored
8 by a State[, a group of States,] or a governmental unit of a State;
9 (2) includes a healthcare insurance receivable; and
10 (3) ~~The term~~ does not include:
11 (A) a letter-of-credit right;
12 (B) ~~or~~ a right to payment evidenced by an instrument or chattel
13 paper; or
14 (C) ~~[,] [or] letter-of-credit rights [, or a deposit account or other right~~
15 to payment for money or funds advanced or sold.
16 (b) “General intangible means any personal property other than goods,
17 accounts, chattel paper, commercial tort claims, documents, instruments,
18 investment property, letter of credit rights, letters of credit, deposit accounts, and
19 money. The term includes a payment intangible.
20 (c) “Healthcare insurance receivable means a right to payment arising out
21 of the furnishing of healthcare goods or services which is an interest in or claim

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

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

7 (c) Except as otherwise provided in subsection (f), ~~in a consumer goods~~
8 ~~secured transaction~~, if the extent to which a security interest is a purchase-money
9 security interest depends on the application of a payment to a particular obligation,
10 the payment must be applied:

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

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

16 (3) in the absence of an agreement to a reasonable method and a timely
17 manifestation of the obligor's intention, in the following order:

18 (A) to obligations that are not secured; and

19 (B) if more than one obligation is secured, to obligations secured by
20 purchase-money security interests in the order in which those obligations were
21 incurred.

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~~Alternative A~~

~~(d) In a consumer goods secured transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation:~~

~~(1) [cite any applicable statute of a State] governs application of the payment to the extent applicable; and~~

~~(2) to the extent the statute is not applicable, the payment must be applied to obligations secured by purchase-money security interests in the order in which those obligations were incurred.~~

~~(2) This subsection may not be varied by agreement [except to the extent that the agreement relates to the application of a payment to interest or other finance charges].~~

~~Alternative B~~

~~(d) In a consumer goods secured transaction, if the extent to which a security interest is a purchase-money security interest depends on the application of a payment to a particular obligation, the payment must be applied to obligations secured by purchase-money security interests in the order in which those obligations were incurred.~~

~~{End of Alternatives}~~

~~(e) Subsection (d) may not be varied by agreement [except to the extent that the agreement relates to the application of a payment to interest or other finance~~

1 charges].

2 (d) Except as otherwise provided in subsection (f), a ~~A~~ purchase-money
3 security interest does not lose its status as such even 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 (e) Except as otherwise provided in subsection (f), a ~~A~~ secured party
11 claiming a purchase-money security interest has the burden of establishing [whether
12 and] the extent to which the security interest is a purchase-money security interest
13 [if either of the following is placed in issue:

14 (1) the status of a the security interest as a purchase-money security
15 interest; or

16 (2) the extent to which it is a purchase-money security interest].

17 (f) Subsections (c), (d), and (e) do not apply to a consumer-goods
18 transaction.

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

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Reporters' Comments

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Changes from Prior Draft:

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A. Former subsections (d) and (e) have been deleted. This section now contains no statement concerning how payments are to be allocated in a consumer-goods transaction, presumably leaving the matter to the courts or to other applicable statutes. Whether this will preserve current law is uncertain. An explicit provision in subsection (c) concerning allocation in non-consumer-goods transactions may suggest to a court that the subsection (c) approach is inappropriate for consumer-goods transactions. On the other hand, an Official Comment, indicating that no negative inferences are to be drawn from the statutory silence and that the law applicable to PMSI's in consumer-goods transactions under revised Article 9 remains unchanged from former Article 9, might suffice to effectuate the Drafting Committee's intention.

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B. Former subsections (f) and (g) (current subsections (d) and (e)) have been revised to apply only to non-consumer-goods transactions. Again, a clear provision for non-consumer-goods transactions may provide a significant implication that the "dual-status" rule is inappropriate in consumer-goods transactions under revised Article 9, even if "dual-status" had been the accepted rule under former Article 9. Here, again, to deter courts from drawing a negative inference, an Official Comment would emphasize that the definition of "purchase money security interest" in subsection (a)(1) has not been changed and that, accordingly, subsections (d) and (e) create no implication that the "dual status" rule is inappropriate to consumer-goods transactions.

1 ***[MODEL SECTION 9-104A. ~~DEFINITIONS:~~ “PRODUCTION-MONEY***
2 ***SECURITY INTEREST”;*** ***“PRODUCTION-MONEY CROPS”;***
3 ***“PRODUCTION-MONEY OBLIGATION”;*** ***”PRODUCTION OF CROPS”;***
4 ***BURDEN OF ESTABLISHING PRODUCTION-MONEY SECURITY***
5 ***INTEREST.***

6 (a) *A security interest [in crops] is a “production-money security interest”*
7 *to the extent that the crops (“production-money crops”) secure an obligation*
8 *(“production-money obligation”) of an obligor incurred for new value given to*
9 *enable the debtor to produce the production-money crops if the value is in fact used*
10 *for the production of the production-money crops.*

11 (b) *The “production of crops” includes tilling and otherwise preparing*
12 *land for growing, planting, cultivating, fertilizing, protecting from damage or*
13 *disease, irrigating, harvesting, and gathering crops.*

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

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

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

1 (3) in the absence of an agreement to a reasonable method and a timely
2 manifestation of the obligor's intention, in the following order:

3 (A) to obligations that are not secured; and

4 (B) if more than one obligation is secured, to obligations secured by
5 production-money security interests in the order in which those obligations were
6 incurred.

7 (d) A production-money security interest does not lose its status as such
8 even if:

9 (1) the production-money crops also secure an obligation that is not a
10 production-money obligation;

11 (2) collateral that is not production-money crops also secures the
12 production-money obligation; or

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

15 (e) A secured party claiming a production-money security interest has the
16 burden of establishing [whether and] the extent to which the security interest is a
17 production-money security interest [if either of the following is placed in issue:

18 (1) the status of ~~α~~ the security interest as a production-money security
19 interest; or

20 (2) the extent to which it is a production-money security interest].

21 Legislative Note: This section is optional. States that do not enact this section also

1 (b) “Equipment means goods other than inventory, farm products, or
2 consumer goods.

3 (c) ~~(1)~~ “Farm products :

4 (1) means goods:

5 (A) that are:

6 (i) crops grown, growing, or to be grown, including crops
7 produced on trees, vines, and bushes and aquatic goods produced in aquacultural
8 operations;

9 (ii) livestock, born or unborn, including bees and aquatic goods
10 produced in aquacultural operations;

11 (iii) supplies used or produced in a farming or apiarian
12 operation; or

13 (iv) products of crops or livestock in their unmanufactured
14 states; and

15 (B) with respect to which the debtor is engaged in a farming or
16 apiarian operation.

17 (2) The term does not include standing timber.

18 ~~(2) For purposes of paragraph (1), the terms “crops” and “livestock”~~
19 ~~include aquatic goods produced in aquacultural operations.~~

20 (d) ~~(1)~~ “Inventory :

21 (1) means goods that:

- 1 (A) are leased by a person [as lessor];
- 2 (B) are held by a person for sale or lease or to be furnished under
- 3 contracts of service;
- 4 (C) are furnished by a person under contracts of service; or
- 5 (D) consist of raw materials, work in process, or materials used or
- 6 consumed in a business; and
- 7 (2) ~~The term~~ does not include farm products.

8 **SECTION 9-107. DEFINITIONS: “COMMODITY ACCOUNT”;**

9 **“COMMODITY CONTRACT”;** **“COMMODITY CUSTOMER”;**

10 **“COMMODITY INTERMEDIARY”;** **“INVESTMENT PROPERTY.”**

11 (a) “Commodity account means an account maintained by a commodity

12 intermediary in which a commodity contract is carried for a commodity customer.

13 (b) “Commodity contract means a commodity futures contract, an option

14 on a commodity futures contract, a commodity option, or another contract ~~that, in~~

15 ~~each case,~~ if the contract or option is:

16 (1) traded on or subject to the rules of a board of trade that has been

17 designated as a contract market for such a contract pursuant to federal commodities

18 laws; or

19 (2) traded on a foreign commodity board of trade, exchange, or market,

20 and is carried on the books of a commodity intermediary for a commodity

1 customer.

2 (c) “Commodity customer means a person for which a commodity
3 intermediary carries a commodity contract on its books.

4 (d) “Commodity intermediary means:

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

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

10 (e) “Investment property means a security, whether certificated or
11 uncertificated, security entitlement, securities account, commodity contract, or
12 commodity account.

13 **SECTION 9-108. CONTROL OVER INVESTMENT PROPERTY.**

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

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

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

19 (2) the commodity customer, secured party, and commodity
20 intermediary have agreed that the commodity intermediary will apply any value

1 distributed on account of the commodity contract as directed by the secured party
2 without further consent by the commodity customer.

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

6 Reporters' Comments

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

8 2. **“Control” under Article 8.** For a discussion of this issue, see the
9 comments to Section 8-106 (in the Appendix).

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

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

12 (1) the secured party is the bank with which the deposit account is
13 maintained;

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

18 (3) the secured party becomes the bank's customer with respect to the
19 deposit account.

20 (b) A secured party that has satisfied the requirements of subsection (a) has
21 control even if the debtor retains the right to direct the disposition of funds from the

1 deposit account.

2 **SECTION 9-110. CONTROL OVER LETTER-OF-CREDIT RIGHTS**

3 **RIGHT.** A secured party has control over a letter-of-credit right ~~rights~~ to the
4 extent of any right to payment or performance by or proceeds received from the
5 issuer or any nominated person if the issuer or nominated person has consented to
6 an assignment of proceeds of the letter of credit under Section 5-114(c) or
7 otherwise applicable law or practice.

8 **SECTION 9-110A. CONTROL OVER INTANGIBLE CHATTEL**

9 **PAPER.**

10 (a) A secured party has control over intangible chattel paper if:

11 (1) all copies of the record or records evidencing the chattel paper
12 permanently identify the secured party as the assignee of the chattel paper; or

13 (2) the following conditions are met:

14 (A) a single copy of the record or records evidencing the chattel
15 paper indicates that it is the only copy in which a security interest may be perfected
16 by control;

17 (B) the copy of the record or records is communicated to the secured
18 party; and

19 (C) either:

1 (i) the copy cannot be duplicated except in a manner that
2 identifies the duplicate as a copy other than the copy in which a security interest
3 may be perfected by control; or

4 (ii) upon communication of the copy to the secured party, the
5 copy permanently identifies the secured party as the assignee of the chattel paper.

6 (b) A copy of a record or records evidencing intangible chattel paper
7 permanently identifies a secured party as the assignee of the chattel paper if:

8 (1) the copy cannot be duplicated except in a manner that identifies the
9 secured party as the assignee; and

10 (2) the secured party is the only person that has the ability to modify the
11 identification of the assignee on the copy.

12 **SECTION 9-111. SUFFICIENCY OF DESCRIPTION.**

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

16 (b) Except as otherwise provided in subsections ~~(c)~~, (d), and (e), a
17 description of collateral reasonably identifies the collateral if it identifies the
18 collateral by:

19 (1) specific listing;

20 (2) category;

1 (a) Except as otherwise provided in subsections (c) and (d) and Section 9-
2 116, this article applies to:

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

5 (2) an agricultural lien;

6 (3) a sale of an account, chattel paper, healthcare insurance receivable,
7 or payment intangible; and

8 (4) a consignment.

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

12 (c) This article does not apply to the extent that:

13 (1) a statute, regulation, or treaty of the United States preempts this
14 article;

15 (2) another statute of this State [expressly] governs the creation,
16 perfection, priority, or enforcement of a security interest created by this State or a
17 governmental unit of this State;

18 (3) a statute of another State, a foreign country, or a governmental unit
19 of another State or a foreign country, other than a statute generally applicable to
20 security interests, [expressly] governs creation, perfection, priority, or enforcement
21 of a security interest created by the State, country, or governmental unit.

1 (d) This article does not apply to:

2 (1) a landlord's lien[, other than an agricultural lien];

3 (2) a lien ~~, other than a statutory lien,~~ given by statute or other rule of

4 law for services or materials, except:

5 ~~(A) as provided in that~~ Section 9-330 applies with respect to priority

6 of the lien; and

7 _____ (B) an agricultural lien;

8 (3) a transfer of a claim for wages, salary, or other compensation of an

9 employee;

10 (4) a sale of accounts, chattel paper, or payment intangibles as part of a

11 sale of the business out of which they arose;

12 (5) an assignment of accounts, chattel paper, or payment intangibles

13 which is for the purpose of collection only;

14 (6) an assignment of a right to payment under a contract to an assignee

15 that is also obliged to perform under the contract;

16 (7) an assignment of a single account or payment intangible to an

17 assignee in whole or partial satisfaction of a preexisting indebtedness;

18 (8) a transfer of an interest in or claim under a policy of insurance,

19 except:

20 (A) [an assignment] [a transfer] by or to a healthcare provider of a

21 healthcare insurance receivable and [a] [any] subsequent [assignment] [transfer] of

1 the right to payment; and
2 _____ (B) ~~as provided in that~~ Sections 9-313 and 9-319 apply with respect
3 to proceeds and priorities in proceeds;
4 (9) a right represented by a judgment, other than a judgment taken on a
5 right to payment that was collateral;
6 (10) a right of recoupment or set-off, except ~~as provided in that~~:
7 _____ (A) Section 9-337 applies with respect to the effectiveness of rights
8 of recoupment or set-off against deposit accounts; and ~~in~~
9 (B) Section 9-404(a) [and (b)] [applies] [apply] with respect to
10 defenses or claims of an account debtor;
11 (11) the creation or transfer of an interest in or lien on real property,
12 including a lease or rents thereunder, except to the extent that provision is made for:
13 (A) liens on real property in Sections 9-203 and 9-308,
14 _____ (B) fixtures in Section 9-331;
15 _____ (C) fixture filings in Sections 9-501, 9-502, 9-512, 9-516, and 9-520;
16 and
17 _____ (D) security agreements covering personal and real property in
18 Section 9-604;
19 (12) a transfer of ~~any~~ a claim arising in tort, except:
20 (A) a transfer of a commercial tort claim; [and]
21 (B) ~~as provided in that~~ Sections 9-313 and 9-319 apply with respect

1 to proceeds and priorities in proceeds[; or] [and
2 (C) a transfer of a liquidated and undisputed claim [that is generally
3 assignable under applicable law]; or]
4 (13) a transfer of an interest in a deposit account in a consumer
5 transaction, except ~~as provided in that~~ Sections 9-313 and 9-319 apply with respect
6 to proceeds and priorities in proceeds.

7 Reporters' Comments

8 **Changes from Prior Draft:**

9 A. New subsection (d)(8)(A) brings healthcare insurance receivables
10 within the scope of Article 9. See the Reporters' Prefatory Note.

11 B. The changes to subsection (d)(11) are for clarification and
12 completeness only.

13 C. Concerning the square brackets added to subsection (d)(12)(C), see
14 the Reporters' Comments to Section 9-401.

15 **Discussion Questions:**

16 A. Does subsection (c)(2) strike the appropriate balance? One observer
17 has questioned whether a change from current law is warranted.

18 B. Does the draft sufficiently make clear that security interests in
19 structured settlements can serve as original collateral under Article 9?

20 **SECTION 9-113.**

21 [deleted]

22 **SECTION 9-114.**

1 [deleted]

2 **SECTION 9-115. APPLICABILITY OF OTHER STATUTES.**

3 (a) A transaction subject to this article [is] [may also be] subject to [insert
4 reference to any local statute regulating the rates, charges, agreements, and practices
5 for loans and credit sales and to consumer protection statutes, or ~~small loans, retail~~
6 installment sales and the like.

7 (b) In case of conflict between this article and a that statute described in
8 subsection (a), the statute controls. Failure to comply with an applicable statute has
9 only the effect the statute specifies.

10 Reporters' Comments

11 **Changes from Prior Draft:** The changes are for clarification only. We
12 understand that the reporters for Articles 2, 2A, and 2B may have an interest in
13 finding a common approach to the issue of non-UCC consumer protection and
14 similar laws addressed by this section and the somewhat overlapping provisions of
15 Section 9-201(b)(1) and (c).

16 **SECTION 9-116. SECURITY INTERESTS ARISING SOLELY UNDER**

17 ~~ARTICLES~~ ARTICLE 2 OR 2A. (a) A security interest arising solely under
18 ~~Article 2 or 2A~~ Section 2-401, 2-505, 2-711(3), or 2A-508(5) is subject to this
19 article. (b) ~~To the extent that, and~~ However, as long as ; the debtor does not ~~have~~
20 ~~or does not lawfully~~ obtain possession of the goods:

21 (1) ~~a security agreement is not necessary to make~~ the security interest is

1 enforceable even if the requirements of Section 9-203(b)(3) have not been met;

2 (2) filing is not required to perfect the security interest; and

3 (3) the rights of the secured party on default by the debtor are governed
4 by Article 2 or 2A ~~in the case of a security interest arising solely under one of those~~
5 ~~Articles~~ , as applicable; and

6 (4) the security interest has priority over a conflicting security interest
7 created by the debtor.

8 Reporters' Comments

9 **Changes from Prior Draft:**

10 A. Former Section 9-113, from which this section derives, referred
11 generally to security interests “arising solely under the Article on Sales (Article 2)
12 or the Article on Leases (Article 2A). Views differed as to the precise scope of
13 that section. In contrast, Section 9-116 specifies the security interests to which it
14 applies.

15 B. Section 2-505 explains how a seller of goods may reserve a security
16 interest in them. Section 2-401 indicates that a reservation of title by the seller of
17 goods, despite delivery to the buyer, is limited to reservation of a security interest.
18 As did former Article 9, this article governs a security interest arising solely under
19 one of those sections; however, until the buyer obtains possession of the goods, the
20 security interest is enforceable even in the absence of a security agreement, filing is
21 not necessary to perfect the security interest, and the seller-secured party’s rights on
22 the buyer’s default are governed by Article 2.

23 C. Sections 2-711(3) and 2A-508(5) create a security interest in favor of
24 a buyer or lessee in possession of goods that were rightfully rejected or as to which
25 acceptance was justifiably revoked. As did former Article 9, this article governs a
26 security interest arising solely under one of those sections; however, until the seller
27 or lessor obtains possession of the goods, the security interest is enforceable even in
28 the absence of a security agreement, filing is not necessary to perfect the security
29 interest, and the secured party’s (buyer’s or lessee’s) rights on the debtor’s (seller’s
30 or lessor’s) default are governed by Article 2 or 2A, as the case may be.

1 D. This section adds to former Section 9-113 a priority rule that,
2 generally speaking, is consistent with the views of the Reporter and Associate
3 Reporter for Article 2: until the debtor obtains possession of the goods, a security
4 interest arising under one of the specified sections of Article 2 or 2A has priority
5 over conflicting security interests created by the debtor. Thus, a security interest
6 arising under Section 2-401 or 2-505 has priority over a conflicting security interest
7 in the buyer's after-acquired goods, even if the goods in question are inventory.
8 Arguably, the same result would obtain under Section 9-322, but even if it would
9 not, a PMSI-like priority seems appropriate. Similarly, a security interest under
10 Section 2-711(3) or 2A-508(5) has priority over security interests claimed by the
11 seller's or lessor's secured lender. This result seems appropriate, inasmuch as the
12 major portion of the debt secured by the Article 2 or 2A security interest is likely to
13 constitute the lender's proceeds.

14 E. This Article does not specifically address the conflict between (i) a
15 security interest created by the buyer and (ii) the seller's right to withhold delivery
16 under Section 2-702(1), 2-703(a), or 2A-525, the seller's right to stop delivery
17 under Section 2-705 or 2A-526, or the seller's right to reclaim under Section 2-
18 507(2) or 2-702(2). These conflicts are governed by the first sentence of Section 2-
19 403(1), under which the buyer's secured party obtains no greater rights in the goods
20 than the buyer had or had power to convey.

21 F. In the event that a security interest referred to in this section conflicts
22 with a security interest that is created by a person other than the debtor, Section 9-
23 323 applies. Thus, if the buyer buys goods subject to a security interest created by
24 the seller, the buyer's security interest under Section 2-711(3) would be subordinate
25 to that of the seller's secured party if the latter security interest is perfected at all
26 times.

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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 EFFECTIVENESS OF SECURITY
AGREEMENT.**

(a) Except as otherwise provided in [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:

(1) validates any charge or practice illegal under ~~any~~ a statute or regulation governing usury, small loans, retail installment sales, or the like; or

(2) extends the application of the statute or regulation to a transaction not otherwise subject to it.

(c) A transaction subject to this article is also subject to any applicable law which establishes a different rule for consumers.

(d) With respect to [the Uniform Commercial Code], failure to comply with the laws referred to in subsection (c) has only the effect specified therein.]

SECTION 9-202. TITLE TO COLLATERAL IMMATERIAL. Except as

1 otherwise provided with respect to consignments or sales of accounts, chattel paper,
2 or payment intangibles, the provisions of this article with regard to rights,
3 obligations, and remedies apply whether title to collateral is in the secured party or
4 in the debtor.

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

8 (a) A security interest is created in, and attaches to, collateral when it
9 becomes enforceable against the debtor with respect to the collateral, unless an
10 agreement expressly postpones the time of creation or attachment.

11 (b) Except as otherwise provided in subsections (c), (d), and (e), and
12 Section 4-210 on the security interest of a collecting bank, Section 5-118 on the
13 security interest of a letter of credit issuer or nominated person, Section 9-116 on a
14 security interest arising under Article 2 or 2A, and Section 9-206 on security
15 interests in investment property, a security interest is enforceable against the debtor
16 and third parties with respect to the collateral only if :

17 (1) value has been given;

18 (2) the debtor has rights in the collateral or the power to transfer rights
19 in the collateral to a secured party; and

20 (3) one of the following conditions is met:

1 (A) the debtor has authenticated a security agreement that provides a
2 description of the collateral and, if the security interest covers timber to be cut, a
3 description of the land concerned;

4 (B) the collateral is in the possession of the secured party under
5 Section 9-311 pursuant to the debtor's security agreement;

6 (C) the collateral is a certificated security and the security certificate
7 has been delivered to the secured party under Section 8-301 pursuant to the debtor's
8 security agreement; or

9 (D) the collateral is investment property, a deposit account, or a
10 letter-of-credit right, and the secured party has control pursuant to the debtor's
11 security agreement.

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

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

16 (2) the person:

17 (A) becomes generally obligated for the obligations of the other
18 person, including the obligation secured under the security agreement; and

19 (B) acquires or succeeds to all or substantially all of the assets of the
20 other person.

21 (d) If a new debtor becomes bound as debtor by a security agreement

1 entered into by another person:

2 (1) the agreement satisfies the requirements of subsection (b)(3) with
3 respect to existing or after-acquired property of the new debtor to the extent the
4 property is described in the agreement; and

5 (2) another agreement is not necessary to make a security interest in the
6 property enforceable.

7 (e) ~~Unless otherwise agreed:~~ The the attachment of a security interest in
8 ~~(f)~~ collateral gives the secured party the rights to proceeds provided by Section
9 9-313 and is also attachment of a security interest in all support obligations
10 ~~obligation~~ with respect to the collateral.

11 (f) ~~(2) the~~ The attachment of a security interest in a securities account is
12 also attachment of a security interest in [all] security entitlements carried in the
13 securities account;

14 (g) ~~(3) the~~ The attachment of a security interest in a commodity account is
15 also attachment of a security interest in all commodity contracts carried in the
16 commodity account, ~~and~~

17 (h) ~~(4) the~~ The attachment of a security interest in a right to payment or
18 performance secured by a security interest or other lien on personal property or real
19 property is also attachment of a security interest in the security interest or other lien.

1 Reporters' Comments

2 **Changes from Prior Draft:** Former subsection (e) has been revised for
3 clarity and to delete the reference to agreements “otherwise, as unnecessary.
4 Subsection (h) (former subsection (e)(4)) has been revised to adopt the “collateral
5 follows the debt rule with respect to all collateral. See also Section 9-308(g),
6 which contains an analogous rule regarding perfection.

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

8 **ADVANCES.**

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

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

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

16 (2) a commercial tort claim.

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

21 **SECTION 9-205. USE OR DISPOSITION OF COLLATERAL**

1 **WITHOUT ACCOUNTING PERMISSIBLE.**

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

4 (1) the debtor has the right or ability to:

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

7 (B) collect, compromise, enforce, or otherwise deal with collateral;

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

9 (D) use, commingle, or dispose of proceeds; or

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

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

15 **SECTION 9-206. SECURITY INTEREST ARISING IN PURCHASE OR**
16 **DELIVERY OF FINANCIAL ASSET.**

17 (a) A security interest in favor of a securities intermediary attaches to a
18 person's security entitlement if:

19 (1) the person buys a financial asset through a securities intermediary in
20 a transaction in which the person is obligated to pay the purchase price to the

1 securities intermediary at the time of the purchase; and

2 (2) the securities intermediary credits the financial asset to the buyer's
3 securities account before the buyer pays the securities intermediary.

4 (b) The security interest described in subsection (a) secures the person's
5 obligation to pay for the financial asset.

6 (c) A security interest in favor of a person that delivers a certificated
7 security or other financial asset represented by a writing attaches to the security or
8 other financial asset if:

9 (1) the security or other financial asset is:

10 (A) in the ordinary course of business transferred by delivery with
11 any necessary indorsement or assignment; and

12 (B) delivered under an agreement between persons in the business of
13 dealing with such securities or financial assets; and

14 (2) the agreement calls for [~~delivery versus payment~~] [delivery against
15 payment].

16 (d) The security interest described in subsection (c) secures the person's
17 obligation to make payment to the seller.

18 [SUBPART 2. RIGHTS AND DUTIES]

1 **SECTION 9-207. RIGHTS AND DUTIES OF SECURED PARTY**
2 **HAVING POSSESSION OF OR CONTROL OVER COLLATERAL.**

3 (a) A secured party shall use reasonable care in the custody and
4 preservation of collateral in the secured party's possession if the secured party:

5 (1) is not a buyer of accounts, chattel paper, or payment intangibles {for a
6 consignor}; or

7 (2) is a buyer of accounts, chattel paper, or payment intangibles which is
8 entitled by agreement:

9 (A) to charge back uncollected collateral; or

10 (B) otherwise to full or limited recourse against the debtor or a
11 secondary obligor based on the nonpayment or other default of an account debtor or
12 other obligor on the collateral.

13 (b) In the case of an instrument or chattel paper, reasonable care under
14 subsection (a) includes taking necessary steps to preserve rights against prior parties
15 unless otherwise agreed.

16 (c) If a secured party has possession of collateral:

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

21 (2) the risk of accidental loss or damage is on the debtor to the extent of

1 a deficiency in any effective insurance coverage;

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

4 (4) the secured party may use or operate the collateral:

5 (A) for the purpose of preserving the collateral or its value;

6 (B) as permitted by an order of a court of appropriate jurisdiction;

7 or

8 (C) except in the case of consumer goods, in the manner and to the
9 extent agreed by the debtor.

10 (d) If a secured party has possession of or control over collateral, the
11 secured party:

12 (1) may hold as additional security any [increase or profits] [proceeds],
13 except money or funds, received from the collateral;

14 (2) shall apply money or funds received under paragraph ~~(3)(A)~~ (1) to
15 reduce the secured obligation, unless remitted to the debtor; and

16 (3) may create a security interest in the collateral.

17 (e) If Subsections (c) and (d) do not apply if the secured party is a buyer of
18 accounts, chattel paper, or payment intangibles [for a consignor];

19 (1) subsections (c) and (d)(1) and (2) do not apply; and

20 (2) the secured party may create a security interest in the collateral
21 regardless of who has possession of it.

1 Reporters' Comments

2 **Changes from Prior Draft:**

3 A. Subsection (d) has been revised to refer to “funds, given the narrow
4 definition of “money in Section 1-201.

5 B. The discussion in comment 5 of the bankruptcy effects resulting
6 from both traceable and non-traceable repledge transactions has been deleted.

7 C. There is no reason that a buyer of receivables or a consignor should
8 not be permitted to create a security interest in the collateral, regardless of who has
9 possession of the collateral. Subsection (e) has been revised accordingly.

10 * * *

11 4. **“Repledges” and Right of Redemption.** Subsection (d)(3) eliminates
12 the qualification in former Section 9-207 that the terms of a “repledge may not
13 “impair a debtors “right to redeem collateral. The change is for clarification only.

14 There is no basis on which to draw from subsection (d)(3) any inference
15 concerning the debtor’s right to redeem the collateral. The debtor enjoys that right
16 under Section 9-621, and this section need not address it. For example, if the
17 collateral is a negotiable note that the secured party (SP-1) repledges to SP-2,
18 nothing in this section suggests that the debtor (D) does not retain the right to
19 redeem the note upon payment to SP-1 of all obligations secured by the note. But,
20 as explained below, the debtor’s unimpaired right to redeem as against the debtor’s
21 original secured party nevertheless may not be enforceable as against the new
22 secured party.

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

30 Whether SP-2 would be liable to D depends on the priority of SP-2’s
31 security interest. Normally, the *nemo dat* principle will apply, and SP-2’s security
32 interest, which is a security interest in SP-1’s security interest, will be defeated if

1 the debtor discharges its secured obligations under Section 9-621 or otherwise. If
2 so, and if SP-2 fails to deliver the note to D, then D will have a right to replevy the
3 note from SP-2 or recover damages from SP-2 in conversion. In some
4 circumstances, however, SP-2's security interest will survive discharge of SP-1's
5 security interest. This will be the case, for example, if SP-2 is a holder in due
6 course. See Sections 9-328, 3-306. Under these circumstances, D has no right to
7 recover the note or recover damages from SP-2. Nevertheless, D will have a
8 damage claim against SP-1.

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

22 **5. "Repledges" of Investment Property.** The rights specified in
23 paragraph (d) are made applicable to secured parties having control over collateral
24 as well as to those in possession of collateral. Important among these rights is the
25 secured party's right to grant a security interest in (i.e., to "repledge ") collateral,
26 especially investment property.. This right is equally as important when the secured
27 party has control over collateral (see Sections 9-108, 9-109, 9-110, and 9-110A), as
28 when the secured party has possession of collateral. Consider the following
29 example:

30 *Example.* Debtor grants Alpha Bank a security interest in a security
31 entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds
32 through an account with Able & Co. Alpha does not have an account with
33 Able. Alpha uses Beta Bank as its securities custodian. Debtor instructs
34 Able to transfer the shares to Beta, for the account of Alpha, and Able does
35 so. Beta then credits Alpha's account. Alpha has control of the security
36 entitlement for the 1000 shares under Section 8-106(d). (These are the facts
37 of Example 3, Section 8-106, Comment 4.) Although Debtor remains the
38 beneficial owner of the securities entitlement as between Debtor and Alpha,

1 Beta has agreed to act on Alpha's entitlement orders because, as between
2 Beta and Alpha, Alpha has become the entitlement holder.

3 Next, Alpha grants Gamma Bank a security interest in the security
4 entitlement that includes the 1000 shares of XYZ Co. stock. In order to
5 afford Gamma control over the entitlement, Alpha instructs Beta to transfer
6 the stock to Gamma's custodian, Delta Bank, which credits Gamma's
7 account for the 1000 shares. At this point Gamma holds its securities
8 entitlement for its benefit as well as that of its debtor, Alpha. Alpha's
9 derivative rights also are for the benefit of Debtor.

10 In many situations and at any particular point in time, it might be impossible for
11 Debtor or Alpha to "trace Alpha's "repledge to any particular securities
12 entitlement or financial asset of Gamma or anyone else. Debtor would retain, of
13 course, a right to redemption from Alpha upon satisfaction of the secured
14 obligation. Were Debtor concerned about Alpha's creditworthiness in the example,
15 Debtor could insist that Gamma agree that it would hold the financial assets in its
16 account with Delta for the benefit of Debtor as well as itself and Alpha.
17 Alternatively, and more plausibly, Debtor could open a securities account with
18 Alpha (assuming Alpha could act as a securities intermediary). In that situation,
19 Alpha would have control over Debtor's security entitlement without further action.
20 See Section 8-106(e).

21 **SECTION 9-208. ADDITIONAL DUTIES OF SECURED PARTY**
22 **HAVING CONTROL OVER COLLATERAL.**

23 (a) This section applies if:

24 (1) there is no outstanding secured obligation; and

25 (2) the secured party has no commitment to make advances, incur
26 obligations, or otherwise give value.

27 (b) Within 10 days after receiving an authenticated demand by the debtor:

28 (1) a secured party that has control over investment property under

29 Section 8-106(d)(2) or 9-108(b) shall send the securities intermediary or

1 commodity intermediary with which the security entitlement or commodity contract
2 is maintained an authenticated record that releases the securities intermediary or
3 commodity intermediary from any further obligation to comply with entitlement
4 orders or directions originated by the secured party;

5 (2) a secured party that has control over a deposit account under Section
6 9-109(a)(2) shall send the bank with which the deposit account is maintained an
7 authenticated statement that releases the bank from any further obligation to comply
8 with instructions originated by the secured party;

9 [(3) a secured party that has control over a deposit account under
10 Section 9-109(a)(3) shall:

11 (A) pay the debtor the balance on deposit in the deposit account; or

12 (B) transfer the balance on deposit into a deposit account in the
13 debtor's name;] and

14 (4) a secured party that has control over a letter-of-credit ~~right~~ rights
15 under Section 9-110 shall send to each person that has an unfulfilled obligation to
16 pay or deliver proceeds of the letter of credit to the secured party an authenticated
17 release from any further obligation to pay or deliver proceeds of the letter of credit
18 to the secured party.

19 **SECTION 9-208A. DUTIES OF SECURED PARTY IF ACCOUNT**
20 **DEBTOR HAS BEEN NOTIFIED OF ASSIGNMENT.**

1 (a) Except as otherwise provided in subsection (c), this section applies if:

2 (1) there is no outstanding secured obligation; and

3 (2) the secured party has no commitment to make advances, incur
4 obligations, or otherwise give value.

5 (b) Within 10 days after the secured party receives an authenticated demand
6 by the debtor, the secured party shall send to an account debtor that has received
7 notification of an assignment to the secured party as assignee under Section
8 9-404(e) an authenticated record that releases the account debtor from any further
9 obligation to the secured party.

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

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

14 (a) In this section:

15 (1) “Request means a record of a type described in paragraphs (2), (3),
16 or (4).

17 (2) “Request for an accounting means a record authenticated by a
18 debtor requesting that the recipient provide an accounting of the unpaid obligations
19 secured by collateral and reasonably identifying the transaction or relationship that
20 is the subject of the request.

1 (3) “Request regarding a list of collateral” means a record authenticated
2 by a debtor requesting that the recipient approve or correct a list of what the debtor
3 believes to be the collateral securing an obligation and reasonably identifying the
4 transaction or relationship that is the subject of the request.

5 (4) “Request regarding a statement of account” means a record
6 authenticated by a debtor requesting that the recipient approve or correct a
7 statement indicating what the debtor believes to be the aggregate amount of unpaid
8 obligations secured by collateral as of a specified date and reasonably identifying
9 the transaction or relationship that is the subject of the request.

10 (b) Subject to subsections (c), (d), and (e), a secured party shall comply
11 with a request within two weeks after receipt by authenticating and sending to the
12 debtor a correction or approval or an accounting, as applicable. This subsection
13 does not apply to a secured party that is a buyer of accounts, chattel paper, or
14 payment intangibles.

15 (c) A secured party that claims a security interest in all of a particular type
16 of collateral owned by the debtor may comply with a request regarding a list of
17 collateral by sending to the debtor an authenticated statement to that effect within
18 two weeks after receipt.

19 (d) A person that receives a request regarding a list of collateral, claims no
20 interest in the collateral when it receives the request, and claimed an interest in the
21 collateral at an earlier time shall comply with the request within two weeks after

1 receipt by sending to the debtor an authenticated [record] [statement]:

2 (1) disclaiming any interest in the collateral; and

3 (2) if known to the recipient, containing the name and mailing address
4 of any assignee of or successor to the recipient's security interest in the collateral.

5 (e) A person that receives a request for an accounting or a request regarding
6 a statement of account, claims no interest in the obligations when it receives the
7 request, and claimed an interest in the obligations at an earlier time shall comply
8 with the request within two weeks after receipt by sending to the debtor an
9 authenticated [record] [statement]:

10 (1) disclaiming any interest in the obligations; and

11 (2) if known to the recipient, containing the name and mailing address
12 of any assignee of or successor to the recipient's interest in the obligations.

13 (f) A debtor is entitled without charge to one response to a request under
14 this section during any six-month period. The secured party may require payment
15 of a charge not exceeding \$[] for each additional response.

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PART 3

PERFECTION AND PRIORITY OF SECURITY INTERESTS

[SUBPART 1. LAW GOVERNING PERFECTION AND PRIORITY]

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

(1) Except as otherwise provided in this section, while a debtor 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 collateral.

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

(3) Except as otherwise provided in paragraphs (4), (5), and (6), while ~~While~~ goods, chattel paper, instruments, money, or negotiable documents are located in a jurisdiction, the local law of that jurisdiction governs the effect of perfection or nonperfection and the priority of a nonpossessory security interest.

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

1 filing.

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

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

7 **SECTION 9-302. LAW GOVERNING FILING, PERFECTION, AND**
8 **PRIORITY OF AGRICULTURAL LIENS.**

9 While collateral is located in a jurisdiction, the local law of that jurisdiction
10 governs perfection, the effect of perfection or nonperfection, and the priority of an
11 agricultural lien on the collateral.

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

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

18 (b) The local law of the jurisdiction under whose certificate of title the
19 goods are covered governs perfection, the effect of perfection or nonperfection, and
20 the priority of a security interest in goods covered by a certificate of title from the
21 time the goods become covered by the certificate until the earlier of the time the

1 certificate becomes ineffective under the law of that jurisdiction or the time the
2 goods become covered subsequently by a certificate of title from another
3 jurisdiction. After that time, the goods are not covered by the first certificate of
4 title.

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

8 **SECTION 9-304. LAW GOVERNING PERFECTION AND PRIORITY**
9 **OF SECURITY INTERESTS IN DEPOSIT ACCOUNTS.**

10 (a) The local law of a bank's jurisdiction governs perfection, the effect of
11 perfection or nonperfection, and the priority of a security interest in a deposit
12 account maintained with that bank.

13 (b) The following rules determine a bank's jurisdiction for purposes of this
14 section:

15 (1) If an agreement between the bank and the debtor expressly provides
16 a particular jurisdiction as the bank's jurisdiction for purposes of this part, this
17 article, or [the Uniform Commercial Code], that jurisdiction is the bank's
18 jurisdiction.

19 (2) If paragraph (1) does not apply and an agreement between the bank
20 and its customer expressly provides that it is governed by the law of a particular
21 jurisdiction, that jurisdiction is the bank's jurisdiction.

1 the letter-of-credit right as provided in Section 5-116.

2 (c) This section does not apply to a security interest that is perfected only
3 under Section 9-308(d).

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

6 (a) Except as otherwise provided in subsection (b), the following rules
7 apply:

8 (1) While a security certificate is located in a jurisdiction, the local law
9 of that jurisdiction governs perfection, the effect of perfection or nonperfection, and
10 the priority of a security interest in the certificated security represented thereby.

11 (2) The local law of the issuer's jurisdiction as specified in Section
12 8-110(d) governs perfection, the effect of perfection or nonperfection, and the
13 priority of a security interest in an uncertificated security.

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

18 (4) The local law of the commodity intermediary's jurisdiction governs
19 perfection, the effect of perfection or nonperfection, and the priority of a security
20 interest in a commodity contract or commodity account.

1 (5) The following rules determine a commodity intermediary's
2 jurisdiction for purposes of paragraph 4 and Section 9-314:

3 (A) If an agreement between the commodity intermediary and
4 commodity customer expressly provides the commodity intermediary's jurisdiction
5 for purposes of this part, this article, or [the Uniform Commercial Code], that
6 jurisdiction is the commodity intermediary's jurisdiction.

7 (B) If subparagraph (A) does not apply and an agreement between
8 the commodity intermediary and commodity customer expressly provides that it is
9 governed by the law of a particular jurisdiction, that jurisdiction is the commodity
10 intermediary's jurisdiction.

11 (C) If neither subparagraph (A) nor subparagraph (B) applies and an
12 agreement between the commodity intermediary and commodity customer
13 expressly provides that the commodity account is maintained at an office in a
14 particular jurisdiction, that jurisdiction is the commodity intermediary's jurisdiction.

15 (D) If none of subparagraph (A), (B), or (C) applies, the commodity
16 intermediary's jurisdiction is the jurisdiction in which is located the office identified
17 in an account statement as the office serving the commodity customer's account.

18 (E) If none of the ~~other~~ preceding subparagraphs applies, the
19 commodity intermediary's jurisdiction is the jurisdiction in which is located the
20 chief executive office of the commodity intermediary.

21 (b) The local law of the jurisdiction in which the debtor is located governs:

- 1 (1) perfection of a security interest in investment property by filing;
2 (2) automatic perfection of a security interest in investment property
3 granted by a broker or securities intermediary; and
4 (3) automatic perfection of a security interest in a commodity contract or
5 commodity account granted by a commodity intermediary.

6 Reporters' Comments

7 **Discussion Questions:** Should subsection (b) be revised to provide that the
8 jurisdiction in which the debtor is located governs perfection by filing but does not
9 govern automatic perfection of security interests granted by a securities
10 intermediary or commodity intermediary (i.e., by deleting paragraphs (2) and (3))?

11 **SECTION 9-306.**

12 [deleted]

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

14 (a) In this section, a "place of business" is a place where a debtor conducts
15 its affairs.

16 (b) Except as otherwise provided in this section, the following rules
17 determine a debtor's location:

18 (1) An individual debtor is located at the individual's residence.

19 (2) Any other debtor having only one place of business is located at its
20 place of business.

21 (3) Any other debtor having more than one place of business is located

1 at its chief executive office.

2 (c) Subsection (b) applies only if a debtor's residence, place of business, or
3 chief executive office, as applicable, is located either in a State or in a jurisdiction,
4 other than a State, whose law requires information concerning the [possible]
5 existence of a security interest to be made publicly available as a condition or result
6 of the security interest's obtaining priority over the rights of a lien creditor with
7 respect to the collateral. If subsection (b) does not apply, the debtor is located in
8 [the District of Columbia].

9 (d) A registered organization that is organized under the law of a State is
10 located in its jurisdiction of organization.

11 (e) Except as otherwise provided in subsection (h), a registered
12 organization that is organized under the law of the United States and a branch or
13 agency of a bank that is not organized under the law of the United States or a State
14 are located:

15 (1) in the State that the law of the United States designates, if the law
16 designates a State of location;

17 (2) in the State that the registered organization designates, if the law of
18 the United States authorizes the registered organization to designate its State of
19 location; or

20 (3) in the District of Columbia, if neither paragraph (1) nor paragraph
21 (2) applies.

1 (f) A registered organization continues to be located in the jurisdiction
2 specified by subsection (d) [or (e)] notwithstanding the suspension, revocation,
3 forfeiture, or lapse of the registered organization’s registration or the dissolution of
4 the registered organization.

5 (g) The United States is located in the District of Columbia.

6 (h) A branch or agency of a bank that is not organized under the law of the
7 United States or a State is located in the State in which the branch or agency is
8 licensed, if the branches or agencies of the bank are licensed in only one State.

9 (i) A foreign air carrier under the Federal Aviation Act of 1958, as
10 amended, is located at the designated office of the agent upon which service of
11 process may be made on behalf of the carrier.

12 (j) This section applies only for purposes of this part.

1 [SUBPART 2. PERFECTION]

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

4 (a) (1) Except as otherwise provided in this section and Section 9-308A, a
5 security interest is perfected if it has attached and all of the applicable requirements
6 for perfection in Sections 9-309 through 9-314A have been satisfied. A security
7 interest is perfected when it attaches if the applicable requirements are satisfied
8 before the security interest attaches.

9 (b) An agricultural lien is perfected if it has become effective and all of the
10 applicable requirements for perfection in Sections 9-309 and 9-314A have been
11 satisfied. An agricultural lien is perfected when it becomes effective if the
12 applicable requirements are satisfied before the statutory lien becomes effective.

13 (c) A security interest or agricultural lien is perfected continuously if it is
14 originally perfected in one manner under this article and is later perfected in another
15 manner under this article, without an intermediate period when it was unperfected.

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

19 (e) Perfection of a security interest in a securities account also perfects a

1 security interest in all security entitlements carried in the securities account;

2 (f) Perfection of a security interest in a commodity account also perfects a
3 security interest in all commodity contracts carried in the commodity account.

4 (g) Perfection of a security interest in a right to payment or performance
5 also perfects a security interest in a lien on personal or real property securing the
6 right, notwithstanding other law to the contrary.

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

9 **SECTION 9-308A. SECURITY INTEREST PERFECTED UPON**
10 **ATTACHMENT.** The following security interests are perfected when they attach:

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

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

17 (3) a sale of a payment intangible;

18 (4) a security interest of a collecting bank arising under Section 4-210;

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

21 (6) a security interest in investment property created by a broker or

1 securities intermediary;

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

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

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

8 (9) ~~(10)~~ a security interest created by an assignment of a beneficial interest
9 in a decedent's estate; ~~and~~

10 (10) ~~(11)~~ a security interest arising ~~under Article 2 or 2A~~ solely under
11 Section 2-401, 2-505, 2-711(3), or 2A-508(5); and

12 (11) a security interest created by the assignment to a healthcare provider of
13 a healthcare insurance receivable.

14 Reporters' Comments

15 **Changes from Prior Draft:**

16 A. Paragraph 10 has been clarified.

17 B. New paragraph 11 provides for automatic perfection of a security
18 interest in healthcare insurance receivables created by an assignment *to* (but not
19 *from*) a healthcare provider. Under this approach, for example, it would not be
20 necessary to file a financing statement against an individual patient that assigns to a
21 healthcare provider its rights to payment under a healthcare insurance policy.

22 **SECTION 9-309. WHEN FILING REQUIRED TO PERFECT**

1 **SECURITY INTEREST OR AGRICULTURAL LIEN; SECURITY**
2 **INTERESTS AND AGRICULTURAL LIENS TO WHICH FILING**
3 **PROVISIONS DO NOT APPLY.**

4 (a) Except as otherwise provided in subsections (b) and (c), a financing
5 statement must be filed to perfect all security interests and agricultural liens.

6 (b) The filing of a financing statement is not necessary to perfect a security
7 interest:

8 (1) in a support obligation under Section 9-308(d);

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

10 (3) in property subject to a statute, regulation, or treaty described in
11 Section 9-309A(a);

12 (4) in instruments, certificated securities, or documents perfected
13 without filing or possession under Section 9-310(e) or (f);

14 (5) in collateral in the secured party's possession under Section 9-311;

15 (6) in investment property, a deposit account, or a letter-of-credit right
16 ~~which~~ that is perfected without filing under Section 9-312;

17 (7) in proceeds under Section 9-313(f); or

18 (8) that is perfected under Section 9-314.

19 (c) The filing of a financing statement is not necessary to perfect an
20 agricultural lien on proceeds under Section 9-313(f).

21 (d) If a secured party assigns a perfected security interest or agricultural

1 lien, a filing under this article is not required to continue the perfected status of the
2 security interest against creditors of and transferees from the original debtor.

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

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

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

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

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

20 (b) During any period in which collateral is inventory held for sale or lease

1 by a person or leased by that person as lessor and that person is in the business of
2 selling or leasing goods of that kind, subsection[s] (a)(2) [does] [and (3) do] not
3 apply to a security interest in that collateral created by that person as debtor.

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

7 (d) Except as otherwise provided in Sections 9-311 and 9-314(c)[, (d), and
8 (e)] for goods covered by a certificate of title, a security interest in property subject
9 to a statute, regulation, or treaty described in subsection (a) may be perfected only
10 by compliance with those requirements, and a security interest so perfected remains
11 perfected notwithstanding a change in the use or transfer of possession of the
12 collateral.

13 (e) Except as otherwise provided in Section 9-314(c), [(d), and (e),]
14 duration and renewal of perfection of a security interest perfected by compliance
15 with the requirements prescribed by a statute, regulation, or treaty described in
16 subsection (a) are governed by the statute, regulation, or treaty. In other respects
17 the security interest is subject to this article.

18 **SECTION 9-310. PERFECTION OF SECURITY INTERESTS IN**
19 **INSTRUMENTS, CHATTEL PAPER, INVESTMENT PROPERTY,**
20 **DOCUMENTS, MONEY, DEPOSIT ACCOUNTS, LETTER-OF-CREDIT**

1 **RIGHTS, AND GOODS COVERED BY DOCUMENTS; PERFECTION BY**
2 **PERMISSIVE FILING; TEMPORARY PERFECTION WITHOUT FILING**
3 **OR TRANSFER OF POSSESSION.**

4 (a) A security interest in instruments, chattel paper, investment property, or
5 negotiable documents may be perfected by filing.

6 (b) Except as otherwise provided in Section 9-313(e) for [cash] proceeds:

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

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

11 (3) a security interest in a letter-of-credit right may be perfected only by
12 control under Section 9-312, except as otherwise provided in Section 9-308(d).

13 (c) While goods are in the possession of a bailee that has issued a
14 negotiable document under Section 7-104(1) [or federal law] covering the goods:

15 (1) a security interest in the goods is perfected by perfecting a security
16 interest in the document; and

17 (2) any security interest in the goods otherwise perfected during the
18 period is subordinate to the security interest perfected in the document.

19 (d) A security interest in goods in the possession of a bailee that has issued
20 a non-negotiable document under Section 7-104(2) [or federal law] covering the
21 goods is perfected by:

- 1 (1) issuance of a document in the name of the secured party;
2 (2) the bailee's receipt of notification of the secured party's interest; or
3 (3) filing as to the goods.

4 (e) A security interest in instruments, certificated securities, or negotiable
5 documents is perfected without filing or the taking of possession for a period of 20
6 days from the time it attaches to the extent that it arises for new value given under
7 an authenticated security agreement.

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

12 (1) makes available to the debtor the goods or documents representing
13 the goods for the purpose of:

14 (A) ultimate sale or exchange; or

15 (B) loading, unloading, storing, shipping, transshipping,
16 manufacturing, processing, or otherwise dealing with them in a manner preliminary
17 to their sale or exchange, but priority among conflicting security interests in the
18 goods is subject to Section 9-322; or

19 (2) delivers the instrument or certificated security to the debtor for the
20 purpose of:

21 (A) ultimate sale or exchange; or

1 (B) presentation, collection, enforcement, renewal, or registration of
2 transfer.

3 (g) After the 20-day period specified in subsection (e) [or] [and] (f) expires,
4 perfection depends upon compliance with this article.

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

7 (a) Except as otherwise provided in subsection (b), a security interest in
8 goods, instruments, money, negotiable documents, or tangible chattel paper may be
9 perfected by the secured party's taking possession of the collateral. A security
10 interest in certificated securities may be perfected by delivery of the security
11 certificates under Section 8-301 to the secured party.

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

15 (c) With respect to collateral other than certificated securities and goods
16 covered by a document, a secured party acquires possession of collateral in the
17 possession of a person other than the debtor, the secured party, or a lessee of the
18 collateral from the debtor in the ordinary course of the debtor's business, when:

19 (1) the person in possession [authenticates a record acknowledging]
20 [agrees] that it holds possession of the collateral for the secured party's benefit; [or]

1 (2) the person takes possession of the collateral after having
2 ~~{authenticated a record acknowledging} {agreed}~~ that it will hold possession of
3 collateral for the secured party's benefit, ~~;~~ ~~or~~

4 ~~(3) the secured party delivers the collateral to the person after having~~
5 ~~instructed the person to:~~

6 ~~(A) hold possession of the collateral for the secured party's benefit;~~
7 ~~or~~

8 ~~(B) redeliver the collateral to the secured party].~~

9 (d) A secured party that has possession of collateral does not relinquish
10 possession by delivering the collateral to a person other than the debtor or a lessee
11 of the collateral from the debtor in the ordinary course of the debtor's business if
12 the person was instructed before the delivery or is instructed contemporaneously
13 with the delivery:

14 _____ (1) to hold possession of the collateral for the secured party's benefit; or

15 _____ (2) to redeliver the collateral to the secured party.

16 (e) ~~(d)~~ A security interest is perfected by possession ~~or delivery~~ when the
17 secured party takes possession ~~or delivery~~[, without a relation back,] and remains
18 perfected by possession ~~continues~~ only while the secured party retains possession,
19 unless otherwise provided in this article.

20 (f) A security interest in a certificated security is perfected by delivery when
21 the secured party takes delivery of the security certificate[, without a relation back,]

1 and remains perfected by delivery until the debtor obtains possession of the security
2 certificate.

3 (g) ~~(e)~~ A person in possession of collateral is not required to ~~acknowledge~~
4 ~~agree~~ that it holds possession for a secured party's benefit.

5 (h) ~~(f)~~ If a person ~~acknowledges~~ ~~agrees~~ that it holds possession for the
6 secured party's benefit:

7 (1) the ~~acknowledgment~~ ~~agreement~~ is effective under subsection (c)
8 [and Section 8-301(a)] even if the acknowledgment violates the rights of a debtor;
9 and

10 (2) unless the person otherwise agrees or other law otherwise provides,
11 the person does not owe any duty to the secured party and is not required to confirm
12 the ~~acknowledgment~~ ~~agreement~~ to another person.

13 Reporters' Comments

14 **Changes from Prior Draft:** See Comments 2 and 3 and new subsections
15 (d) and (f).

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

17 2. **Delivery to Third Party by Secured Party.** New subsection (d)
18 addresses concerns expressed by mortgage warehouse lenders. These lenders
19 typically send mortgage notes to prospective purchasers under cover of letters
20 advising the prospective purchasers that the lenders hold security interests in the
21 notes. This notification to the prospective purchaser (a bailee) is sufficient to
22 maintain perfection by possession under former 9-305. These lenders have
23 expressed the view that requiring them to obtain authenticated acknowledgments
24 from each prospective purchaser would be unduly burdensome and disruptive of
25 their established practices. New subsection (d) reflects suggestions made by the
26 mortgage warehouse lenders. Under this approach, when a secured party in

1 possession itself delivers the collateral to a bailee, instructions to the bailee would
2 be sufficient to maintain perfection by possession; an acknowledgment would not
3 be necessary.

4 **3. Certificated Securities.** The second sentence of subsection (a) reflects
5 the traditional rule for perfection of a security interest in certificated securities.
6 Compare Sections 9-115(4)(a), 8-106(a), 9-115(6) (1994 Official Text); Sections
7 8-321, 8-313(1)(a) (1978 Official Text); Section 9-305 (1972 Official Text). It has
8 been modified to refer to “delivery under Section 8-301, which provides that a
9 person other than a secured party that holds possession for the secured party’s
10 benefit must be a person other than a securities intermediary. Corresponding
11 changes appear in Section 9-203(b). The official comments should explain that
12 subsections (f) and (g) apply to a person in possession of security certificates or
13 holding security certificates for the secured party under Section 8-301.

14 Under new subsection (f), a possessory security interest in a certificated
15 security remains perfected until the debtor obtains possession of the security
16 certificate. This rule is analogous to that of Section 9-312(c), which deals with
17 perfection of security interests in investment property by control. See Section 9-
18 312, Comment 3.

19 **SECTION 9-312. PERFECTION BY CONTROL.**

20 (a) A security interest in investment property, a deposit account, a letter-of-
21 credit right, or intangible chattel paper may be perfected by control of the collateral
22 under Section 9-108, 9-109, 9-110, or 9-110A.

23 (b) A security interest in a deposit account, a letter-of-credit right, or
24 intangible chattel paper is perfected by control from the time the secured party
25 obtains control and continues only while control is retained[, unless otherwise
26 provided in this article].

27 (c) A security interest in investment property is perfected by control from
28 the time the secured party obtains control and remains perfected by control until:

1 **DISPOSITION OF COLLATERAL AND IN PROCEEDS.**

2 (a) “Proceeds means the following property:

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

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

6 (3) rights arising out of collateral;

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

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

12 (b) “Cash proceeds means money checks, deposit accounts, and the like.

13 “Noncash proceeds means all other proceeds.

14 (c) Except as otherwise provided in this article and in Section 2-403(2), a
15 security interest [for agricultural lien]:

16 (1) continues in collateral notwithstanding sale, lease, license, exchange,
17 or other disposition thereof unless the secured party authorized the disposition free
18 of the security interest [for agricultural lien] [in the security agreement or
19 otherwise]; and

20 (2) attaches to any identifiable proceeds.

21 ~~[(d) Other law determines whether an agricultural lien continues on~~

1 collateral notwithstanding disposition or becomes effective as to proceeds.}]

2 (d) ~~(e)~~ Proceeds that are commingled with other property are identifiable
3 proceeds:

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

5 and

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

10 ~~(e)~~ ~~(f)~~ A security interest in or agricultural lien on proceeds is a perfected
11 security interest or agricultural lien if the security interest in or agricultural lien on
12 the original collateral was perfected. ~~(g)~~ ~~A~~ The security interest in or agricultural
13 lien on proceeds ceases to be a perfected security interest or agricultural lien and
14 becomes unperfected on the 21st day after the security interest attaches to the
15 proceeds or the agricultural lien becomes effective as to the proceeds unless:

16 (1) the following conditions are satisfied:

17 (A) a filed financing statement covers the original collateral;

18 (B) the proceeds are collateral in which a security interest may be
19 perfected by filing in the office in which the financing statement has been filed; and

20 (C) if the proceeds are acquired with cash proceeds or funds from a
21 deposit account, the description of collateral in the financing statement indicates the

1 type of property constituting the proceeds;

2 (2) the proceeds are identifiable cash proceeds; or

3 (3) the security interest in or agricultural lien on the proceeds is
4 perfected within 20 days after the security interest attaches to the proceeds or the
5 agricultural lien becomes effective as to the proceeds.

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

10 ~~(g)~~ (h) If a filed financing statement covers the original collateral, a security
11 interest in or agricultural lien on proceeds which remains perfected under subsection
12 ~~(f)~~(1) becomes unperfected at the later of:

13 (1) when the effectiveness of the filed financing statement lapses under
14 Section 9-516 or is terminated under Section 9-511; and

15 (2) the 21st day after the security interest attaches to the proceeds or the
16 agricultural lien becomes effective as to the proceeds.

1 Reporters' Comments

2 **Changes from Prior Draft:**

3 A. Under Section 9-316(a), a merchant-debtor has the power to transfer
4 collateral to a buyer in ordinary course of business free of a security interest the
5 debtor itself created. The question has arisen whether the same result obtains if the
6 secured party entrusts goods to a merchant, other than the debtor, who deals in
7 goods of the kind. Section 2-403(2) provides generally that "Any entrusting of
8 possession of goods to a merchant who deals in goods of that kind gives him power
9 to transfer all rights of the entruster to a buyer in ordinary course of business.
10 However, Section 2-402(3)(a) provides that nothing in Article 2 shall be deemed to
11 impair the rights of creditors of the seller under the provisions of Article 9. Some
12 courts have read that provision, in conjunction with former Section 9-306(2) (draft
13 Section 9-313(c)), to mean that a merchant to whom a secured party has entrusted
14 collateral does not have the power to transfer goods title to a buyer in ordinary
15 course of business.

16 Subsection (c) has been revised to resolve the issue in accordance with the
17 views of the Article 2 Drafting Committee and in favor of the buyer in ordinary
18 course. In doing so, it makes clear that an entrusting secured party runs the same
19 risk as any other entruster. Under Section 2-403(2), the non-debtor merchant to
20 whom a secured party has entrusted collateral has the power, even if not the right,
21 to transfer all the secured party's rights in the collateral to a buyer in ordinary
22 course of business. As a practical matter, this means that the buyer in ordinary
23 course from the merchant will take free of the security interest. Inasmuch as
24 "entrusting" includes any delivery and any acquiescence in retention of possession,
25 see Section 2-403(3), a buyer in ordinary course also would take free if the debtor
26 delivered the goods to a merchant and the secured party acquiesced in the
27 merchant's retention of possession. However, a merchant to whom the debtor
28 delivered the goods would not have the power to cut off a security interest created
29 by the debtor if the secured party neither acquiesced in the merchant's retention of
30 possession nor authorized the merchant to dispose of the goods free of the security
31 interest.

32 B. Consistent with the Drafting Committee's decision at the February,
33 1998, meeting, subsection (c) has been revised and subsection (d) has been deleted.
34 These revisions respond to the suggestion of the ABA Article 9 Revision
35 Agricultural Financing task force that agricultural liens should extend to proceeds
36 in the same manner as security interests.

1 **SECTION 9-314. [CONTINUED] PERFECTION OF SECURITY**
2 **INTEREST OR AGRICULTURAL LIEN FOLLOWING CHANGE IN**
3 **APPLICABLE LAW.**

4 (a) A security interest perfected pursuant to the law designated in Section
5 9-301(1) or Section 9-305(b) or an agricultural lien perfected pursuant to the law
6 designated in Section 9-302 remains perfected until the earliest of:

7 (1) the time perfection would have ceased under the law of the first
8 jurisdiction.

9 (2) the expiration of four months after a change of the debtor's location
10 to another jurisdiction;

11 (3) the expiration of four months after a transfer of collateral to a debtor
12 located in another jurisdiction; or

13 (4) the expiration of four months after a new debtor located in another
14 jurisdiction becomes bound under Section 9-203(c).

15 (b) If a security interest or agricultural lien described in subsection (a)
16 becomes perfected under the law of the other jurisdiction before the earliest time or
17 event described in that subsection, it ~~continues~~ remains perfected thereafter. If the
18 security interest does not become perfected under the law of the other jurisdiction
19 before the earliest event, it becomes unperfected and is deemed never to have been
20 perfected as against a previous or subsequent purchaser of the collateral for value.

21 (c) A possessory security interest in collateral, other than goods covered by

1 a certificate of title and as-extracted collateral consisting of goods, remains
2 continuously perfected if:

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

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

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

8 **~~Alternative A~~**

9 ~~(d) A security interest in goods covered by a certificate of title which is~~
10 ~~perfected by any method under the law of another jurisdiction when the goods~~
11 ~~become covered by a certificate of title from this jurisdiction remains perfected~~
12 ~~until the earlier of:~~

13 ~~(1) the time the security interest would have become unperfected under~~
14 ~~the law of the other jurisdiction had the goods not become so covered; or~~

15 ~~(2) the expiration of four months after the goods had become so~~
16 ~~covered.~~

17 ~~(e) If a security interest described in subsection (d) becomes perfected~~
18 ~~under Section 9-309A(d) or 9-311 before the earlier of the time or the end of the~~
19 ~~period described in that subsection, it continues perfected thereafter. If the security~~
20 ~~interest does not become perfected under one of those sections before the earlier of~~
21 ~~that time or the end of that period, it becomes unperfected and is deemed never to~~

1 have been perfected as against a previous or subsequent purchaser of the collateral
2 for value.

3 **Alternative B**

4 (d) A security interest in goods covered by a certificate of title which is
5 perfected by any method under the law of another jurisdiction when the goods
6 become covered by a certificate of title from this jurisdiction remains perfected
7 until the security interest would have become unperfected under the law of the other
8 jurisdiction had the goods not become so covered.

9 (e) A security interest described in subsection (d) becomes unperfected as
10 against a purchaser of the goods for value and is deemed never to have been
11 perfected as against a previous or subsequent purchaser of the collateral for value if
12 the applicable requirements for perfection under Section 9-309A(d) or 9-311 are
13 not satisfied before the earlier of:

14 (1) the time the security interest would have become unperfected under
15 the law of the other jurisdiction had the goods not become so covered; or

16 (2) the expiration of four months after the goods had become so
17 covered.

18 **End of Alternatives**

19 (f) A security interest in deposit accounts[, letter-of-credit rights,] [or
20 investment property] perfected under the law of the bank's jurisdiction[, the issuer's
21 jurisdiction, a nominated person's jurisdiction,] [, the securities intermediary's

1 jurisdiction, or the commodity intermediary's jurisdiction, as applicable] remains
2 perfected until the earlier of:

3 (1) the time perfection would have ceased under the law of the first
4 jurisdiction; or

5 (2) the expiration of four months after a change of the [bank's]
6 [applicable] jurisdiction.

7 (g) If a security interest described in subsection (f) becomes perfected under
8 the law of the other jurisdiction before the earlier of the time or the end of the
9 period described in that subsection, it ~~continues~~ remains perfected thereafter. If the
10 security interest does not become perfected under the law of the other jurisdiction
11 before the earlier of that time or the end of that period, it becomes unperfected and
12 is deemed never to have been perfected as against a previous or subsequent
13 purchaser of the collateral for value.

14 [(h) A security interest in letter-of-credit rights perfected by control under
15 the law of the issuer's or nominated person's jurisdiction remains perfected until
16 the earlier of:

17 (1) the time perfection would have ceased under the law of the first
18 jurisdiction; or

19 (2) the expiration of four months after a change of the issuer's or
20 nominated person's jurisdiction.

21 (i) If a security interest described in subsection (h) becomes perfected under

1 the law of the other jurisdiction before the earlier of the time or the end of the
2 period described in that subsection, it ~~continues~~ remains perfected thereafter. If the
3 security interest does not become perfected under the law of the other jurisdiction
4 before the earlier of that time or the end of that period, it becomes unperfected and
5 is deemed never to have been perfected as against a previous or subsequent
6 purchaser of the collateral for value.]

7 (j) A security interest in investment property perfected under the law of the
8 securities intermediary's jurisdiction or the commodity intermediary's jurisdiction,
9 as applicable, remains perfected until the earlier of:

10 (1) the expiration of four months after a change of the intermediary's
11 jurisdiction; or

12 (2) the time perfection would have ceased under the law of the first
13 jurisdiction.

14 (k) If a security interest described in subsection (j) becomes perfected under
15 the law of the other jurisdiction before the earlier of the time or the end of the
16 period described in that subsection, it ~~continues~~ remains perfected thereafter. If the
17 security interest does not become perfected under the law or the other jurisdiction
18 before the earlier of that time or the end of that period, it becomes unperfected and
19 is deemed never to have been perfected as against a previous or subsequent
20 purchaser of the collateral for value.]

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

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

19 (d) A buyer of accounts, general intangibles, or investment property, other
20 than a security certificate, which is not a secured party takes free of a security

1 interest if the buyer gives value without knowledge of the security interest and
2 before it is perfected.

3 (e) Except as otherwise provided in Sections 9-316 and 9-317, if a person
4 files a financing statement with respect to a purchase-money security interest before
5 or within 20 days after the debtor receives delivery of the collateral, the security
6 interest takes priority over the rights of a buyer, lessee, or lien creditor which arise
7 between the time the security interest attaches and the time of filing.

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

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

15 (b) Except as otherwise provided in subsection (c), for purposes of
16 determining the rights of creditors of, and purchasers for value of goods from, a
17 consignee, the consignee has rights and title to the goods identical to those the
18 consignor had or had power to transfer while the goods are in the possession of the
19 consignee.

20 (c) For purposes of determining the rights of a creditor of a consignee, other

1 law determines the rights and title of a consignee while goods are in the consignee's
2 possession if, under this part, a perfected security interest held by the consignor
3 would be senior to the rights of the creditor.

4 **SECTION 9-316. BUYER OF GOODS.**

5 (a) Except as otherwise provided in subsection (e), a buyer in ordinary
6 course of business [, other than a person buying farm products from a person
7 engaged in farming operations,] takes free of a security interest created by the
8 buyer's seller, even if the security interest is perfected and ~~even if~~ the buyer knows
9 of its existence.

10 (b) Except as otherwise provided in subsection (e), a buyer of consumer
11 goods takes free of a security interest, even if perfected, if the buyer buys:

- 12 (1) without knowledge of the security interest;
- 13 (2) for value;
- 14 (3) for the buyer's own personal, family, or household purposes; and
- 15 (4) before a person files a financing statement covering the goods.

16 (c) To the extent that it affects the priority of a security interest over a buyer
17 of consumer goods under subsection (b), the period of effectiveness of a filing
18 made in the jurisdiction in which the debtor is located is governed by Section
19 9-314(a) and (b).

20 (d) [Except as otherwise provided in subsection (e) a] [A] buyer in ordinary

1 course of business buying oil, gas, or other minerals at the wellhead or minehead or
2 after extraction takes free of an interest arising out of an encumbrance.

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

5 **SECTION 9-317. LESSEE OF GOODS IN ORDINARY COURSE OF**
6 **BUSINESS.** A lessee of goods in ordinary course of business takes the leasehold
7 interest free of a security interest in the goods created by the lessor even if the
8 security interest is perfected and the lessee knows of its existence.

9 **SECTION 9-318. LICENSEE IN ORDINARY COURSE OF BUSINESS.**
10 [To be moved from Article 2B]

11 **SECTION 9-319. PRIORITIES AMONG CONFLICTING SECURITY**
12 **INTERESTS AND AGRICULTURAL LIENS IN SAME COLLATERAL.**

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

18 (1) Conflicting security interests and agricultural liens rank according to

1 priority in time of filing or perfection. Priority dates from the earlier of the time:

2 (A) a filing covering the collateral is first made; or

3 (B) the security interest or agricultural lien is first perfected, if there
4 is no period thereafter when there is neither filing nor perfection.

5 (2) The first security interest or agricultural lien to attach or become
6 effective has priority if conflicting security interests and agricultural liens are
7 unperfected.

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

10 (c) A security interest in collateral which qualifies for priority over a
11 conflicting security interest under Section 9-324, 9-325, 9-326, 9-327, or 9-328 also
12 has priority in:

13 (1) cash proceeds of the collateral; and

14 (2) other proceeds of the collateral if the proceeds are chattel paper,
15 negotiable documents, instruments, investment property, or letter-of-credit rights.

16 (d) Subject to subsection (e), if a security interest in chattel paper, deposit
17 accounts, negotiable documents, instruments, investment property, or letter-of-
18 credit rights is perfected by a method other than filing, conflicting security interests
19 in and agricultural liens on proceeds of the collateral rank according to priority in
20 time of filing.

21 (e) Subsection (d) applies only if the proceeds of the collateral are not cash

1 proceeds, chattel paper, negotiable documents, instruments, investment property, or
2 letter-of-credit rights.

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

7 **SECTION 9-319A.**

8 [deleted]

9 **SECTION 9-320. FUTURE ADVANCES.**

10 (a) Except as otherwise provided in subsection (c), for purposes of
11 determining the priority of a security interest under Section 9-319(a), perfection of
12 the security interest dates from the time an advance is made to the extent that the
13 security interest secures an advance that:

14 (1) is not made pursuant to commitment; and

15 (2) is made while the security interest is temporarily perfected under
16 Section 9-310(d) or (e) [or is perfected when it attaches under Section 9-308A] and
17 by no other method.

18 (b) Except as otherwise provided in subsection (c), a security interest is
19 subordinate to the rights of a person that becomes a lien creditor while the security

1 interest is perfected only to the extent that it secures advances made more than 45
2 days after the person becomes a lien creditor unless the advance is made:

3 (1) without knowledge of the lien; or

4 (2) pursuant to a commitment entered into without knowledge of the
5 lien.

6 (c) Subsections (a) and (b) do not apply to a security interest held by a
7 secured party that is a buyer of accounts, chattel paper, or payment intangibles or a
8 consignor.

9 (d) Except as otherwise provided in subsections (e) and (g), a buyer of
10 goods other than a buyer in ordinary course of business takes free of a security
11 interest to the extent that it secures advances made after the earlier of:

12 (1) the time the secured party acquires knowledge of the buyer's
13 purchase; or

14 (2) 45 days after the purchase.

15 (e) Subsection (d) does not apply if the advance is made pursuant to a
16 commitment entered into without knowledge of the buyer's purchase and before the
17 expiration of the 45-day period.

18 ~~(f) Subsection (d) does not affect a security interest in goods in the~~
19 ~~possession of the secured party under Section 9-311.~~

20 (f) Except as otherwise provided in subsection (g), a lessee of goods other
21 than a lessee of goods in ordinary course of business takes the leasehold interest

1 free of a security interest to the extent that it secures advances made after the earlier
2 of:

3 (1) the time the secured party acquires knowledge of the lease; or

4 (2) 45 days after the lease contract becomes enforceable.

5 ~~(g) Subsection (g) does~~ Subsections (d) and (f) do not apply if the advance
6 is made pursuant to a commitment entered into without knowledge of the lease and
7 before the expiration of the 45-day period.

8 Reporters' Comments

9 **Changes from Prior Draft:** Subsection (f) of the January, 1998, draft has
10 been deleted. Is this satisfactory to the Drafting Committee?

11 ***[MODEL SECTION 9-320A. PRIORITY OF PRODUCTION-MONEY***
12 ***SECURITY INTERESTS AND AGRICULTURAL LIENS.***

13 *(a) Except as otherwise provided in subsections (c), (d), and (e), if the*
14 *requirements of subsection (b) are met, a perfected production-money security*
15 *interest in production-money crops has priority over a conflicting security interest*
16 *in the same crops and, except as otherwise provided in Section 9-325, also has*
17 *priority in their identifiable proceeds.*

18 *(b) A production-money security interest has priority under subsection (a)*
19 *if:*

20 *(1) the production-money security interest is perfected by filing when*
21 *the production-money secured party first gives new value to enable the debtor to*

1 *produce the crops;*

2 *(2) the production-money secured party gives an authenticated*
3 *notification to the holder of the conflicting security interest not less than 10 or*
4 *more than 30 days before the production-money secured party first gives new value*
5 *to enable the debtor to produce the crops if the holder had filed a financing*
6 *statement covering the crops before the date of the filing made by the production-*
7 *money secured party; and*

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

11 *(c) Except as otherwise provided in subsection (e) (d), if more than one*
12 *security interest qualifies for priority in the same collateral under subsection (a),*
13 *the security interests rank according to priority in time of filing under Section*
14 *9-319(a).*

15 *(d) To the extent that a person holding a perfected security interest in*
16 *production-money crops that are the subject of a production-money security*
17 *interest gives new value to enable the debtor to produce the production-money*
18 *crops and the value is in fact used for the production of the production-money*
19 *crops, the security interests rank according to priority in time of filing under*
20 *Section 9-319(a).*

21 *(e) To the extent that a person holds both an agricultural lien and a*

1 *Subsection (e) deals with a creditor who holds both an agricultural lien and an*
2 *Article 9 production-money security interest in the same collateral. In these cases,*
3 *the priority rules applicable to agricultural liens govern. The creditor can avoid*
4 *this result by waiving its agricultural lien.*

5 **SECTION 9-321.**

6 [deleted]

7 **SECTION 9-322. PRIORITY OF PURCHASE-MONEY SECURITY**
8 **INTERESTS.**

9 (a) Subject to subsection (b), and except as otherwise provided in
10 subsection (g), a perfected purchase-money security interest in inventory has
11 priority over a conflicting security interest in the same inventory, has priority over a
12 conflicting security interest in chattel paper or an instrument constituting proceeds
13 of the inventory and in proceeds of the chattel paper or instrument as provided in
14 Section 9-327, and, except as otherwise provided in Section 9-325, also has priority
15 in its identifiable cash proceeds of the inventory to the extent the identifiable cash
16 proceeds are received on or before the delivery of the inventory to a buyer, if:

17 (1) the purchase-money security interest is perfected when the debtor
18 receives possession of the inventory;

19 (2) the purchase-money secured party gives an authenticated notification
20 to the holder of the conflicting security interest, if the holder had filed a financing
21 statement covering the same types of inventory:

22 (A) before the date of a filing made by the purchase-money secured

1 party; or

2 (B) if the purchase-money security interest is temporarily perfected
3 without filing or possession under Section 9-310(e), before the beginning of the
4 20-day period thereunder;

5 (3) the holder of the conflicting security interest receives the notification
6 no earlier than five years before the debtor receives possession of the inventory; and

7 (4) the notification states that the person giving the notification has or
8 expects to acquire a purchase-money security interest in inventory of the debtor and
9 describes the inventory by item or type.

10 (b) Subsections (a)(2) through (4) apply only if the holder of the conflicting
11 security interest had filed a financing statement covering the same types of
12 inventory:

13 (1) if the purchase-money security interest is perfected by filing, before
14 the date of the filing; or

15 (2) if the purchase-money security interest is temporarily perfected
16 without filing or possession under Section 9-310(f), before the beginning of the
17 20-day period thereunder.

18 ~~(c) If a purchase-money security interest in inventory has priority over a~~
19 ~~conflicting security interest under subsection (a), a security interest held by the~~
20 ~~purchase-money secured party in chattel paper [or an instrument] constituting~~
21 ~~proceeds of the inventory has priority over a conflicting security interest in the~~

1 chattel paper [or instrument] if:

2 (1) ~~the conflicting security interest in the chattel paper [or instrument] is~~
3 ~~claimed merely as proceeds of inventory subject to a security interest; and:~~

4 (A) ~~the purchase-money secured party takes possession of the chattel~~
5 ~~paper [or instrument] in the ordinary course of its business; and~~

6 (B) ~~the chattel paper [or instrument] does not indicate that it has~~
7 ~~been assigned to [an identified assignee] [the person holding the conflicting security~~
8 ~~interest]; or~~

9 (2) ~~the purchase-money secured party takes possession of the chattel~~
10 ~~paper [or instrument] in good faith, in the ordinary course of its business, and~~
11 ~~without knowledge that its security interest violates the rights of the person holding~~
12 ~~the conflicting security interest.~~

13 (c) ~~(d)~~ Subject to subsection (e) and except as otherwise provided in
14 subsection (g), a perfected purchase-money security interest in livestock that are
15 farm products has priority over a conflicting security interest in the same livestock
16 and, except as otherwise provided in Section 9-325, also has priority in its
17 identifiable proceeds and identifiable products in their unmanufactured states if:

18 (1) the purchase-money security interest is perfected when the debtor
19 receives possession of the livestock;

20 (2) the purchase-money secured party gives an authenticated notification
21 to the holder of the conflicting security interest;

1 (3) the holder of the conflicting security interest receives the notification
2 no earlier than six months before the debtor receives possession of the livestock;
3 and

4 (4) the notification states that the person giving the notification has or
5 expects to acquire a purchase-money security interest in livestock of the debtor and
6 describes the livestock by item or type.

7 (d) ~~(e)~~ Subsections (d)(2) through (4) apply only if the holder of the
8 conflicting security interest had filed a financing statement covering the same types
9 of livestock:

10 (1) if the purchase-money security interest is perfected by filing, before
11 the date of the filing; or

12 (2) if the purchase-money security interest is temporarily perfected
13 without filing or possession under Section 9-310(f), before the beginning of the
14 20-day period thereunder.

15 (e) ~~(f)~~ Except as otherwise provided in subsection (g), 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 (f) ~~(g)~~ If more than one security interest qualifies for priority in the same

1 collateral under subsection (a), (d), or (f):

2 (1) a security interest securing an obligation incurred [by an obligor] as
3 the price of the collateral has priority over a security interest securing an obligation
4 incurred [by an obligor] for value given to enable the debtor to acquire rights in
5 collateral; and

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

8 **Reporters' Comments**

9 **Changes from Prior Draft:** The rule in former subsection (c) afforded
10 priority in chattel-paper- and instrument-proceeds of a purchase-money security
11 interest in inventory, if the holder of the PMSI met all the requirements for priority
12 under Section 9-327 other than the requirement to give new value. Under new
13 Section 9-327(e), the holder of a PMSI in inventory is deemed automatically to
14 meet the “new value” requirement, so former subsection (c) no longer is necessary.
15 Subsection (a) has been revised to refer to Section 9-327.

16 **SECTION 9-323. PRIORITY OF SECURITY INTERESTS IN**
17 **TRANSFERRED COLLATERAL.**

18 [(a)] [Subject to subsection (b), a] [A] security interest created by a debtor
19 is subordinate to a security interest in the same collateral created by another person,
20 notwithstanding anything to the contrary in this part, if:

21 (1) the debtor acquired the collateral subject to a security interest created
22 by the other person;

23 (2) the security interest created by the other person was perfected when

1 the debtor acquired the collateral; and

2 (3) there is no period thereafter when the security interest is unperfected.

3 [(b) If the security interest created by the other person is unperfected when
4 the debtor acquires the property or at any time thereafter, the other provisions of
5 this part, as applicable, determine its priority.]

6 **SECTION 9-323A. PRIORITY OF SECURITY INTERESTS CREATED**
7 **BY NEW DEBTOR.**

8 (a) Subject to subsection (b), a security interest that is perfected by a filed
9 financing statement that is effective solely under Section 9-510 in collateral in
10 which a new debtor has or acquires rights is subordinate to a security interest in the
11 same collateral that is perfected in another manner.

12 (b) If more than one security interest in the same collateral is subordinate
13 under this section, the other provisions of this part, as applicable, determine the
14 priority among of the subordinated security interests.

15 **SECTION 9-324. PRIORITY OF SECURITY INTERESTS IN**
16 **INVESTMENT PROPERTY.** The following rules govern priority among
17 conflicting security interests in the same investment property:

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

1 control over the investment property.

2 (2) A possessory security interest in a certificated security [in registered
3 form] which is perfected under Section 9-311(a) has priority over a conflicting
4 security interest perfected by a method other than control.

5 (3) Except as otherwise provided in paragraphs (4) and (5), conflicting
6 security interests of secured parties each of which has control rank [according to
7 priority in time of obtaining control] [equally].

8 (4) A security interest held by a securities intermediary in a security
9 entitlement or a securities account maintained with the securities intermediary has
10 priority over a conflicting security interest held by another secured party.

11 (5) A security interest held by a commodity intermediary in a commodity
12 contract or a commodity account maintained with the commodity intermediary has
13 priority over a conflicting security interest held by another secured party.

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

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

19 Reporters' Comments

20 **Discussion Questions:**

21 A. Concerning paragraph (2), see Section 9-311, Comment 2. Is the

1 reference to “registered form, which appeared in former § 9-115(6) and is now in
2 square brackets, necessary? Useful?

3 B. Consistent with the decision of the Drafting Committee at the February,
4 1998, meeting, paragraph (3) has been revised to provide a first-to-control priority
5 rule for conflicting security interests perfected by control. No similar change has
6 been made to paragraph (6), however. How should the first-to-control priority rule
7 be applied to after-acquired collateral, in which conflicting security interests may
8 attach and become perfected by control simultaneously?

9 **SECTION 9-325. PRIORITY OF SECURITY INTERESTS IN DEPOSIT**

10 **ACCOUNTS.** The following rules govern priority among conflicting security
11 interests in the same deposit account:

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

15 (2) Except as otherwise provided in paragraphs (3) and (4), security
16 interests perfected by control rank according to priority in time of obtaining
17 control [equally].

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

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

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Reporters' Comments

Discussion Question: If a change is made to the equal priority rule in Section 9-324(3), for security interests in investment property perfected by control, should a corresponding change be made to this section?

SECTION 9-326. PRIORITY OF SECURITY INTERESTS IN LETTER-OF-CREDIT RIGHTS. The following rules govern priority among conflicting security interests in the same letter-of-credit right:

(1) Except as otherwise provided in paragraph (2):

(A) a security interest held by a secured party that has control over the letter-of-credit right has priority to the extent of its control over a conflicting security interest held by a secured party that does not have control; and

(B) security interests perfected by control rank [according to priority in time of obtaining control] [equally].

(2) The rights of a transferee beneficiary or nominated person are independent and superior to the extent provided by Section 5-114.

Reporters' Comments

Discussion Question: If a change is made to the equal priority rule in Section 9-324(3), for security interests in investment property perfected by control, should a corresponding change be made to this section?

SECTION 9-327. PURCHASE OF CHATTEL PAPER AND INSTRUMENTS.

(a) A purchaser of chattel paper [or an instrument] has priority over a security interest in the chattel paper [or instrument] which is claimed merely as

1 proceeds of inventory subject to a security interest and, except as otherwise
2 provided in Section 9-325, in proceeds of the chattel paper or instrument if:

3 (1) in good faith and in the ordinary course of the purchaser's business,
4 the purchaser gives new value and takes possession or obtains control of the chattel
5 paper [or takes possession of the instrument]; and

6 (2) the chattel paper [or instrument] does not indicate that it has been
7 assigned to [an identified assignee] [the person holding the conflicting security
8 interest].

9 (b) A purchaser of chattel paper or an instrument has priority over a
10 security interest in the chattel paper or instrument which is claimed other than
11 merely as proceeds of inventory subject to a security interest and, except as
12 otherwise provided in Section 9-325, in proceeds of the chattel paper or instrument
13 if the purchaser gives new value and:

14 (1) takes possession or obtains control of the chattel paper in good faith,
15 in the ordinary course of the purchaser's business, and without knowledge that the
16 purchase violates the rights of the secured party; or

17 (2) takes possession of the instrument in good faith and without
18 knowledge that the purchase violates the rights of the secured party.

19 (c) For purposes of subsection (b), if chattel paper or an instrument
20 indicates that it has been assigned to [an identified assignee] [the person holding the
21 conflicting security interest] ~~secured party~~, a purchaser of the chattel paper or

1 instrument has knowledge that the purchase violates the rights of the secured party.

2 [(d) Except as otherwise provided in Section 9-328(c), a [possessory
3 security interest in] [purchaser for value that takes possession of] an instrument has
4 priority over a [nonpossessory security interest in the instrument perfected by
5 means other than filing] [security interest in the instrument perfected by filing].]

6 (e) For purposes of this section, the holder of a purchase-money security
7 interest in inventory gives new value for chattel paper or an instrument constituting
8 proceeds of the inventory.

9 **SECTION 9-328. PRIORITY OF RIGHTS OF PURCHASERS OF**
10 **INSTRUMENTS, DOCUMENTS, AND SECURITIES UNDER OTHER**
11 **ARTICLES; PRIORITY OF INTERESTS IN FINANCIAL ASSETS AND**
12 **SECURITY ENTITLEMENTS UNDER ARTICLE 8.**

13 (a) Nothing in this article limits the rights of a holder in due course of a
14 negotiable instrument, a holder to whom a negotiable document of title has been
15 duly negotiated, or a protected purchaser of a security. These holders or purchasers
16 take priority over an earlier security interest, even if perfected, to the extent
17 provided in Articles 3, 7, and 8.

18 (b) Nothing in this article limits the rights of or imposes liability on a
19 person to the extent that the person is protected against the assertion of an adverse
20 claim under Article 8

1 (c) Filing under this article does not constitute notice of a claim or defense
2 to the holders, or purchasers, or persons mentioned in subsections (a) and (b).

3 Reporters' Comments

4 [The following draft official comment has been revised.]

5 x. **Collections by Junior Secured Party.** Under this section, a junior
6 secured party in accounts may, under some circumstances collect and retain the
7 proceeds of those accounts, free of the claim of a senior secured party to those same
8 accounts. In order to qualify as a holder in due course, however, the junior must
9 satisfy the requirements of Section 3-302, which include taking in "good faith .
10 This means that the junior not only must act "honestly , but also must observe
11 "reasonable commercial standards of fair dealing under the particular
12 circumstances. See Section § 9-102(a)(27). Although "good faith does not impose
13 a general duty of inquiry, e.g., a search of the records in filing offices, there may be
14 circumstances in which "reasonable commercial standards of fair dealing would
15 require such a search.

16 Consider, for example, a junior secured party in the business of financing or
17 buying accounts who fails to undertake a search to determine the existence of prior
18 security interests. Because a search, under the usages of trade of that business,
19 would enable it to know or learn upon reasonable inquiry that collecting the
20 accounts violated the rights of a senior secured party, the junior may fail to meet the
21 good-faith standard. See *Utility Contractors Financial Services, Inc. v. Amsouth*
22 *Bank, NA*, 985 F.2d 1554 (11th Cir. 1993). Likewise, a junior secured party who
23 collects accounts when it knows or should know under the particular circumstances
24 that doing so would violate the rights of a senior secured party, because the debtor
25 had agreed not to grant a junior security interest in, or sell, the accounts, may not
26 meet the good-faith test. Thus, if a junior secured party conducted or should have
27 conducted a search and a financing statement filed on behalf of the senior secured
28 party states such a restriction, the junior's collection would not meet the good-faith
29 standard. On the other hand, if there was a course of performance between the
30 senior secured party and the debtor which placed no such restrictions on the debtor
31 and allowed the debtor to collect and use the proceeds without any restrictions, the
32 junior secured party may then satisfy the requirements for being a holder in due
33 course. This would be more likely in those circumstances where the junior secured
34 party was providing additional financing to the debtor on an on-going basis by
35 lending against or buying the accounts and had no notice of any restrictions against
36 doing so. Generally, the senior secured party would not be prejudiced because the

1 practical effect of such payment to the junior secured party is little different than if
2 the debtor itself had made the collections and subsequently paid the secured party
3 from the debtor's general funds. Absent collusion, the junior secured party would
4 take the funds free of the senior security interests. See Section 9-329. In contrast,
5 the senior secured party is likely to be prejudiced if, as a part of a liquidation
6 process, the junior secured party collects the accounts by notifying the account
7 debtors to make payments directly to the junior. Those collections may not be
8 consistent with "reasonable commercial standards of fair dealing .

9 Whether the junior secured party qualifies as a holder in due course is fact-
10 sensitive and should be decided on a case-by-case basis in the light of those
11 circumstances. Decisions such as *Financial Management Services Inc. v. Familian*,
12 905 P.2d 506 (Ariz. App. Div. 1995) (finding holder in due course status) could be
13 determined differently under this application of the good-faith requirement.

14 **SECTION 9-329. TRANSFER OF MONEY; TRANSFER OF FUNDS**
15 **FROM DEPOSIT ACCOUNT.**

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

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

22 Reporters' Comments

23 **Discussion Question:** Should subsection (b) also cover transferees of funds
24 from securities accounts? Other sources? (The Drafting Committee earlier decided
25 that it should not be extended to letter-of-credit rights.)

26 **SECTION 9-330. PRIORITY OF CERTAIN LIENS ARISING BY**

1 **FIXTURES.**

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

5 (b) A security interest under this article may be created in goods that are
6 fixtures or may continue in goods that become fixtures. A security interest does not
7 exist under this article in ordinary building materials incorporated into an
8 improvement on land.

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

11 (d) Except as otherwise provided in subsection (h), a perfected security
12 interest in fixtures has priority over a conflicting interest of an encumbrancer or
13 owner of the real property if the debtor has an interest of record in the real property
14 or is in possession of the real property and:

15 (1) the security interest is a purchase-money security interest; [and]

16 (2) [the interest of the encumbrancer or owner arises before the goods
17 become fixtures; and

18 (3)] the security interest is perfected by a fixture filing before the goods
19 become fixtures or within 20 days thereafter.

20 (e) A perfected security interest in fixtures has priority over a conflicting
21 interest of an encumbrancer or owner of the real property if:

1 (1) the debtor has an interest of record in the real property or is in
2 possession of the real property and the security interest:

3 (A) is perfected by a fixture filing before the interest of the
4 encumbrancer or owner is of record; and

5 (B) the security interest has priority over any conflicting interest of a
6 predecessor in title of the encumbrancer or owner;

7 (2) before the goods become fixtures, the security interest is perfected by
8 any method permitted by this article and the fixtures are readily removable:

9 (A) factory or office machines;

10 (B) equipment that is not primarily used or leased for use in the
11 operation of the real property; or

12 (C) replacements of domestic appliances that are consumer goods;

13 (3) the conflicting interest is a lien on the real property obtained by legal
14 or equitable proceedings after the security interest was perfected by any method
15 permitted by this article; or

16 (4) the security interest is:

17 (A) created in a manufactured home in a manufactured-home
18 transaction; and

19 (B) perfected [pursuant to a statute described in Section 9-
20 309A(a)(2) or (3)] [before the manufactured home becomes a fixture or within 20
21 days thereafter].

1 security interest in a fixture that is a manufactured home be senior a conflicting
2 interest of an encumbrancer or owner of real property, however and whenever it is
3 perfected.

4 **SECTION 9-332. ACCESSIONS.**

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

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

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

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

13 (e) A security interest in an accession is subordinate to a security interest in
14 the whole which is perfected by compliance with the requirements of a certificate-
15 of-title statute under Section 9-309A(d).

16 (f) On default, subject to Part 6, a secured party may remove an accession
17 from other goods if the security interest in the accession has priority over the claims
18 of every person having an interest in the whole.

19 (g) A secured party that removes an accession from other goods under
20 subsection (f) shall promptly reimburse any encumbrancer or owner of the whole or
21 of the other goods, other than the debtor, for the cost of repair of any physical injury

1 to the whole or the other goods. The secured party need not reimburse the
2 encumbrancer or owner for any diminution in value of the whole or the other goods
3 caused by the absence of the accession removed or by any necessity for replacing it.
4 A person entitled to reimbursement may refuse permission to remove until the
5 secured party gives adequate assurance for the performance of the obligation to
6 reimburse.

7 **SECTION 9-333. COMMINGLED GOODS.**

8 (a) In this section, “commingled goods” means goods that are physically
9 united with other goods in such a manner that their identity is lost in a product or
10 mass.

11 (b) ~~A~~ ~~Except as otherwise provided in subsection (c), no security interest~~
12 ~~exists [under this Article]~~ does not exist in commingled goods as such; however, a
13 security interest may attach to a product or mass that results when goods become
14 commingled goods.

15 (c) If collateral becomes commingled goods, a security interest attaches to
16 the product or mass.

17 (d) If a security interest in collateral is perfected before the collateral
18 becomes commingled goods, the security interest that attaches to the product or
19 mass under subsection (c) is perfected.

20 (e) Except as otherwise provided in subsection (f), the other provisions of
21 this part, as applicable, determine the priority of a security interest that attaches to

1 the product or mass under subsection (c).

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

4 (1) A security interest that is perfected under subsection (d) has priority
5 over a security interest that is unperfected at the time the collateral becomes
6 commingled goods.

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

10 Reporters' Comments

11 **Changes from Prior Draft:** Subsection (b) has been revised to clarify its
12 intended meaning. Subsection (c) is only one example of the way in which a
13 security interest may attach to a product or mass. A security interest also may attach
14 to a product or mass under Section 9-203.

15 **SECTION 9-334. PRIORITY OF SECURITY INTERESTS IN GOODS**

16 **COVERED BY CERTIFICATE OF TITLE.** If, while a security interest in
17 goods is perfected by any method under the law of another jurisdiction, this State
18 issues a certificate of title that ~~neither shows~~ does not show that the goods are
19 subject to the security interest ~~nor contains~~ or contain a statement that they may be
20 subject to security interests not shown on the certificate:

21 (1) a buyer of the goods, other than a person that is in the business of selling
22 goods of that kind, takes free of the security interest if to the extent that the buyer

1 gives value and receives delivery of the goods after issuance of the certificate and
2 without knowledge of the security interest; and

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

7 **SECTION 9-335. PRIORITY OF SECURITY INTEREST OR**
8 **AGRICULTURAL LIEN PERFECTED BY EFFECTIVE FINANCING**
9 **STATEMENT CONTAINING INCORRECT INFORMATION.** A security
10 interest or agricultural lien perfected by a filed financing statement complying with
11 Section 9-502(a) and (b) but containing information described in Section
12 9-515(b)(5) which is incorrect is subordinate to the rights of a holder of a perfected
13 security interest in or [another purchaser] [a buyer] of the collateral to the extent
14 that the secured party or [other purchaser] [buyer] gives value in reasonable reliance
15 upon the incorrect information.

16 (b) A statutory lien, other than an agricultural lien, perfected by a filed
17 financing statement complying with Section 9-502(a) but containing information
18 described in Section 9-515(b)(5) ~~that~~ which is incorrect is subordinate to the rights
19 of a holder of a perfected security interest in the collateral to the extent that the
20 secured party gives value in reasonable reliance upon the incorrect information.

1 **SECTION 9-338. BANK’S RIGHT TO DISPOSE OF FUNDS IN**
2 **DEPOSIT ACCOUNT.** Except as otherwise provided in Section 9-337(c), and
3 unless the bank otherwise agrees in an authenticated record, a bank's rights and
4 duties with respect to a deposit account maintained with the bank are not
5 terminated, suspended, or modified by:

- 6 (1) the creation or perfection of a security interest in the deposit account;
7 (2) the bank's knowledge of the security interest; or
8 (3) the bank's receipt of instructions from the secured party.

9 **SECTION 9-339. BANK’S RIGHT TO REFUSE TO ENTER INTO OR**
10 **DISCLOSE EXISTENCE OF CONTROL AGREEMENT.** This article does not
11 require a bank to enter into an agreement of the type described in Section
12 9-109(a)(2) even if its customer so requests or directs. A bank that has entered into
13 such an agreement is not required to confirm the existence of the agreement to
14 another person unless requested to do so by its customer.

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PART 4
RIGHTS OF THIRD PARTIES

SECTION 9-401. ALIENABILITY OF DEBTOR'S RIGHTS.

[(a)] A debtor's rights in collateral may be voluntarily or involuntarily transferred notwithstanding any [agreement] [provision in the security agreement] prohibiting a transfer or making a transfer a default.

[(b) Except as otherwise provided in subsection (a) and in Sections 9-404, 9-405, 9-406, and 9-406A, whether a debtor's rights in collateral may be voluntarily or involuntarily transferred is governed by applicable law other than this article.]

Reporters' Comments

Changes from Prior Draft: New subsection (b) would address the question whether property necessarily is transferable by virtue of its inclusion (i.e., its eligibility as collateral) within the scope of Article 9. Subsection (b) gives a negative answer, subject to the identified exceptions. If subsection (b) is retained, the newly-bracketed language in the definition of "commercial tort claim" (Section 9-102(a)) and in the exceptions to the tort exclusion (Section 9-112(d)(11)) should be deleted. We believe that subsection (b) is implicit in current law.

SECTION 9-402. SECURED PARTY NOT OBLIGATED ON CONTRACT OF DEBTOR. The existence of a security interest, agricultural lien, or authority given to a debtor to dispose of or use collateral, without more, does not impose upon a secured party liability in contract or tort liability upon a secured party for the debtor's acts or omissions.

1 personal, family, or household purposes.

2 (f) Except as otherwise provided in subsection (d), this ~~This~~ section does
3 not displace other law that gives effect to an agreement by an account debtor not to
4 assert a claim or defense against an assignee.

5 Reporters' Comments

6 **Change from Prior Draft:** Subsection (d) is new. Under this
7 subsection, the assignee of a writing that is required to contain the legend set forth
8 in the Federal Trade Commission Holder in Due Course Regulations takes subject
9 to the consumer account debtor's claims and defenses even if the required legend
10 does not appear on the writing. The draft presents three different formulations of
11 the rule for the Drafting Committee's consideration.

12 **SECTION 9-404. RIGHTS ACQUIRED BY ASSIGNEE; DEFENSES**
13 **AGAINST ASSIGNEE; MODIFICATION OF CONTRACT; DISCHARGE**
14 **OF ACCOUNT DEBTOR; NOTIFICATION OF ASSIGNMENT;**
15 **IDENTIFICATION AND PROOF OF ASSIGNMENT; TERM**
16 **PROHIBITING ASSIGNMENT INEFFECTIVE.**

17 (a) Unless an account debtor has made an enforceable agreement not to
18 assert defenses or claims, and subject to subsections (b) and (k) ~~(j)~~, the rights of an
19 assignee are subject to:

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

23 (2) any other defense or claim of the account debtor against the assignor

1 which accrues before the account debtor receives a notification of the assignment
2 authenticated by the assignor or the assignee.

3 (b) Subject to subsection (k) (j) and except as otherwise provided in
4 subsection (l), the claim of an account debtor against an assignor may be asserted
5 against an assignee under subsection (a) only to reduce the amount the account
6 debtor owes.

7 (c) A modification of or substitution for an assigned contract is effective
8 against an assignee if made in good faith and in accordance with reasonable
9 commercial standards. The assignee acquires corresponding rights under the
10 modified or substituted contract. The assignment may provide that the modification
11 or substitution is a breach of contract by the assignor. This subsection is subject to
12 subsections (d) and (k) (j).

13 (d) Subsection (c) applies to the extent that:

14 (1) the right to payment or a part thereof under an assigned contract has
15 not been fully earned by performance; or

16 (2) the right to payment or a part thereof has been fully earned by
17 performance and the account debtor has not received notification of the assignment
18 under subsection (e).

19 (e) Subject to subsections (f), (g), (h), and (k) (j), an account debtor on an
20 account, chattel paper, [instrument other than a negotiable instrument,] or payment
21 intangible may discharge its obligation by paying the assignor until, but not after,

1 the account debtor receives a notification, authenticated by the assignor or the
2 assignee, that the amount due or to become due has been assigned and that payment
3 is to be made to the assignee. After receipt of the notification, the account debtor
4 may discharge its obligation by paying the assignee and may not discharge the
5 obligation by paying the assignor.

6 (f) Subject to subsection (k) ~~(j)~~, a notification is ineffective under subsection
7 (e):

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

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

12 (3) at the option of an account debtor, if the notification notifies the
13 account debtor to make less than the full amount of any installment or other
14 periodic payment to the assignee, regardless of whether:

15 (A) only a portion of the account, chattel paper, or general intangible
16 has been assigned to that assignee;

17 (B) a portion has been assigned to another assignee; or

18 (C) the account debtor knows that the assignment to that assignee is
19 limited.

20 (g) Subject to subsection (k) ~~(j)~~, if requested by the account debtor, ~~the~~ an
21 assignee ~~must~~ shall seasonably furnish reasonable proof that the assignment has

1 been made. Unless the assignee complies, the account debtor may discharge its
2 obligation by paying the assignor even if the account debtor has received [an
3 effective] [a] notification under subsection (e).

4 (h) Except as otherwise provided in subsection (i) and Sections 2A-303 and
5 9-405, and subject to subsection (k) (j), a term in an agreement between an account
6 debtor and an assignor is ineffective if:

7 (1) it the term prohibits, restricts, or requires the account debtor's
8 consent to the assignment or transfer of or the creation, attachment, or perfection of
9 a security interest in an account, chattel paper, or payment intangible; or

10 (2) the creation, attachment, or perfection of the security interest would
11 cause a default, breach, right of recoupment, claim, defense, termination, right of
12 termination, or remedy under the account, chattel paper, or payment intangible.

13 (i) Subsection (h) This subsection does not apply to the sale of a payment
14 intangible.

15 (j) (j) [Subject to subsection (k) (j), an] [An] account debtor may not waive
16 or vary its option under subsection (f)(3).

17 (k) (j) This section is subject to other law that establishes a different rule for
18 an account debtor who is an individual and who incurred the obligation primarily
19 for personal, family, or household purposes.

20 (l) In a consumer transaction, if a writing evidences the account debtor's
21 obligation, other law requires that the writing contain a statement to the effect that

1 the account debtor's recovery against an assignee with respect to claims and
2 defenses against the assignor shall not exceed amounts paid by the account debtor
3 under the writing, and the writing does not contain such a statement, the extent to
4 which a claim of an account debtor against the assignor may be asserted against an
5 assignee is determined as if the writing contained such a statement.

6 (m) This section does not apply to an assignment of a healthcare insurance
7 receivable.

8 Reporters' Comments

9 **Change from Prior Draft:**

10 A. New subsection (h)(2) conforms that subsection to the approach
11 taken in Sections 9-406 and 9-406A. We recognize that the terminology in Section
12 9-405 also should be conformed and we plan to take that up with the Reporter for
13 the Article 2A Drafting Committee.

14 B. Subsection (l) is new. It applies to rights to payment evidenced by a
15 writing that is required to contain, but does not contain, the legend set forth in the
16 Federal Trade Commission Holder in Due Course Regulations. Under this
17 subsection, an assignee of such a writing takes subject to the consumer account
18 debtor's claims and defenses to the same extent as it would if the writing had
19 contained the required legend.

20 C. Subsection (m) is new. The obligation of an insurer with respect to a
21 healthcare insurance receivable is governed by other law.

22 **SECTION 9-405. RESTRICTIONS ON CREATION OR**
23 **ENFORCEMENT OF SECURITY INTEREST IN LEASEHOLD INTEREST**
24 **OR IN LESSOR'S RESIDUAL INTEREST.**

25 ~~(a) In this section, "creation of a security interest" includes the sale of a~~
26 ~~lease contract that is subject to this article.~~

1 B. The substitution of “ineffective” for “not enforceable” conforms this
2 section to the terminology used in Sections 9-404, 9-406, and 9-406A.

3 **SECTION 9-406. RESTRICTIONS ON ASSIGNMENT OF CERTAIN**
4 **GENERAL INTANGIBLES INEFFECTIVE.**

5 (a) ~~A~~ Except as otherwise provided in subsection (b), a term in [an
6 agreement between an account debtor and a debtor which relates to a healthcare
7 insurance receivable or a general intangible, including a contract, permit, license, or
8 franchise, between an account debtor and a debtor, and which prohibits, restricts, or
9 requires the account debtor’s consent to the assignment or transfer of or creation,
10 attachment, or perfection of a security interest in the general intangible, is
11 ineffective to the extent that:

12 (1) the term would impair the creation, attachment, or perfection of a
13 security interest; or

14 (2) the creation, attachment, or perfection of the security interest would
15 cause a default, breach, right of recoupment, claim, defense, termination, right of
16 termination, or remedy under the general intangible.

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

19 (c) A provision in a statute or governmental rule or regulation which
20 prohibits, restricts, or requires the consent of a government or governmental body or
21 official to the assignment or transfer of or creation of a security interest in a general

1 intangible, including a contract, permit, license, or franchise, between an account
2 debtor and a debtor is ineffective to the extent that:

3 (1) the provision would impair the creation, attachment, or perfection of
4 a security interest; or

5 (2) the creation, attachment, or perfection of the security interest would
6 cause a default, breach, claim, defense, termination, right of termination, or remedy
7 under the general intangible.

8 (d) To the extent that a term in a general intangible, or provision in a
9 statute, rule, or regulation, is ineffective under subsection (a) or (c) but is effective
10 under other law, the creation, attachment, or perfection of a security interest in the
11 general intangible:

12 (1) is not enforceable against the account debtor;

13 (2) imposes no duties or obligations on the account debtor; and

14 (3) does not require the account debtor to recognize the security interest,
15 pay or render performance to the secured party, or accept payment or performance
16 from the secured party.

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

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

21 *Legislative Note: States that amend statutes, rules, and regulations to remove*
22 *provisions inconsistent with this section need not enact subsection (e).*

1 Reporters' Comments

2 **Discussion Question:** Some concerns have been expressed about the
3 perceived the breadth of this section. In particular, some have read it to override
4 various covenants that do not directly prohibit, restrict, or require consent to an
5 assignment but which might present a practical impairment of an assignment.
6 Properly construed, however, this section reaches only covenants that prohibit,
7 restrict, or require consents to assignments; it does not override all covenants that
8 might “impair an assignment.

9 **SECTION 9-406A. RESTRICTIONS ON ASSIGNMENT OF ~~LETTERS~~**
10 **LETTER-OF-CREDIT RIGHTS INEFFECTIVE.**

11 (a) A term in a letter of credit or a rule of law, custom, or practice
12 applicable to the letter of credit which prohibits, restricts, or requires the consent of
13 an applicant, issuer, or nominated person to a beneficiary's assignment of or creation
14 of a security interest in a letter-of-credit right is ineffective to the extent that:

15 (1) the term or rule of law, custom, or practice would impair the
16 creation, attachment, or perfection of a security interest in the letter-of-credit right;

17 or

18 (2) the creation, attachment, or perfection of the security interest would
19 cause a default, breach, claim, defense, termination, right of termination, or remedy
20 under the letter-of-credit right.

21 (b) To the extent that a ~~provision~~ term in a letter of credit is ineffective
22 under subsection (a) but is effective under Article 5, other law, or a ~~rule of~~ custom
23 or practice applicable to the letter of credit, to the transfer of a right to draw or

1 otherwise demand performance under the letter of credit, or to the assignment of a
2 right to proceeds of the letter of credit, the creation, attachment, or perfection of a
3 security interest in the letter-of-credit right:

4 (1) is not enforceable against the applicant, issuer, nominated person, or
5 transferee beneficiary;

6 (2) imposes no duties or obligations on the applicant, issuer, nominated
7 person, or transferee beneficiary; and

8 (3) does not require the applicant, issuer, nominated person, or
9 transferee beneficiary to recognize the security interest, pay or render performance
10 to the secured party, or accept payment or other performance from the secured party.

11 **PART 5**
12 **FILING**

13 [SUBPART 1. FILING OFFICE; CONTENTS AND
14 EFFECTIVENESS OF FINANCING STATEMENT]

15 **SECTION 9-501. FILING OFFICE.**

16 (a) Except as otherwise provided in subsection (b), if the law of this State
17 governs perfection of a security interest or agricultural lien, the office ~~with~~ in which
18 to file a financing statement to perfect the security interest or agricultural lien is:

19 (1) the office designated for the filing or recording of a mortgage on the
20 real property, if:

1 (A) the collateral is timber to be cut or as-extracted collateral; or

2 (B) the financing statement is filed as a fixture filing and the

3 collateral is goods that are or are to become fixtures; and

4 (2) the office of [] [or any office duly authorized by []], in all other

5 cases, including if the goods are or are to become fixtures and the financing

6 statement is not filed as a fixture filing.

7 (2) the office of [] [or any office duly authorized by []] in all other

8 cases, including if the goods are or are to become fixtures and the financing

9 statement is not filed as a fixture filing.

10 (b) The office ~~with~~ in which to file a financing statement to perfect a

11 security interest on collateral, including fixtures, of a transmitting utility is the

12 office of []. The financing statement {also} constitutes a fixture filing as to the

13 collateral indicated in the financing statement which is or is to become fixtures.

14 *Legislative Note: The State should designate the filing office where the brackets*
15 *appear. The filing office may be that of a governmental official (e.g., the Secretary*
16 *of State) or a private party that maintains the State's filing system.*

17 **SECTION 9-502. CONTENTS OF FINANCING STATEMENT;**

18 **MORTGAGE AS FINANCING STATEMENT; TIME OF FILING**

19 **FINANCING STATEMENT.**

20 (a) Subject to subsection (b), a financing statement is sufficient only if it:

21 (1) provides the name of the debtor;

1 (2) ~~and provides~~ the name ~~and mailing address~~ of the secured party or a
2 representative of the secured party; and

3 (3) indicates the collateral covered by the financing statement.

4 (b) Except as otherwise provided in Section 9-501(b), to be sufficient, a
5 financing statement that covers timber to be cut or as-extracted collateral or which
6 is filed as a fixture filing and the collateral is goods that are or are to become
7 fixtures also must:

8 (1) indicate that it covers this type of collateral;

9 (2) indicate that it is to be filed [for record] in the real property records;

10 (3) provide a description of the real property [sufficient to give
11 constructive notice of the mortgage under the law of this State if the description
12 were contained in a mortgage of the real property]; and

13 (4) if the debtor does not have an interest of record in the real property,
14 provide the name of a record owner.

15 *Legislative Note: Language in brackets is optional. Where the State has any*
16 *special recording system for real property other than the usual grantor-grantee*
17 *index (as, for instance, a tract system or a title registration or Torrens system) local*
18 *adaptations of subsection (b) and Section 9-520(b) through (d) may be necessary.*
19 *See, e.g., Mass. Gen. Laws Chapter 106, Section 9-410.*

20 ~~(c) If a financing statement indicates that it is filed in connection with a~~
21 ~~public-finance transaction or manufactured-home transaction, it also may indicate~~
22 ~~that its period of effectiveness is 30 years after the date of filing.~~

23 (c) A real property mortgage is effective from the date of recording as a

1 financing statement filed as a fixture filing or as a financing statement covering
2 [timber to be cut or] as-extracted collateral only if:

3 (1) the mortgage indicates the goods or accounts that it covers;

4 (2) ~~(A)~~ the goods are or are to become fixtures related to the real
5 property described in the mortgage ; or ~~(B)~~ the collateral is as-extracted collateral
6 related to the real property described in the mortgage;

7 (3) the mortgage complies with the requirements for a financing
8 statement in this section other than an indication that it is to be filed in the real
9 property records; and

10 (4) the mortgage is [duly] recorded.

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

13 Reporters' Comments

14 **Changes from Prior Draft:**

15 A. Subsection (a) reflects the Drafting Committee's decision at the
16 February, 1998, meeting. The function of the secured party's address is not to
17 identify the secured party but rather to provide an address to which others can send
18 required notifications, e.g., of a purchase-money security interest in inventory or of
19 the disposition of collateral, the failure to include an address for the secured party of
20 record no longer renders a financing statement ineffective. However, the failure
21 remains a ground for rejecting the financing statement under Section 9-515(b)(4).
22 Inasmuch as the address shown on a filed financing statement is "a place held out by
23 [the secured party] as the place for receipt of such communications, see § 1-
24 201(26)(b) (definition of "notice), the secured party will be deemed to have
25 received notices sent to that address, even if the address is or becomes incorrect.

26 B. Subsection (c) has been deleted as unnecessary. Section 9-516(b) has

1 been revised to provide that a financing statement indicating that it is filed in
2 connection with a public-finance transaction or manufactured-home transaction
3 automatically is effective for 30 years.

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 organization, only if the financing
4 statement provides the name of the debtor as shown on the public records of the
5 debtor's State 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 held in 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, 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 or is a trustee acting with respect to property held in trust; and

16 (4) in other cases:

17 (A) if the debtor has a name, only if it provides the individual or
18 [organization] [organizational] name of the debtor; and

19 (B) if the debtor does not have a name, only if it provides the names
20 of the partners, members, associates, or other persons comprising the debtor.

21 (b) A financing statement that sufficiently provides the name of the debtor

1 in accordance with subsection (a) is not rendered ineffective by the [presence or]
2 absence of:

3 (1) a trade or other name {of the debtor}; or

4 (2) unless required under subsection (a)(4)(B), names of partners,
5 members, associates, or other persons comprising the debtor.

6 (c) A financing statement that provides only the debtor's trade name does
7 not sufficiently provide the name of a the debtor.

8 (d) A financing statement may provide the name of more than one debtor
9 and the name of more than one secured party.

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

13 **SECTION 9-504. INDICATION OF COLLATERAL.** A financing
14 statement sufficiently indicates the collateral that it covers if the financing statement
15 provides:

16 (1) a description of the collateral pursuant to Section 9-111;

17 (2) an indication of the type of collateral; or

18 (3) an indication that the financing statement covers all assets or all
19 personal property.

1 **SECTION 9-505. FILING AND COMPLIANCE WITH OTHER**
2 **STATUTES AND TREATIES FOR CONSIGNMENTS, LEASES,**
3 **BAILMENTS, AND OTHER TRANSACTIONS.**

4 (a) A consignor, lessor, or bailor of goods or a buyer of a payment
5 intangible may file a financing statement, or may comply with a statute or treaty
6 described in Section 9-309A(a), using the terms “consignor, “consignee, “lessor,
7 “lessee, “bailor, “bailee, “owner, “registered owner , “buyer, “seller, or
8 words of similar import, instead of the terms “secured party and “debtor.

9 (b) This part applies to the filing of such a financing statement and, as
10 appropriate, to compliance that is equivalent to filing a financing statement under
11 Section 9-309A(c), but the filing or compliance is not of itself a factor in
12 determining whether the collateral secures an obligation. If it is determined for
13 another reason that the collateral secures an obligation, a security interest held by
14 the consignor, lessor, bailor, owner, or buyer which attaches to the collateral is
15 perfected by the filing or compliance.

16 **SECTION 9-506. EFFECT OF ~~INSUFFICIENCY~~ MINOR ERRORS OR**
17 **OMISSIONS.**

18 (a) A financing statement substantially complying with the requirements of
19 this part is effective even if it contains ~~an insufficiency,~~ minor errors or omissions,
20 unless the ~~insufficiency makes~~ errors or omissions make the financing statement

1 seriously misleading.

2 (b) Except as otherwise provided in subsection (c), a financing statement
3 that fails to ~~sufficiently~~ provide sufficiently the name of the debtor in accordance
4 with Section 9-503(a) is seriously misleading.

5 (c) If a search of the records of the filing office under the debtor's correct
6 name, utilizing the filing office's standard search technique, would disclose a
7 financing statement that fails to ~~sufficiently~~ provide sufficiently the name of the
8 debtor in accordance with Section 9-503(a), the name provided does not make the
9 financing statement seriously misleading.

10 (d) For purposes of Section 9-510(b), the "debtor's correct name" in
11 subsection (c) means the correct name of the new debtor.

12 **SECTION 9-507. EFFECT OF CERTAIN CHANGES ON**
13 **EFFECTIVENESS OF FINANCING STATEMENT.**

14 (a) Except as otherwise provided in subsection (b) and Section 9-510, a
15 financing statement is not rendered ineffective if, after the financing statement is
16 filed, the information contained in the financing statement becomes seriously
17 misleading under Section 9-506.

18 (b) If a debtor so changes its name that a filed financing statement becomes
19 seriously misleading under Section 9-506:

20 (1) the financing statement is effective to perfect a security interest in

1 collateral acquired by the debtor before, or within four months after, the change; and

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

6 (c) A filed financing statement remains effective with respect to collateral
7 that is sold, exchanged, leased, licensed, or otherwise disposed of and in which a
8 security interest [or agricultural lien] continues under Section 9-313(c), even if the
9 secured party knows of or consents to the disposition.

10 **SECTION 9-508. WHEN RECORD MAY BE FILED.**

11 (a) A person is entitled to file an initial financing statement, amendment
12 that adds collateral covered by a financing statement, or amendment that adds a
13 debtor to a financing statement only if:

14 (1) the debtor authorizes the filing in an authenticated record; or

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

18 (b) By authenticating a security agreement, a debtor authorizes the filing of
19 an initial financing statement, and an amendment, covering[:

20 (1)] the collateral described in the security agreement; [and

1 (2) proceeds of the collateral, whether or not the security agreement
2 expressly covers proceeds].

3 (c) A person is entitled to file an amendment other than an amendment that
4 adds collateral covered by a financing statement or an amendment that adds a debtor
5 to a financing statement only if:

6 (1) the secured party of record authorizes the filing [in an authenticated
7 record]; or

8 (2) the amendment is a termination statement for a financing statement
9 as to which the secured party of record has failed to file or send a termination
10 statement as required by Section 9-511(b) or (d).

11 (d) If there is more than one secured party of record for a financing
12 statement, each secured party of record may authorize the filing of an amendment
13 under subsection (c).

14 **SECTION 9-508A. EFFECTIVENESS OF FILED RECORD.**

15 (a) Subject to subsection (c), a filed record is effective only to the extent
16 that a person is entitled to file it under Section 9-508.

17 (b) A record authorized by one secured party of record does not affect the
18 rights under the financing statement of another secured party of record.

19 (c) If a person is entitled to file a termination statement only under Section
20 9-508(c)(2), the filed termination statement is effective only if the debtor authorizes

1 the filing and the termination statement indicates that the filing is made by or on
2 behalf of the debtor.

3 (d) A continuation statement that is filed outside the six-month period
4 described in Section 9-516(d) is ineffective.

5 **SECTION 9-509. AMENDMENT OF FINANCING STATEMENT.**

6 (a) Subject to Section 9-508, a person may add or delete collateral covered
7 by a financing statement or, subject to subsection (e), otherwise amend the
8 information contained in a financing statement by filing an amendment that
9 identifies the initial financing statement by its file number.

10 (b) Except as otherwise provided in Section 9-516, the filing of an
11 amendment does not extend the period of effectiveness of a financing statement.

12 (c) A financing statement that is amended by an amendment that adds
13 collateral is effective as to the added collateral only from the date of the filing of the
14 amendment.

15 (d) A financing statement that is amended by an amendment that adds a
16 debtor is effective as to the added debtor only from the date of the filing of the
17 amendment.

18 (e) An amendment is ineffective to the extent it:

19 (1) purports to delete all secured parties of record and fails to provide the
20 name of a new secured party of record; or

1 (2) purports to delete the names of all debtors and fails to provide the
2 name of a debtor not previously covered by the financing statement.

3 **[SECTION 9-509A. SECURED PARTY OF RECORD.**

4 (a) A secured party of record with respect to a financing statement is a
5 person whose name is provided as the name of the secured party or a representative
6 of the secured party in an initial financing statement that has been filed.

7 (b) A person [whose name is provided] remains a secured party of record
8 until the filing of an effective amendment of the financing statement which
9 indicates that the person is not a secured party or a representative of a secured party.

10 (c) If an effective amendment of a financing statement which provides the
11 name of a person as a secured party or a representative of a secured party is filed,
12 the person named in the amendment is a secured party of record.]

13 **SECTION 9-510. EFFECTIVENESS OF FINANCING STATEMENT IF**
14 **NEW DEBTOR BECOMES BOUND BY SECURITY AGREEMENT.**

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

1 (b) If the difference between the name of the original debtor and that of the
2 new debtor causes a filed financing statement that is effective under subsection (a)
3 to be seriously misleading under ~~Sections~~ Section 9-506(c) and (d):

4 (1) the financing statement is effective to perfect a security interest in
5 collateral acquired by the new debtor before, and within four months after, the new
6 debtor becomes bound under Section 9-203(c); and

7 (2) the financing statement is not effective to perfect a security interest
8 in collateral acquired by the new debtor more than four months after the new debtor
9 becomes bound under Section 9-203(c) unless an initial financing statement
10 providing the name of the new debtor is filed before the expiration of that time.

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

13 **SECTION 9-511. TERMINATION STATEMENT.**

14 (a) A termination statement for a financing statement is an amendment of
15 the financing statement ~~that~~ which:

16 (1) complies with the requirements of Section 9-509(a); and

17 (2) indicates either that it is a termination statement or that an identified
18 financing statement is no longer effective.

19 (b) The secured party shall cause the secured party of record for a financing
20 statement to file ~~with~~ in the filing office a termination statement for the financing

1 statement if ~~(A)~~ the financing statement covers consumer goods ; and:

2 (1) there is no outstanding secured obligation and no commitment to
3 make an advance, incur an obligation, or otherwise give value; or

4 (2) the debtor did not authorize the filing of the initial financing
5 statement.

6 (c) To comply with subsection (b), the secured party shall cause the secured
7 party of record to file the termination statement:

8 (1) within one month after there is no outstanding secured obligation and
9 no commitment to make an advance, incur an obligation, or otherwise give value; or

10 (2) if earlier, [within 10 days] after the debtor sends to the secured party
11 ~~receives~~ an authenticated demand ~~by the debtor~~.

12 (d) In cases not governed by subsection (b), within 10 days after the debtor
13 sends to the secured party ~~receives~~ an authenticated demand ~~by the debtor~~, the
14 secured party shall cause the secured party of record for a financing statement to
15 send to the debtor a termination statement for the financing statement or file the
16 termination statement with filing office if:

17 (1) there is no outstanding secured obligation and no commitment to
18 make an advance, incur an obligation, or otherwise give value;

19 (2) the debtor did not authorize the filing of the initial financing
20 statement; or

21 (3) the financing statement covers accounts, chattel paper, or payment

1 intangibles that have been sold but as to which the account debtor or other person
2 obligated has discharged its obligation.

3 (e) Except as otherwise provided in Section 9-508A, upon the filing of a
4 termination statement with the filing office, the financing statement to which the
5 termination statement relates becomes ineffective.

6 Reporters' Comments

7 **Changes from Prior Draft:** In accordance with the Drafting Committee's
8 instructions during its February, 1998, meeting, subsections (c) and (d) have been
9 revised to base the period for a secured party's response to a demand on the time
10 that a demand is sent by the debtor instead of the time that the secured party
11 receives a demand. See the revised definition of send in Section 9-201, in the
12 Appendix. The Drafting Committee may wish to consider lengthening the 10-day
13 period or may wish to reconsider this approach inasmuch as the cap on class action
14 damages has been removed.

15 **Discussion Question:** Section 9-309A provides that compliance with a
16 statute such as a certificate of title act "is equivalent to the filing of a financing
17 statement under this article. Should this section apply to termination of an
18 "equivalent filing under Section 9-309A? Should the issue be clarified in the
19 Official Comments or in the statute?

20 **SECTION 9-512. ASSIGNMENT OF POWERS OF SECURED PARTY**
21 **OF RECORD.**

22 (a) Except as otherwise provided in subsection (d), an initial financing
23 statement may reflect an assignment of all of the secured party's power to authorize
24 an amendment to the financing statement by providing the name and mailing
25 address of the assignee as the name and address of the secured party. Upon the
26 filing of the initial financing statement, the assignee named in an initial financing

1 statement filed under this subsection is the secured party of record for the financing
2 statement.

3 (b) Except as otherwise provided in subsection (d), a secured party of record
4 may assign of record all or part of its power to authorize an amendment to a
5 financing statement by filing in the filing office an amendment of the financing
6 statement that:

7 (1) complies with the requirements of Section 9-509(a);

8 (2) provides the name and mailing address of the secured party of
9 record; and

10 (3) provides the name and mailing address of the assignee.

11 (c) Upon the filing of an amendment [under] [pursuant to] subsection (b),
12 the assignee named in an amendment filed under this subsection becomes a secured
13 party of record for the financing statement.

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

1 **SECTION 9-513.**

2 [deleted]

3 **SECTION 9-514.**

4 [deleted]

5 **SECTION 9-515. WHAT CONSTITUTES FILING; EFFECTIVENESS**
6 **OF FILING.**

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

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

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

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

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

17 (A) in the case of an initial financing statement, the record does not
18 provide a name for the debtor;

19 (B) in the case of an amendment or correction statement, the record:

20 (i) does not identify the initial financing statement as required by
21 Section 9-509 or 9-519, as applicable; or

1 (ii) identifies an initial financing statement whose effectiveness
2 has lapsed under Section 9-516; or

3 (C) in the case of an initial financing statement that provides the
4 name of a debtor identified as an individual or an amendment that provides a name
5 of a debtor identified as an individual which was not previously provided in the
6 financing statement to which the record relates, the record does not identify the
7 debtor's last name; and

8 (4) in the case of an initial financing statement and an amendment that
9 adds a secured party of record, the record does not provide a name and mailing
10 address for the secured party of record;

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

12 (A) provide a mailing address for the debtor;

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

14 (C) if the financing statement indicates that the debtor is an
15 organization, provide:

16 (i) the type of organization;

17 (ii) a State of organization for the debtor; or

18 (iii) an organizational identification number for the debtor or
19 indicate that the debtor has none;

20 (6) in the case of an assignment reflected in an initial financing
21 statement under Section 9-512(a) or an amendment filed under Section 9-512(b),

1 the record does not provide a name and mailing address for the assignee;

2 (7) in the case of an amendment that provides a name of a debtor which
3 was not previously provided in the financing statement to which the record relates,
4 the record does not provide a mailing address for the debtor; or

5 (8) in the case of a continuation statement, the record is not filed within
6 the six-month period specified in Section 9-516(d).

7 (c) For purposes of subsection (b):

8 (1) a record does not provide information if the filing office is unable to
9 read or decipher the information; and

10 (2) a record that ~~neither~~ does not indicate that indicates it is an
11 amendment ~~nor identifies~~ or identify the initial financing statement, as required by
12 Section 9-509 or 9-519, is an initial financing statement.

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

16 (d) ~~(e)~~ A record that is presented to the filing office with tender of the filing
17 fee, but which the filing office refuses to accept for a reason other than one set forth
18 in subsection (b), is effective as a filed record except as against a purchaser of the
19 collateral which gives value in reasonable reliance upon the absence of the record
20 from the files.

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Reporters' Comments

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Changes from Prior Draft:

- A. New subsection (b)(3)(C) requires the filing office to reject an initial financing statement or amendment adding an individual debtor if the office cannot index the record because it does not identify the debtor’s last name (e.g., it is unclear whether the debtor’s name is Elton John or John Elton).
- B. Subsection (d) has been moved to Section 9-521 and reformulated.

SECTION 9-516. DURATION AND EFFECTIVENESS OF FINANCING STATEMENT; EFFECT OF LAPSED FINANCING STATEMENT.

(a) A continuation statement for a financing statement is an amendment of the financing statement that:

- (1) complies with the requirements of Section 9-509(a); and
- (2) indicates that it is a continuation statement for, or that it is filed to continue the effectiveness of, the financing statement.

(b) Except as otherwise provided in subsections (c), (f), (h) and (i), a filed financing statement is effective for a period of five years after the date of filing.

(c) Except as otherwise provided in subsections (h) and (i), an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction is effective for a period of 30 years after the date of filing if it indicates that ~~[(1)]~~ it is filed in connection with a public-finance transaction or manufactured-home transaction, ~~[(2)]~~ and ~~its period of effectiveness is 30 years after the date of filing~~.

(d) The effectiveness of a filed financing statement lapses on the expiration

1 of the period of its effectiveness unless before the lapse a continuation statement is
2 filed pursuant to subsection (e) [, notwithstanding the commencement of insolvency
3 proceedings by or against the debtor]. Upon lapse, a financing statement becomes
4 ineffective and any security interest or agricultural lien that was perfected by the
5 financing statement becomes unperfected, unless the security interest [or
6 agricultural lien] is perfected without filing. If the security interest or an
7 agricultural lien becomes unperfected upon lapse, it is deemed never to have been
8 perfected as against a previous or subsequent purchaser of the collateral for value.

9 (e) A continuation statement may be filed only within six months before the
10 expiration of the five-year period specified in subsection (b).

11 (f) Except as otherwise provided in subsection (g) and Section 9-508A,
12 upon timely filing of a continuation statement, the effectiveness of the initial
13 financing statement continues for a period of five years commencing on the day on
14 which the financing statement would have become ineffective in the absence of the
15 filing. Upon the expiration of the five-year period, the financing statement lapses in
16 the same manner as provided in subsection (d), unless, before the lapse, another
17 continuation statement is filed pursuant to subsection (e). Succeeding continuation
18 statements may be filed in the same manner to continue the effectiveness of the
19 initial financing statement.

20 (g) Filing of a continuation statement does not extend the effectiveness of a
21 financing statement described in subsection (c).

1 ~~continue the effectiveness of, the financing statement.~~

2 [deleted]

3 Reporters' Comments

4 **Reason for Deletion:** Renumbered as Section 9-516(a).

5 **SECTION 9-518. EFFECT OF INDEXING ERRORS.** The failure of the
6 filing office to index a record correctly does not affect the effectiveness of the
7 record.

8 **SECTION 9-519. CLAIM CONCERNING INACCURATE OR**
9 **WRONGFULLY FILED RECORD.**

10 (a) A person may file ~~with~~ in the filing office a correction statement with
11 respect to a record indexed there under the person's name if the person believes that
12 the record is inaccurate or was wrongfully filed.

13 (b) A correction statement must:

14 (1) identify the record to which it relates by the file number assigned to
15 the initial financing statement to which the record relates;

16 (2) indicate that it is a correction statement; and

17 (3) either:

18 (A) provide the basis for the person's belief that the record or was
19 wrongfully filed; or

20 (B) provide the basis for the person's belief that the record is

1 inaccurate and indicate the manner in which the person believes the record should
2 be amended to cure any inaccuracy.

3 (c) The filing of a correction statement does not affect the effectiveness of
4 the initial financing statement or other record [relating to it] [to which it relates].

5 [SUBPART 2. DUTIES AND OPERATION OF FILING OFFICE]

6 **SECTION 9-520. NUMBERING, MAINTAINING, AND INDEXING**
7 **RECORDS; COMMUNICATING INFORMATION CONTAINED IN**
8 **RECORDS.**

9 (a) For each record filed ~~with~~ in a filing office, the filing office shall:

10 (1) assign a unique number to the record;

11 (2) create a record that bears the number assigned to the record and the
12 date and time of filing;

13 (3) maintain the filed record for public inspection; and

14 (4) index the record in accordance with subsections (b), (c), and (d).

15 (b) Except as otherwise provided in subsections (c) and (d), the filing
16 office:

17 (1) shall index an initial financing statement according to the name of

18 the debtor and shall index all filed records relating to the initial financing statement

1 in a manner that associates with one another an initial financing statement and all
2 filed records relating to the initial financing statement; and

3 (2) shall index a record that provides a name of a debtor which was not
4 previously provided in the financing statement to which the record relates also
5 according to the name that was not previously provided.

6 (c) If a financing statement is filed as a fixture filing or covers timber to be
7 cut or as-extracted collateral, [it must be filed for record and] the filing office shall
8 index it:

9 (1) under the names of the debtor and of each owner of record shown on
10 the financing statement as if they were the mortgagors under a mortgage of the real
11 property described; and

12 (2) to the extent that the law of this State provides for indexing of
13 mortgages under the name of the mortgagee, under the name of the secured party as
14 if the secured party were the mortgagee thereunder, or, if indexing is by description,
15 as if the financing statement were a mortgage of the real property described.

16 (d) If a financing statement is filed as a fixture filing or covers timber to be
17 cut or as-extracted collateral, the filing office shall index an assignment filed under
18 Section 9-512(a) or an amendment filed under Section 9-512(b):

19 (1) under the name of the assignor as grantor; and

20 (2) to the extent that the law of this State provides for indexing the
21 assignment of a real property mortgage under the name of the assignee, under the

1 name of the assignee.

2 (e) The filing office shall maintain a storage and retrieval capability that:

3 (1) provides for retrieval of a record by the name of the debtor and by
4 the file number assigned to initial financing statement to which the record relates;
5 and

6 (2) associates with one another an initial financing statement and each
7 filed record relating to the initial financing statement.

8 (f) The filing office ~~shall~~ may not remove a debtor's name from the index
9 [until the effectiveness of a financing statement naming the debtor lapses under
10 Section 9-516 with respect all secured parties of record].

11 (g) The filing office shall perform the acts required by subsections (a)
12 through (d) at the time and in the manner prescribed by rule, but not later than two
13 business days after the filing office receives the record in question.

14 *Legislative Note: In States in which writings will not appear in the real property*
15 *records and indices unless actually recorded the bracketed language in subsection*
16 *(c) should be used.*

17 **SECTION 9-520A. FILE NUMBER.**

18 [(a)] In this part, "file ~~"File number~~ means the number assigned to an
19 initial financing statement pursuant to Section 9-520(a)(1).

20 [(b)] A file number assigned after July 1, 2002, must contain at least three
21 separate segments in the following order:

1 **SECTION 9-521. ACCEPTANCE AND REFUSAL TO ACCEPT**
2 **RECORD.**

3 (a) A filing office shall refuse to accept a record for filing for a reason set
4 forth in Section 9-515(b) and may refuse to accept a record for filing only for a
5 reason set forth in Section 9-515(b).

6 (b) If a filing office refuses to accept a record for filing, it shall
7 communicate the fact of and reason for its refusal to the person that presented the
8 record. The communication must be made at the time and in the manner prescribed
9 by rule but in no event more than two business days after the filing office receives
10 the record.

11 (c) A filing office that accepts written records may not refuse to accept a
12 written initial financing statement in the following form except for a reason set forth
13 in Section 9-515(b):

1

[INSERT FINANCING STATEMENT FORM]

1

[INSERT ADDENDUM FORM]

1 (d) A filing office ~~financing statement~~ that accepts written records} may not
2 refuse to accept a written record in the following form except for a reason set forth
3 in Section 9-515(b):

1

[INSERT CHANGE FORM]

1

[INSERT CHANGE ADDENDUM]

- 1 (1) either:
- 2 (A) note upon the copy:
- 3 (i) the number assigned to the record pursuant to Section 9-
- 4 520(a)(1); and
- 5 (ii) the date and time of the filing of the original; and
- 6 (B) deliver or send the copy to the person; or
- 7 (2) send to the person an image of the record showing the number
- 8 assigned to the record pursuant to Section 9-520(a)(1) and the date and time of the
- 9 filing of the original.

10 ~~{Alternative A}~~

11 (b) The filing office shall communicate the following information to any

12 person that requests it:

13 (1) whether there is on file on a date and time specified by the filing

14 office, but not a date earlier than three business days before the filing office receives

15 the request, any financing statement that:

16 (A) designates a particular debtor [or, if the request so states,

17 designates a particular debtor at the address specified in the request]; and

18 (B) has not lapsed under Section 9-516 with respect to all secured

19 parties of record, and, if the request so states, has lapsed under Section 9-516 ;

20 (2) the date and time of filing of each financing statement; and

21 (3) the information contained in each financing statement.

1 ~~{Alternative B}~~

2 (b) ~~The filing office shall communicate the following information to any~~
3 ~~person that requests it:~~

4 (1) ~~whether there is on file on a date and time specified by the filing~~
5 ~~office, but not a date earlier than three business days before the filing office receives~~
6 ~~the request, any financing statement that:~~

7 (A) ~~designates a particular debtor [or, if the request so states,~~
8 ~~designates a particular debtor at the address specified in the request]; and~~

9 (B) ~~has not lapsed under Section 9-516 with respect to all secured~~
10 ~~parties of record, and, if the request so states, has lapsed under Section 9-516;~~

11 (2) ~~the date and time of filing of each financing statement; and~~

12 (3) ~~[either:~~

13 (A)] ~~the information contained in each financing statement; [or~~

14 (B)] ~~if the request so states, [with respect to each record comprising~~
15 ~~the financing statement:~~

16 (i) ~~the number assigned to the record pursuant to Section 9-~~
17 ~~520(a)(1);~~

18 (ii) ~~the names and addresses of the debtor and secured party~~
19 ~~provided in the record; and~~

20 (iii) ~~whether the record is an initial financing statement or an~~
21 ~~amendment] [a reasonable summary of the information (other than an indication of~~

1 collateral) contained in the record].

2 **[End of Alternatives]**

3 (c) In complying with its duty under subsection (b), the filing office may
4 communicate information in any medium. However, if requested, the filing office
5 shall communicate information by issuing [its written certificate] [a record that can
6 be admitted into evidence in the courts of this State without extrinsic evidence of its
7 authenticity].

8 (d) At least weekly, the [insert appropriate official or governmental agency]
9 [filing office] shall sell or license to the public on a nonexclusive basis, in bulk,
10 copies of all records filed ~~with~~ in it under this part, in every medium from time to
11 time available to the filing office.

12 (e) The filing office shall perform the acts required by subsections (a) and
13 (b) at the time and in the manner prescribed by rule, but not later than two business
14 days after the filing office receives the request.

15 *Legislative Note: States whose filing office responds to search requests limited to a*
16 *particular address should adopt the bracketed language in subsection (b)(1)(A).*

17 Reporters' Comments

18 **Changes from Prior Draft:** Subsection (b), Alternative A, deleted. See
19 Comment 3.

20 * * *

21 **3. Information that Must Be Provided.** Subsection (b)(3) requires the
22 filing office to provide “the information contained in each financing statement to a
23 person who requests it. This requirement can be satisfied by providing copies,

1 images, or reports. The requirement does not in any manner inhibit the filing office
2 from offering to provide less than all of the information (presumably for a lower
3 fee) to a person who asks for less. Thus, subsection (b) accommodates the current
4 practice of providing only the type of record (e.g., initial financing statement,
5 continuation statement), number assigned to the record, date and time of filing, and
6 names and addresses of the debtor and secured party when a requesting person asks
7 for no more (i.e., when the person does not ask for copies of financing statements).

8 * * *

9 **SECTION 9-524. DELAY BY FILING OFFICE.** Delay by the filing office
10 beyond the time limits prescribed in this part is excused if:

11 (1) the delay is caused by interruption of communication or computer
12 facilities, war, emergency conditions, failure of equipment, or other circumstances
13 beyond control of the filing office; and

14 (2) the filing office exercises reasonable diligence under the circumstances.

15 **SECTION 9-525.**

16 [deleted]

17 **SECTION 9-526.**

18 [deleted]

19 **[SECTION 9-527. FEES.**

20 (a) [Except as otherwise provided in subsection (f), the] [The] fee for filing
21 and indexing a [record under this part] [financing statement, amendment,
22 continuation statement, or termination statement] other than an initial financing

1 statement of the kind described in Section 9-502(c) is the amount specified in
2 subsection (c), if applicable, plus:

3 (1) \$ __[X]_____ if the record is communicated in writing and consists
4 of one or two pages;

5 (2) \$ __[2X]_____ if the record is communicated in writing and
6 consists of more than two pages; and

7 (3) \$ __[1/2X]___ if the record is communicated by another medium
8 authorized by rule.

9 (b) [Except as otherwise provided in subsection (f), the] [The] fee for filing
10 and indexing an initial financing statement of the kind described in Section 9-502(c)
11 is the amount specified in subsection (c), if applicable, plus:

12 (1) \$ _____ if the financing statement indicates that it is filed in
13 connection with a public-finance transaction;

14 (2) \$ _____ if the financing statement indicates that it is filed in
15 connection with a manufactured-home transaction.

16 (c) [Except as otherwise provided in subsection (f), the] [The] fee for each
17 name more than two required to be indexed, if the record is communicated in
18 writing, is \$ _____.

19 (d) [~~Except as otherwise provided in subsection (f), the]~~ [The] fee for
20 responding to a request for information from the filing office, including for [issuing
21 a certificate showing] [communicating] whether there is on file any financing

1 statement naming a particular debtor, is:

2 (1) \$ ____ if the request is communicated in writing; and

3 (2) \$ ____ if the request is communicated by another medium authorized
4 by rule].

5 (e) The fee for filing and indexing a written record in a form other than as
6 set forth in Sections 9-521(c) and (d) may not be less than the fee charged for filing
7 a written record of the same kind in the form set forth in those sections.

8 (f) [A fee is not required for the filing of a mortgage filed as a financing
9 statement, other than the regular recording and satisfaction fees with respect to the
10 mortgage.]

11 *Legislative Note: A State may wish to consolidate the provisions of this section*
12 *with statutes setting fees for other services.*

13 **SECTION 9-528. ADMINISTRATIVE RULES.**

14 (a) The [insert appropriate official or governmental agency] [filing office]
15 shall adopt rules to carry out the provisions of this article. The rules must be:

16 (1) consistent with this article[; and

17 (2) adopted in accordance with the [insert any applicable state
18 administrative procedure act].

19 (b) To keep the rules and practices of the filing office in harmony with the
20 rules and practices of filing offices in other jurisdictions that enact substantially this

1 part, and to keep the technology used by the filing office compatible with the
2 technology used by filing offices in other jurisdictions that enact substantially this
3 part, the filing office, so far as is consistent with the purposes, policies, and
4 provisions of this article, shall in adopting, amending, and repealing rules:

5 (1) shall consult with filing offices in other jurisdictions that enact
6 substantially this part; and

7 (2) shall consult the most recent version of the Model Rules promulgated
8 by the International Association of Corporate Administrators or any successor
9 organization; and

10 (3) shall take into consideration the rules and practices of, and the
11 technology used by, filing offices in other jurisdictions that enact substantially this
12 part.

13 **SECTION 9-529. DUTY TO REPORT.**

14 (a) The [insert appropriate official or governmental agency] [filing office]
15 shall report [annually on or before _____] to the [Governor and Legislature] on
16 the operation of the filing office.

17 (b) The report must contain a statement of the extent to which:

18 (1) the filing office has complied with the time limits prescribed in this
19 part and the reasons for any noncompliance;

20 (2) the rules are not in harmony with the rules of filing offices in other

1 jurisdictions that enact substantially this part and the reasons for these variations;

2 and

3 (3) the rules are not in harmony with the most recent version of the

4 Model Rules promulgated by the International Association of Corporate

5 Administrators or any successor organization and the reasons for these variations.

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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.**

(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:

(1) may reduce a claim to judgment, foreclose, or otherwise enforce the claim, security interest, or agricultural lien by any available judicial procedure; and

(2) if the collateral is documents, may proceed either as to the documents or as to the goods they cover.

(b) [A secured party in possession or control of collateral has the rights, remedies, and duties provided in Section 9-207.]

(c) The rights and remedies referred to in subsections (a) and (b) are cumulative and may be exercised simultaneously.

(d) Except as otherwise provided in subsection (g) and Section 9-605, after

1 default, a debtor and an obligor have the rights and remedies provided in this part
2 [and] [,] by agreement of the parties~~[, and in Section 9-207]~~.

3 (e) If a secured party has reduced its claim to judgment, the lien of any levy
4 that may be made upon the collateral by virtue of an execution based upon the
5 judgment relates back to the earliest of:

6 (1) the date of perfection of the security interest or agricultural lien in the
7 collateral;

8 (2) the date of filing a financing statement covering the collateral; or

9 (3) any date specified in a statute under which the agricultural lien was
10 created.

11 (f) A sale pursuant to an execution is a foreclosure of the security interest or
12 agricultural lien by judicial procedure within the meaning of this section. A secured
13 party may purchase at the sale and thereafter hold the collateral free of any other
14 requirements of this article.

15 (g) Except as otherwise provided in Sections 9-607(c), 9-608(b), and 9-
16 614(f), this part imposes no duties upon a secured party that is a consignor or is a
17 buyer of accounts, chattel paper, or payment intangibles.

18 Reporters' Comments

19 **Changes from Prior Draft:** Subsection (b) has been conformed to Section
20 9-207, which now applies to secured parties in control of collateral. The
21 unnecessary reference in subsection (d) to Section 9-207 has been deleted.

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, [a] secondary obligor, or [a] consumer obligor in a
6 consumer-goods transaction, except as ~~expressly~~ provided in subsection (b) and
7 Section 9-623:

8 (1) Section 9-209~~}, which deals with requests for an accounting and~~
9 requests concerning a list of collateral and statement of account~~};~~

10 (2) Section 9-607(c)~~}, which deals with collection and enforcement of~~
11 collateral~~};~~

12 (3) Sections 9-608(a) and 9-614(d) insofar as they deal with application
13 or payment of noncash proceeds of collection, enforcement, or disposition;

14 (4) Sections 9-608(a) and 9-614~~(b) and (e) and (f)~~ insofar as they require
15 accounting for or payment of surplus proceeds of collateral;

16 (5) Section 9-609 insofar as it imposes upon a secured party that takes
17 possession of collateral without judicial process the duty to do so without breach of
18 the peace;

19 (6) Sections 9-610(b), 9-611, and 9-613~~}, which deal with disposition of~~
20 collateral~~};~~

21 (7) Section 9-614(h)~~}, which deals with calculation of a deficiency or~~

1 surplus when ~~the proceeds of a disposition are unreasonably low~~; a disposition is
2 made to the secured party, a person related to the secured party, or a secondary
3 obligor;

4 (8) Section 9-614A, which deals with explanation of the calculation of a
5 surplus or deficiency;

6 (9) Section 9-618, 9-619, ~~or~~ and 9-620], which deal with acceptance of
7 collateral in satisfaction of obligation];

8 (10) Section 9-621], which deals with redemption of collateral];

9 ~~(9) Section 9-622~~], which deals with reinstatement of obligations];

10 (11) Section 9-623], which deals with permissible waivers]; and

11 (12) Sections 9-624, 9-625, and ~~9-627~~ 9-628], which deal with the

12 secured party's liability for failure to comply with this article].

13 (b) An obligor other than a consumer obligor in a consumer-goods
14 transaction or a secondary obligor may waive or vary the rules referred to in
15 subsection (a) to the extent and in the manner provided by other law.

16 **SECTION 9-603. AGREEMENT ON STANDARDS CONCERNING**
17 **RIGHTS AND DUTIES.**

18 (a) The parties may determine by agreement the standards measuring the
19 fulfillment of the rights of a debtor or obligor and the duties of a secured party if the
20 standards are not manifestly unreasonable.

21 (b) Subsection (a) does not apply to the duty under Section 9-609 to refrain

1 from breaching the peace when taking possession of collateral.

2 **SECTION 9-604. PROCEDURE IF SECURITY AGREEMENT COVERS**
3 **REAL PROPERTY OR FIXTURES.**

4 (a) If a security agreement covers both personal and real property, a secured
5 party may proceed:

6 (1) under this part as to the personal property without prejudicing any
7 rights and remedies with respect to the real property; or

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

11 (b) Subject to subsection (c), if a security agreement covers goods that are
12 or become fixtures, a secured party may proceed:

13 (1) under this part; or

14 (2) in accordance with the rights and remedies with respect to real
15 property, in which case the other provisions of this part do not apply.

16 (c) Subject to the other provisions of this part, if a secured party ~~with~~
17 holding a security interest in fixtures has priority over all owners and
18 encumbrancers of the real property, the secured party may, on default remove the
19 collateral from the real property.

20 (d) [Unless otherwise agreed, a] [A] secured party that removes collateral

1 shall promptly reimburse any encumbrancer or owner of the real property, other
2 than the debtor, for the cost of repair of any physical injury caused by the removal.
3 The secured party need not reimburse the encumbrancer or owner for any
4 diminution in value of the real property caused by the absence of the goods removed
5 or by any necessity of replacing them. A person entitled to reimbursement may
6 refuse permission to remove until the secured party gives adequate assurance for the
7 performance of the obligation to reimburse.

8 **SECTION 9-605. UNKNOWN DEBTOR OR SECONDARY OBLIGOR.**

9 A secured party does not owe a duty based on its status as secured party to a person,
10 or to a secured party or lienholder that has filed a financing statement against the
11 person, unless the secured party knows:

- 12 (1) that a person is a debtor or a secondary obligor;
13 (2) the identity of the person; and
14 (3) how to communicate with the person.

15 **SECTION 9-606. TIME OF DEFAULT FOR AGRICULTURAL LIEN.**

16 For purposes of this part, a default occurs in connection with an agricultural lien at
17 [the earlier of:

- 18 (1) the time provided by agreement of the parties; or
19 (2)] the time at which the secured party becomes entitled to enforce the lien

1 in accordance with the statute under which it was created.

2 **SECTION 9-607. COLLECTION AND ENFORCEMENT BY SECURED**
3 **PARTY.**

4 (a) If so agreed, and in any event on default, a secured party:

5 (1) may notify an account debtor or other person obligated on collateral
6 to make payment or otherwise render performance to or for the benefit of the
7 secured party[, whether or not a debtor had been making collections on or enforcing
8 the collateral];

9 (2) may take any proceeds to which the secured party is entitled under
10 Section 9-313;

11 (3) may enforce the obligations of an account debtor or other person
12 obligated on collateral and exercise the rights and remedies of the debtor with
13 respect to the obligation of the account debtor or other person obligated on
14 collateral [to make payment or otherwise render performance to the debtor, and with
15 respect to any property that secures the obligations of the account debtor or other
16 person obligated on the collateral];

17 (4) if it holds a security interest in a deposit account perfected by control
18 under Section 9-109(a)(1), may apply the balance of the deposit account to the
19 obligation secured by the deposit account; and

20 (5) if it holds a security interest in a deposit account perfected by control

1 under Section 9-109(a)(2) or (3), may instruct the bank to pay the balance of the
2 deposit account to or for the benefit of the secured party.

3 (b) If necessary to enable a secured party to exercise under subsection (a)(3)
4 the right of a debtor to enforce nonjudicially any mortgage, the secured party may
5 record in the office in which the mortgage is recorded:

6 (1) a copy of the security agreement that creates or provides for a
7 security interest in the obligation secured by the mortgage; and

8 (2) the secured party's sworn affidavit in recordable form stating that:

9 (A) a default has occurred; and

10 (B) the secured party is entitled to enforce nonjudicially the
11 mortgage.

12 (c) A secured party shall proceed in a commercially reasonable manner if
13 the secured party:

14 (1) undertakes to collect from or enforce an obligation of an account
15 debtor or other person obligated on collateral; and

16 (2) is entitled [by agreement] to charge back uncollected collateral or
17 otherwise to full or limited recourse against the debtor or against a secondary
18 obligor.

19 (d) The secured party may deduct from the collections made pursuant to
20 subsection (c) reasonable expenses of collection and enforcement, including
21 reasonable attorney's fees and legal expenses incurred by the secured party.

1 f(e) This section does not determine whether an account debtor, bank, or
2 other person obligated on collateral owes a duty to a secured party.}

3 **SECTION 9-608. APPLICATION OF PROCEEDS OF COLLECTION**
4 **OR ENFORCEMENT; LIABILITY FOR DEFICIENCY AND RIGHT TO**
5 **SURPLUS.**

6 (a) If a security interest or agricultural lien secures payment or performance
7 of an obligation, the following rules apply:

8 (1) A secured party shall apply or pay over for application the cash
9 proceeds of collection or enforcement under this section in the following order to:

10 (A) the reasonable expenses of collection and enforcement and, to
11 the extent provided for by agreement and not prohibited by law, reasonable
12 attorney's fees and legal expenses incurred by the secured party;

13 (B) the satisfaction of obligations secured by the security interest or
14 agricultural lien under which the collection or enforcement is made; and

15 (C) the satisfaction of obligations secured by any subordinate
16 security interest in or other lien on the collateral subject to the security interest or
17 agricultural lien under which the collection or enforcement is made if the secured
18 party receives an authenticated demand for proceeds before distribution of the
19 proceeds is completed.

20 (2) If requested by a secured party, a holder of a subordinate security

1 interest or other lien shall furnish reasonable proof of the interest or lien within a
2 reasonable time. Unless the holder complies, the secured party need not comply
3 with the holder's demand under paragraph (1)(C).

4 (3) A secured party need not apply or pay over for application the
5 noncash proceeds of collection and enforcement under this section. A secured party
6 that applies or pays over for application noncash proceeds shall do so in a
7 commercially reasonable manner.

8 (4) A secured party shall account to and pay a debtor for any surplus
9 despite any agreement to the contrary, and, ~~unless otherwise agreed~~, the obligor is
10 liable for any deficiency.

11 (b) If the underlying transaction is a sale of accounts, chattel paper, or
12 payment intangibles, the debtor is entitled to any surplus, and the obligor is liable
13 for any deficiency, ~~only if its agreement so provides~~.

14 (c) Recovery of a deficiency under [subsection (a)] [this section] is subject
15 to Section 9-625.

16 Reporters' Comments

17 **Changes from Prior Draft:** Subsections (a)(4) and (b) have been revised to
18 omit, as unnecessary, the references to agreements varying the baseline rules on
19 deficiencies. The parties are always free to agree that an obligor will not be liable
20 for a deficiency, even if the collateral secures an obligation, and that an obligor is
21 liable for a deficiency, even if the transaction is a sale of receivables. Parallel
22 changes have been made to Section 9-614(e) and (f).

23 **SECTION 9-609. SECURED PARTY'S RIGHT TO TAKE POSSESSION**

1 **AFTER DEFAULT.**

2 (a) A secured party has the right on default to take possession of the
3 collateral.

4 (b) A secured party may take possession of collateral:

5 (1) [with] [pursuant to] judicial process; or

6 (2) if it takes possession without breach of the peace, without judicial
7 process.

8 (c) If a security agreement so provides, a secured party may require a debtor
9 to assemble the collateral and make it available to the secured party at a place to be
10 designated by the secured party which is reasonably convenient to both parties.

11 (d) Without removal, a secured party:

12 (1) may render equipment unusable; and

13 (2) may dispose of collateral on a debtor's premises under Section 9-610.

14 **SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.**

15 (a) A secured party after default may sell, lease, license, or otherwise
16 dispose of any or all of the collateral in its present condition or following any
17 commercially reasonable preparation or processing.

18 (b) Every aspect of a disposition of collateral, including the method,
19 manner, time, place, and other terms, must be commercially reasonable. If
20 commercially reasonable, a secured party may dispose of collateral by public or

1 private proceedings, by one or more contracts, as a unit or in parcels, and at any
2 time and place and on any terms.

3 (c) A secured party may purchase collateral:

4 (1) at a public sale; or

5 (2) at a private sale only if the collateral is of a kind that is:

6 (A) customarily sold on a recognized market; or

7 (B) the subject of widely distributed standard price quotations.

8 (d) A contract for sale, lease, license, or other disposition includes the
9 warranties relating to title, possession, quiet enjoyment, and the like which by
10 operation of law accompany a voluntary disposition of property of the kind subject
11 to the contract.

12 (e) A secured party may disclaim or modify warranties under subsection (d)
13 ~~in the contract for disposition~~ :

14 _____ (1) in a manner that would be effective to disclaim or modify the
15 warranties in a voluntary disposition of property of the kind subject to the contract
16 of disposition; or

17 _____ (2) by ~~giving a~~ communicating to the purchaser a record evidencing the
18 contract for disposition and containing [an authenticated] [an] ~~statement explicitly~~
19 ~~disclaiming or modifying~~ explicit disclaimer or modification of the warranties.

20 (f) [A] [An authenticated] ~~statement~~ record is sufficient to disclaim
21 warranties under ~~this section~~ subsection (e) if it ~~states~~ indicates “There is no

1 warranty relating to title, possession, quiet enjoyment, or the like in this disposition
2 or contains words of similar import.

3 Reporters' Comments

4 **Changes from Prior Draft:** The rule in former subsection (e), which now
5 appears as modified in subsection (e)(2), was intended to be a safe harbor and not
6 the exclusive manner of disclaiming or modifying warranties in an Article 9
7 disposition. Subsection (e)(1) has been added to make clear that a disclaimer or
8 modification of warranties that would be effective under other law is effective for
9 purposes of Part 6. Subsection (e)(2) has been modified to make clear that the
10 disclaimer or modification need not be written but may not be oral.

11 1. **Source.** Former Section 9-504(1), (3)

12 * * *

13 10. **Relevance of Price.** The amount of proceeds received in a disposition
14 (e.g., the cash price if the disposition is by way of sale) need not be commercially
15 reasonable. However, a low price may suggest that a court should scrutinize more
16 carefully all aspects of a disposition, including the method manner, time, place, and
17 other terms, to ensure that each aspect was commercially reasonable.

18 **SECTION 9-611. PERSONS ENTITLED TO NOTIFICATION BEFORE**
19 **DISPOSITION OF COLLATERAL.**

20 (a) In this section, "notification date" means the earlier of the date on
21 which:

22 (1) a secured party sends to the debtor and any secondary obligor an
23 authenticated notification of disposition; ~~for~~ ~~and~~

24 (2) the debtor and any secondary obligor waive the right to notification.

25 (b) A secured party that intends to dispose of collateral under Section 9-610

1 shall send to a debtor and any secondary obligor a reasonable authenticated
2 notification of disposition ~~under Section 9-613~~. If the collateral is consumer goods,
3 the secured party need not send another notification. If the collateral is not
4 consumer goods, the secured party shall send an authenticated notification of
5 disposition to:

6 (1) any other person from which the secured party has received, before
7 the notification date, an authenticated notification of a claim of an interest in the
8 collateral;

9 (2) any other secured party that, [] days before the notification date,
10 held a security interest in or agricultural lien in on the collateral perfected by the
11 filing of a financing statement that:

12 (A) identified the collateral;

13 (B) was indexed under the debtor's name as of that date; and

14 (C) was filed in the office in which to file a financing statement
15 against the debtor covering the collateral as of that date; and

16 (3) any other secured party that, [] days before the notification date,
17 held a security interest in the collateral perfected by compliance with a statute,
18 regulation, or treaty described in Section 9-309A(a).

19 (c) Subsection (b) does not apply if the collateral is perishable or threatens
20 to decline speedily in value or is of a type customarily sold on a recognized market.

21 (d) A secured party complies with the notification requirement specified in

1 subsection (b)(2) if:

2 (1) not later than [] days before the notification date, the secured party
3 requests, in a commercially reasonable manner, information concerning financing
4 statements indexed under the debtor's name in the office indicated in subsection
5 (b)(2); and

6 (2) before the notification date the secured party:

7 (A) did not receive a response to the request for information; or

8 (B) received a response to the request for information and sent an
9 authenticated notification of disposition to each secured party named in that
10 response and whose financing statement covered the collateral.

11 **SECTION 9-612. TIMELINESS OF NOTIFICATION BEFORE**
12 **DISPOSITION OF COLLATERAL.**

13 (a) [A] [Unless otherwise agreed,] a notification of disposition sent after
14 default and 10 days or more before the earliest time of disposition set forth in the
15 notification is sent within a reasonable time before the disposition.

16 (b) Whether a notification sent less than 10 days before the earliest time of
17 disposition set forth in the notification is sent within a reasonable time is a question
18 of fact.

19 (c) This section does not apply to a consumer-goods transaction.

1 notification is sent]
2 From: [Name, address, and telephone number of secured
3 party]

4 Name of Debtor(s): [Include only if debtor(s) are not an addressee]
5 [For a public disposition:]

6 We will sell [or lease or license, *as applicable*] the [describe collateral]
7 [to the highest qualified bidder] in public as follows:

8 Day and Date: _____

9 Time: _____

10 Place: _____

11 [For a private disposition:]

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

14 You are entitled to an accounting of the unpaid indebtedness secured by the
15 property that we intend to sell [or lease or license, *as applicable*] [for a charge of
16 \$ _____]. You may request an accounting by calling us at [telephone
17 number]

18 **[End of Form]**

19 (4) A particular phrasing of the notification is not required. A
20 notification substantially complying with the requirements of paragraph (1) is
21 sufficient even if:

1 If you make the payment, [you] [name of obligor, if different] will have to
2 keep on making the rest of the regular [monthly] payments.

3 If you want us to explain to you in writing how we have figured the amount that
4 you owe us, you may call us at [telephone number]. [We will charge you
5 \$ _____ for the explanation.]

6 **[End of Form]**

7 (3) A particular phrasing of the notification is not required. ~~A~~
8 notification substantially complying with the requirements of this subsection is
9 sufficient even if it contains minor errors that are not seriously misleading. A
10 notification [that complies with the requirements of paragraph (1)] [in substantially
11 the form of paragraph (2)] is sufficient even if it contains errors in information not
12 [required by] [specified in] that paragraph, unless the erroneous information is
13 misleading with respect to rights and remedies arising under this article.

14 Reporters' Comments

15 1. **Source.** New.

16 * * *

17 x. **Consumer Goods Secured Transactions.** Paragraph (1) sets forth the
18 information required for an effective notification in a consumer-goods transaction.
19 A notification that lacks any of the information set forth in paragraph (1) is
20 insufficient as a matter of law. Compare Section 9-613(2), under which the trier of
21 fact may find a notification to be sufficient even if it lacks some information listed
22 in paragraph (1).

23 **SECTION 9-614. APPLICATION OF PROCEEDS OF DISPOSITION;**

1 **LIABILITY FOR DEFICIENCY AND RIGHT TO SURPLUS.**

2 (a) In this section:

3 (1) “Person related to₂ with respect to an individual₂ means:

4 (A) the spouse of the individual;

5 (B) a brother, brother-in-law, sister, or sister-in-law of the individual;

6 (C) an ancestor or lineal descendant of the individual or the
7 individual’s spouse; and

8 (D) any other relative, by blood or marriage, of the individual or the
9 individual’s spouse who shares the same home with the individual.

10 (2) “Person related to₂ with respect to an organization₂ means:

11 (A) a person directly or indirectly controlling, controlled by, or under
12 common control with the organization;

13 (B) an officer or director of, or a person performing similar functions
14 with respect to, the organization;

15 (C) an officer or director of, or a person performing similar functions
16 with respect to, a person described in paragraph (A);

17 (D) the spouse of ~~a person~~ an individual described in paragraph (A),
18 (B), or (C); ~~and~~ or

19 (E) an individual ~~a person~~ related by blood or marriage to ~~a person~~
20 an individual described in paragraph (A), (B), (C), or (D) and who shares the same
21 home with the ~~person:~~ individual.

1 (b) A secured party shall apply or pay over for application the cash proceeds
2 of disposition in the following order to:

3 (1) the reasonable expenses of retaking, holding, preparing for
4 disposition, processing, and disposing, and, to the extent provided for by agreement
5 and not prohibited by law, reasonable attorney's fees and legal expenses incurred by
6 the secured party;

7 (2) the satisfaction of obligations secured by the security interest or
8 agricultural lien under which the disposition is made;

9 (3) the satisfaction of obligations secured by any subordinate security
10 interest in or other lien on the collateral if:

11 (A) the secured party receives from the holder of the subordinate
12 security interest an authenticated demand for proceeds before distribution of the
13 proceeds is completed; and

14 (B) if a consignor has an interest in the collateral, the subordinate
15 security interest or lien is senior to the interest of the consignor; and

16 (4) a secured party that is a consignor of the collateral if the secured
17 party receives from the consignor an authenticated demand for proceeds before
18 distribution of the proceeds is completed.

19 (c) If requested by a secured party, a holder of a subordinate security
20 interest or other lien shall furnish reasonable proof of the interest or lien within a
21 reasonable time. Unless the holder does so, the secured party need not comply with

1 the holder's demand under subsection (b)(3).

2 (d) A secured party need not apply or pay over for application noncash
3 proceeds of disposition under this section. A secured party that applies or pays over
4 for application noncash proceeds shall do so in a commercially reasonable manner.

5 (e) If the security interest under which a disposition is made secures
6 payment or performance of an obligation, after making the payments and
7 applications required by subsection (b):

8 (1) unless subsection (b)(4) requires the secured party to apply or pay
9 over cash proceeds to a consignor, the secured party shall account to and pay a
10 debtor for any surplus; and

11 (2) ~~[unless otherwise agreed,]~~ the obligor is liable for any deficiency.

12 (f) If the underlying transaction is a sale of accounts, chattel paper, or
13 payment intangibles:

14 (1) the debtor is not entitled to any surplus; and

15 (2) the obligor is ~~[not]~~ liable for any deficiency~~[, only if its agreement so~~
16 ~~provides]~~.

17 (g) Recovery of any deficiency under subsection (e) ~~or (f)~~ is subject to
18 Section 9-625.

19 (h) The surplus or deficiency under subsection (e) [or (f)] is calculated
20 based on the amount of proceeds that would have been realized in a ~~commercially~~
21 ~~reasonable~~ disposition complying with the requirements of this part to a transferee

1 other than the secured party, a person related to the secured party, or a secondary
2 obligor if:

3 (1) the transferee in the disposition is the secured party, a person related
4 to the secured party, or a secondary obligor; and

5 (2) the amount of proceeds of the disposition is ~~unreasonably low~~
6 significantly below the range of proceeds that a complying disposition to a person
7 other than the secured party, a person related to the secured party, or a secondary
8 obligor would have brought.

9 (i) A secured party that receives cash proceeds of a disposition in good faith
10 and without knowledge that the receipt violates the rights of the holder of a security
11 interest or other lien that is not subordinate to the security interest or agricultural
12 lien under which the disposition is made:

13 (1) takes the cash proceeds free of the security interest or other lien;

14 (2) is not obligated to apply the proceeds of the disposition to the
15 satisfaction of obligations secured by the security interest or other lien; and

16 (3) is not obligated to account to or pay the holder of the security interest
17 or other lien for any surplus.

18 Reporters' Comments

19 **Changes from Prior Draft:**

20 A. Subsection (h) has been revised in accordance with the discussion at
21 the February, 1998, Drafting Committee meeting.

1 B. Concerning the revisions to subsections (e) and (f), see the
2 Reporters' Comments to Section 9-609.

3 * * *

4 x. **“Low Price” Dispositions.** Subsection (h) provides a special method for
5 calculating a deficiency or surplus when the secured party, a person related to the
6 secured party (as defined in subsection (a)), or a secondary obligor acquires the
7 collateral at a foreclosure disposition. It recognizes that when the foreclosing
8 secured party or a related party is the transferee of the collateral, the secured party
9 sometimes lacks the incentive to maximize the proceeds of disposition. As a
10 consequence, the disposition may comply with the procedural requirements of this
11 Article (e.g., it is conducted in a commercially reasonable manner following
12 reasonable notice) but nevertheless fetch a price that is unreasonably low.

13 Subsection (h) adjusts for this lack of incentive. If the proceeds of a
14 disposition of collateral to a secured party, a person related to the secured party, or a
15 secondary obligor are “significantly below the range of proceeds that a complying
16 disposition to a person other than the secured party, a person related to the secured
17 party, or a secondary obligor would have brought, then instead of calculating a
18 deficiency (or surplus) based on the actual net proceeds, the calculation is based
19 upon the amount that would have been received in a commercially reasonable
20 disposition to an unrelated person. Subsection (h) thus rejects the view that the
21 secured party's receipt of an unreasonably low amount constitutes noncompliance
22 with Part 6. However, a low price [suggests] [may suggest] the need for greater
23 judicial scrutiny. See Section 9-610, Comment x-r.

24 **SECTION 9-614A. EXPLANATION OF CALCULATION OF SURPLUS**
25 **OR DEFICIENCY.**

26 ~~(a) This section applies to a consumer goods transaction in which the debtor~~
27 ~~is entitled to a surplus or a consumer obligor is liable for a deficiency under Section~~
28 ~~9-614(e).~~

29 (a) In this section:

30 (1) “Explanation means a writing that:

1 (A) states the amount of the surplus or deficiency; and
2 (B) provides ~~a reasonable~~ an explanation in accordance with
3 subsection (c) of how the secured party calculated the surplus or deficiency; ;
4 ~~including an indication of:~~
5 (i) ~~the amount of the obligation secured, calculated as of a date~~
6 ~~not more than [] days before disposition of the collateral;~~
7 (ii) ~~the components of the obligation secured, including, as~~
8 ~~applicable, the unpaid balance of principal or purchase price, interest or other~~
9 ~~finance charges, delinquency, default, deferral, or other additional charges, and~~
10 ~~reasonable expenses and attorney's fees of the type described in Section 9-614(b)(1);~~
11 ~~and~~
12 (iii) ~~the amount of credit applied to the obligation secured, made~~
13 ~~after the date of calculation, and its components, including, as applicable, payments,~~
14 ~~rebates, and proceeds of a disposition of collateral.~~
15 (C) states, if applicable, that [other] [future] debits, credits, charges,
16 rebates, and expenses may affect the amount of the surplus or deficiency; and
17 _____ (D) provides a telephone number or mailing address from which
18 additional information concerning the transaction is available.

19 (2) "Request" means a record:

20 (A) authenticated by a debtor or consumer obligor; and

21 (B) requesting that the recipient provide an explanation.

1 (b) In a consumer-goods transaction in which the debtor is entitled to a
2 surplus or a consumer obligor is liable for a deficiency under Section 9-614(e), the
3 A secured party shall send an explanation to the debtor or consumer obligor, as
4 applicable:

5 (1) before or when the secured party accounts to the debtor and pays any
6 surplus or first makes written demand on the consumer obligor for payment of the
7 deficiency; and

8 (2) within two weeks after receipt of a request.

9 (c) To comply with subsection (a)(1)(B), a writing must provide the
10 following information in the following order:

11 (1) the aggregate amount of obligations secured by the security interest
12 under which the disposition was made, calculated as of a specified date not more
13 than [] days before disposition of the collateral;

14 (2) the amount of proceeds of the disposition;

15 (3) the aggregate amount of the obligations after deducting the amount
16 of proceeds;

17 (4) the aggregate amount of expenses and attorney's fees secured by the
18 collateral known to the secured party and not reflected in the amount in paragraph
19 (1);

20 (5) the types and aggregate amount of rebates and other credits to which
21 the obligor is entitled and that are not reflected in the amount in paragraph (1); and

1 (6) the amount of the surplus or deficiency.

2 (d) A particular phrasing of the explanation is not required. An explanation
3 complying substantially with the requirements of subsection (a) is sufficient even if
4 it contains minor errors [or omissions] that are not seriously misleading.

5 (e) A debtor or consumer obligor is entitled without charge to one response
6 to a request under this section during any six-month period in which the secured
7 party did not send to the debtor or consumer obligor an explanation pursuant to
8 subsection (b)(1). The secured party may require payment of a charge not
9 exceeding \$[] for each additional response.

10 **SECTION 9-615. RIGHTS OF TRANSFEREE OF COLLATERAL.**

11 (a) A secured party's disposition of collateral after default:

12 (1) transfers to a transferee for value all of a the debtor's rights in the
13 collateral; and

14 (2) discharges the security interest under which the disposition is made;
15 and

16 (3) discharges any subordinate security interest or other lien [other than
17 liens created under [cite acts or statutes providing for liens, if any, that are not to be
18 discharged]].

19 (b) The transferee takes free of the rights and interests described in
20 subsection (a) even if the secured party fails to comply with the requirements of this

1 article or any judicial proceedings:

2 (1) in a public sale, if the transferee:

3 (A) has no knowledge of any defects in the sale;

4 (B) does not buy in collusion with the secured party, other bidders, or
5 the person conducting the sale; and

6 (C) acts in good faith; and

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

8 (c) If a transferee does not take free of the rights and interests described in
9 subsection (a), the transferee takes the collateral subject to:

10 (1) the debtor's rights in the collateral;

11 (2) the security interest or agricultural lien under which the disposition is
12 made; and

13 (3) any [subordinate] security interest or other lien.

14 (d) Except as otherwise provided in this section or elsewhere in this article,
15 a secured party's disposition of collateral does not discharge any security interest or
16 other lien.

17 **SECTION 9-616. RIGHTS AND DUTIES OF CERTAIN [SECONDARY**
18 **OBLIGORS] [PERSONS LIABLE TO SECURED PARTY].**

19 (a) A secondary obligor acquires the rights and becomes obligated to
20 perform the duties of the secured party after the secondary obligor:

1 (1) receives an assignment of a secured obligation from the secured
2 party;

3 (2) receives a transfer of collateral from the secured party and agrees to
4 accept the rights and assume the duties of the secured party; or

5 (3) is subrogated to the rights of a secured party with respect to
6 collateral.

7 (b) An assignment, transfer, or subrogation described in subsection (a):

8 (1) is not a disposition of collateral under Section 9-610; and

9 (2) relieves the secured party of further duties under this article.

10 **SECTION 9-617. TRANSFER OF RECORD OR LEGAL TITLE ~~FILE~~.**

11 (a) In this section, "transfer statement" means a record authenticated by a
12 secured party stating:

13 (1) that the debtor has defaulted in connection with an obligation secured
14 by specified collateral;

15 (2) that the secured party has exercised its post-default remedies with
16 respect to the collateral;

17 (3) that, by reason of the exercise, a transferee has acquired the rights of
18 the debtor in the collateral; and

19 (4) the name and mailing address of the secured party, the debtor, and
20 the transferee.

1 [written] statement authenticated by a secured party containing the terms on which
2 the secured party is willing to accept collateral in full or partial satisfaction of the
3 obligation it secures.

4 (b) Except as otherwise provided in subsections (f) and (h), a secured
5 party may accept collateral in full or partial satisfaction of the obligation it secures
6 only if:

7 (1) the debtor consents to the acceptance under subsection (d);

8 (2) the secured party does not receive, within the time set forth in
9 subsection (e), a notification of objection to the proposal authenticated by

10 (A) a person to which the secured party was required to send a
11 proposal under Section 9-619; or

12 (B) any other person holding an interest in the collateral subordinate
13 to the security interest that is the subject of the proposal; ~~and~~

14 (3) if the collateral is consumer goods, the collateral is not in the
15 possession of the debtor when the debtor consents to the acceptance; and

16 (4) the secured party is not required to dispose of the collateral [under]
17 [pursuant to] subsection (f).

18 (c) A purported or apparent acceptance of collateral under this section is
19 ineffective unless:

20 (1) the secured party consents to the acceptance in an authenticated
21 record or sends to the debtor a proposal; and

1 (2) the conditions of subsection (b) are met.

2 (d) For purposes of this section:

3 (1) a debtor consents to an acceptance of collateral in partial satisfaction
4 of the obligation it secures only if the debtor agrees to the terms of the acceptance in
5 a record authenticated after default; and

6 (2) a debtor consents to an acceptance of collateral in full satisfaction of
7 the obligation it secures only if the debtor agrees to the terms of the acceptance in a
8 record authenticated after default or the secured party:

9 (A) sends to the debtor after default a proposal that is unconditional
10 or subject only to a condition that collateral not in the possession of the secured
11 party be preserved or maintained;

12 (B) in the proposal, proposes to accept collateral in full satisfaction
13 of the obligation it secures; and

14 (C) does not receive a notification of objection authenticated by the
15 debtor within 20 days after the proposal is sent.

16 (e) To be effective under subsection (b)(2), a notification of objection must
17 be received by the secured party:

18 (1) in the case of a person to which the proposal was sent pursuant to
19 Section 9-619, within 20 days after notification was sent to that person; and

20 (2) in other cases:

21 (A) within 20 days after the last notification was sent pursuant to

1 Section 9-619; or

2 (B) if a notification was not sent, before the debtor consents to the
3 acceptance under subsection (d).

4 (f) A secured party that has taken possession of collateral shall dispose of
5 the collateral pursuant to Section 9-610 within the time specified in subsection (g)
6 if:

7 (1) 60 percent of the cash price has been paid in the case of a purchase-
8 money security interest in consumer goods; or

9 (2) 60 percent of the principal amount of the obligation secured has been
10 paid in the case of another security interest in consumer goods.

11 (g) To comply with subsection (f), the secured party shall dispose of the
12 collateral:

13 (1) within 90 days after taking possession; or

14 (2) within any [extended] [longer] period to which the debtor and all
15 secondary obligors have agreed by [signing] [authenticating] a statement to that
16 effect after default.

17 (h) In a consumer transaction, a secured party may not accept collateral in
18 partial satisfaction of the obligation it secures.

19 Reporters' Comments

20 **Changes from Prior Draft:** Subsection (h) is new. It prohibits the secured
21 party from accepting collateral in partial satisfaction of the obligation it secures.
22 The Official Comments can explain the consequences of an attempted acceptance in

1 partial satisfaction: The attempted acceptance is void. A secured party that takes
2 possession of the collateral and fails to dispose of it will violate subsection (f), if
3 applicable, and may violate Section 9-614 in any event.

4 **SECTION 9-619. NOTIFICATION OF PROPOSAL TO ACCEPT**
5 **COLLATERAL.**

6 (a) A secured party that desires to accept collateral in full or partial
7 satisfaction of the obligation it secures shall send its proposal to:

8 (1) any person from which the secured party has received, before the
9 debtor consented to the acceptance, an authenticated notification of a claim of an
10 interest in the collateral;

11 (2) any other secured party or lienholder that, [] days before the debtor
12 consented to the acceptance, held a security interest in or other lien on the collateral
13 perfected by the filing of a financing statement that:

14 (A) identified the collateral;

15 (B) was indexed under the debtor's name as of that date; and

16 (C) was filed in the office or offices in which to file a financing
17 statement against the debtor covering the collateral as of that date; and

18 (3) any other secured party that, [] days before the debtor consented to
19 the acceptance, held a security interest in the collateral perfected by compliance
20 with a statute, regulation, or treaty described in Section 9-309A(a).

21 (b) A secured party that desires to accept collateral in partial satisfaction of

1 the obligation it secures shall send its proposal to any secondary obligor in addition
2 to the persons described in subsection (a).

3 **SECTION 9-620. EFFECT OF ACCEPTANCE OF COLLATERAL.**

4 (a) A secured party's acceptance of collateral in full or partial satisfaction of
5 the obligation it secures:

6 (1) discharges the obligation to the extent consented to by the debtor, but
7 recovery of a deficiency is subject to Section 9-625;

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

9 (3) discharges the security interest or agricultural lien that is the subject
10 of the debtor's consent and any subordinate security interest or other lien; and

11 (4) terminates any other subordinate interest.

12 (b) A subordinate interest is discharged or terminated under subsection (a)
13 whether or not the secured party is required to send or does send its proposal to the
14 holder of the interest. However, any person to which the secured party was required
15 to send, but did not send, its proposal has the remedy provided by Section 9-624(b).

16 **SECTION 9-621. RIGHT TO REDEEM COLLATERAL.**

17 (a) The debtor, any secondary obligor, or any other secured party or
18 lienholder may redeem the collateral.

19 (b) To redeem collateral, a person must tender:

1 (1) fulfillment of all obligations secured by the collateral; and
2 (2) the reasonable expenses and attorney's fees described in Section 9-
3 614(b)(1).

4 (c) A redemption may occur at any time before a secured party:

5 (1) has collected collateral under Section 9-607;

6 (2) has disposed of collateral or entered into a contract for its disposition
7 under Section 9-610; or

8 (3) has accepted collateral in full or partial satisfaction of the obligation
9 it secures under Section 9-618.

10 **SECTION 9-622. [Deleted.] REINSTATEMENT OF OBLIGATION**
11 **~~SECURED WITHOUT ACCELERATION.~~**

12 ~~(a) A debtor or a secondary obligor who is a consumer obligor may cure a~~
13 ~~default consisting only of the failure to make required payment and may reinstate~~
14 ~~the secured obligation without acceleration if:~~

15 ~~(1) 60 percent of the cash price has been paid in the case of a purchase-~~
16 ~~money security interest in consumer goods; or~~

17 ~~(2) 60 percent of the principal amount of the obligation secured has been~~
18 ~~paid in the case of another consumer goods secured transaction.~~

19 ~~(b) To cure a default under subsection (a), a person must tender:~~

20 ~~(1) the unpaid amount of the secured obligation due at the time of tender;~~

1 ~~without acceleration, including charges for delinquency, default, or deferral; and~~

2 ~~(2) reasonable expenses and attorney's fees of the type described in~~
3 ~~Section 9-614(b)(1).~~

4 ~~(c) A tender of payment under subsection (b) 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:~~

10 ~~(A) disposes of collateral or enters into a contract for its disposition~~
11 ~~under Section 9-610; or~~

12 ~~(B) accepts collateral in full or partial satisfaction of the obligation it~~
13 ~~secures under Section 9-618.~~

14 ~~(d) A tender of payment under subsection (b) restores to the debtor and~~
15 ~~consumer obligor who is a secondary obligor their respective rights as if the default~~
16 ~~had not occurred and all payments had been made when scheduled, including the~~
17 ~~debtor's right, if any, to possess the collateral. Promptly upon the tender, the~~
18 ~~secured party shall take all steps necessary to cause any judicial process affecting~~
19 ~~the collateral to be vacated and any pending action based on the default to be~~
20 ~~dismissed.~~

21 ~~(e) A secured obligation may be reinstated under this section only once.~~

1 ~~debtor expressly agreed to the terms of a purported waiver in consumer goods~~
2 ~~secured transactions.~~

3 [SUBPART 2. NONCOMPLIANCE WITH ARTICLE.]

4 **SECTION 9-624. REMEDIES FOR SECURED PARTY'S FAILURE TO**
5 **COMPLY WITH THIS ARTICLE.**

6 (a) If it is established that a secured party is not proceeding in accordance
7 with this article, a court may order or restrain collection, enforcement, or disposition
8 of collateral on appropriate terms and conditions.

9 (b) Subject to subsection (c), a ~~▲~~ secured party is liable for damages in the
10 amount of any loss caused by a failure to comply with this article. Loss caused by a
11 failure to comply with a request under Section 9-209 may include loss resulting
12 from the debtor's inability to obtain, or increased costs of, alternative financing.

13 (c) Except as otherwise provided in Section 9-627:

14 (1) a person that, at the time of the failure, was a debtor, was a secondary
15 obligor, or held a security interest in or other lien on the collateral has a right to
16 recover damages for its loss under this subsection (b); and

17 (2) if the collateral is consumer goods, a person that was a debtor [or a
18 secondary obligor] at the time a secured party failed to comply with this part has a
19 right to recover for that failure in any event an amount not less than the interest or
20 finance charges plus 10 percent of the principal amount of the obligation.

1 (d) A debtor whose deficiency is eliminated under Section 9-625 may
2 recover damages for the loss of any surplus. However, a debtor or [secondary] [an]
3 ~~consumer~~ obligor whose deficiency is eliminated or reduced under Section 9-625
4 may not otherwise recover under ~~this subsection~~ subsection (b) for noncompliance
5 with [Sections 9-607 through 9-614A, 9-618, and 9-619] [the provisions of this part
6 relating to collection, enforcement, disposition, or acceptance].

7 ~~(d) Except as otherwise provided in Section 9-627, in a consumer goods~~
8 ~~transaction, a person that was a debtor at the time a secured party failed to comply~~
9 ~~with this part has a right to recover from the noncomplying secured party an amount~~
10 ~~equal to the interest or finance charges plus 10 percent of the principal amount of~~
11 ~~the obligation less the sum of:~~

12 ~~(1) any amount by which any consumer obligor's personal liability for a~~
13 ~~deficiency is eliminated or reduced under Section 9-625; and~~

14 ~~(2) any amount awarded against the secured party under subsection (b).~~

15 ~~(e) The secured party has the burden of establishing the amount of any~~
16 ~~deduction under paragraph (d)(1).~~

17 (e) In addition to any damages recoverable under subsection (b), the ~~The~~
18 ~~debtor, [secondary] consumer obligor, or requestor, requester, as applicable, may~~
19 ~~recover \$500 in each case and, in addition, any damages recoverable under~~
20 ~~subsection (b) from:~~

21 (1) a secured party that fails to comply with Section 9-208;

1 intended to leave the treatment of statutory damages as it was under former Article
2 9, with the probable result that statutory damages would not be reduced to take
3 account of actual damages awarded against the secured party or, in jurisdictions in
4 which an absolute bar or rebuttable presumption rule has been judicially adopted, to
5 take account of a loss of a deficiency.

1 **Alternative A**

2 **(“Absolute Bar” Rule for Consumer Goods Secured Transactions;**
3 **“Rebuttable Presumption” Rule for Other Transactions)**

4 **SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS**
5 **IN ISSUE.**

6 (a) This section applies in an action in which the amount of a deficiency or
7 surplus is in issue.

8 (b) A secured party need not prove compliance with [Sections 9-607
9 through 9-614A] [the provisions of this part relating to collection, enforcement,
10 disposition, or acceptance] unless the debtor or a secondary obligor places the
11 secured party's compliance in issue. If the secured party's compliance is placed in
12 issue, the secured party has the burden of establishing that the collection,
13 enforcement, disposition, or acceptance was conducted in accordance with [Sections
14 9-607 through 9-614A, as applicable] [the applicable provisions of this part].

15 (c) Except as otherwise provided in Section 9-627, if a secured party fails to
16 prove that the collection, enforcement, disposition, or acceptance was conducted in
17 accordance with [Sections 9-607 through 9-614A] [the provisions of this part
18 relating to collection, enforcement, disposition, or acceptance] the following rules
19 apply:

20 (1) In a consumer goods secured transaction for which no other property
21 remains to secure the obligation, neither the debtor nor a secondary obligor is liable

1 for a deficiency.

2 (2) ~~In other cases, the liability of a debtor or a secondary obligor for a~~
3 ~~deficiency is limited to an amount by which the sum of the secured obligation,~~
4 ~~expenses, and attorney's fees exceeds the greater of:~~

5 (A) ~~the proceeds of the collection, enforcement, disposition, or~~
6 ~~acceptance; or~~

7 (B) ~~the amount of proceeds that would have been realized had the~~
8 ~~noncomplying secured party proceeded in accordance with [Sections 9-607 through~~
9 ~~9-614A] [the provisions of this part relating to collection, enforcement, disposition,~~
10 ~~or acceptance].~~

11 (d) ~~For purposes of subsection (c)(2)(B), the amount of proceeds that would~~
12 ~~have been realized is equal to the sum of the secured obligation, expenses, and~~
13 ~~attorney's fees unless the secured party proves that the amount is less than that sum.~~

14 (e) ~~In a consumer goods secured transaction, liability under subsection~~
15 ~~(c)(2) is not a personal liability of a consumer obligor but may be satisfied only by~~
16 ~~enforcing a security interest or other consensual lien against property securing the~~
17 ~~obligation.~~

18 **Alternative B**

19 **~~("Rebuttable Presumption" Rule for All Transactions)~~**

20 **SECTION 9-625. ACTION IN WHICH DEFICIENCY OR SURPLUS IS**
21 **IN ISSUE.**

1 (a) This section applies in an action in which the amount of a deficiency or
2 surplus is in issue.

3 (b) If a deficiency or surplus is calculated under Section 9-614(h), the
4 debtor has the burden of establishing that the amount of proceeds of the disposition
5 is significantly below the range of prices that a complying disposition to an
6 unrelated third person would have brought.

7 (c) Except in a consumer-goods transaction, the following rules apply:

8 (1) A secured party need not prove compliance with [Sections 9-607
9 through 9-614A, 9-618, and 9-619] [the provisions of this part relating to collection,
10 enforcement, disposition, or acceptance] unless the debtor or a secondary obligor
11 places the secured party's compliance in issue.

12 (2) If the secured party's compliance is placed in issue, the secured party
13 has the burden of establishing that the collection, enforcement, disposition, or
14 acceptance was conducted in accordance with [Sections 9-607 through 9-614A, 9-
15 618, and 9-619, as applicable] [the applicable provisions of this part].

16 (3) Except as otherwise provided in Section 9-627, if a secured party
17 fails to prove that the collection, enforcement, disposition, or acceptance was
18 conducted in accordance with [Sections 9-607 through 9-614A, 9-618, and 9-619]
19 [the provisions of this part relating to collection, enforcement, disposition, or
20 acceptance,] the liability of a debtor or a secondary obligor for a deficiency is
21 limited to an amount by which the sum of the secured obligation, expenses, and

1 attorney's fees exceeds the greater of:

2 (A) the proceeds of the collection, enforcement, disposition, or
3 acceptance; or

4 (B) the amount of proceeds that would have been realized had the
5 noncomplying secured party proceeded in accordance with [Sections 9-607 through
6 9-614A, 9-618, and 9-619] [the provisions of this part relating to collection,
7 enforcement, disposition, or acceptance].

8 (4) For purposes of ~~subsection (c)(2)~~, paragraph (3)(B), the amount of
9 proceeds that would have been realized is equal to the sum of the secured
10 obligation, expenses, and attorney's fees unless the secured party proves that the
11 amount is less than that sum.

12 Reporters' Comments

13 **Changes from Prior Draft:**

14 A. This draft deletes Alternative A of Section 9-625, which
15 contemplated that a legislature might choose to adopt the absolute bar rule
16 statutorily. Instead, Section 9-625 now codifies the rebuttable presumption rule for
17 non-consumer-goods transactions. Except as to actual damages recoverable under
18 Section 9-624(b), however, the draft is silent as to whether a secured party's
19 noncompliance in a consumer-goods transaction affects a deficiency claim and, if
20 so, the nature of the effect. Thus, if a jurisdiction is to adopt an absolute bar rule, it
21 must do so judicially.

22 How the courts construe revised Article 9 will determine whether the
23 status of consumer-goods transactions ultimately remains unchanged from that
24 under former Article 9. Unlike this draft, former Article 9 contained no hint that
25 deficiencies in consumer- and non-consumer transactions should receive differing
26 treatment. This draft can be read to indicate that rebuttable presumption treatment
27 should not (and certainly that it might not) be appropriate for consumer-goods

1 transactions. Moreover, counsel for debtors in jurisdictions that have adopted the
2 “actual damages” rule based on a straightforward reading of former Section 9-507
3 (in lieu of either absolute bar or rebuttable presumption) will be compelled to argue
4 for absolute bar under revised Article 9. Courts may be loathe to embrace a rule
5 that is *less* favorable for consumers (actual damages) than the rule applicable in
6 non-consumer-goods transactions (rebuttable presumption). On the other hand,
7 counsel for creditors in absolute-bar jurisdictions can be expected to argue that the
8 legislative approval of the rebuttable presumption rule for non-consumer-goods
9 transactions signals rejection of the absolute bar rule for all transactions, on the
10 ground that all the policy reasons supporting the rebuttable presumption rule apply
11 with equal force to consumer-goods transactions. Thus, the approach taken in the
12 draft may lead to extensive litigation and relitigation under revised Article 9, even
13 in jurisdictions where the law already had been settled under former Article 9. On
14 the other hand, the Official Comments will indicate that the silence in this section
15 with respect to consumer-goods transactions leaves courts free to continue to apply
16 established law. See Comment y, below. If followed, this Comment would leave
17 the law where it was under former Article 9.

18 B. Alternative A of Section 9-625 also was intended to rationalize and
19 clarify the law even in jurisdictions that may already have opted judicially for the
20 absolute bar rule. For example, it dealt with the effect of noncompliance when
21 other collateral securing the deficiency remains following a disposition. Section 9-
22 625(c) also clarifies the application of the rebuttable presumption rule. Because
23 subsection (c) does not apply to consumer-goods transactions, however, the benefits
24 of the clarifications (e.g., allocation of the burden of proof) may be unavailable in
25 those transactions. A court might be reluctant to apply the statutory rule embodied
26 in Section 9-625 to consumer-goods transactions by analogy, inasmuch as it does
27 not apply to those transactions by its terms. However, the Official Comments could
28 attempt to negate any inferences that might otherwise be drawn from silence.

29 C. Subsection (b) is new. It imposes upon a debtor the burden of
30 proving that the proceeds of a disposition under Section 9-614(h) are so low that the
31 actual proceeds should not serve as the basis upon which a deficiency or surplus is
32 calculated. If the burden were placed on the secured party, then debtors might be
33 encouraged to challenge the price received in every disposition to the secured party,
34 a person related to the secured party, or a secondary obligor.

35 * * *

36 x. **Rebuttable Presumption Rule.** Subsection (c) establishes the rebuttable
37 presumption rule for transactions other than consumer-goods transactions. Under

1 paragraph (1), the secured party need not prove compliance with [Sections 9-607
2 through 9-614, 9-618, and 9-619, as applicable] [the applicable provisions of this
3 part] as part of its prima facie case. If, however, the debtor raises the issue (in
4 accordance with the forum’s rules of pleading and practice), then the secured party
5 bears the burden of proving that the collection, enforcement, or disposition
6 complied. In the event the secured party is unable to meet this burden, then
7 paragraph (2) explains how to calculate the deficiency. Under this rebuttable
8 presumption rule, the debtor or obligor is to be credited with the greater of the
9 actual proceeds of the disposition and the proceeds that would have been realized
10 had the secured party complied with [Sections 9-607 through 9-614, 9-618, and 9-
11 619, as applicable] [the applicable provisions of this part]. If a deficiency remains,
12 then the secured party is entitled to recover it. The references to “the secured
13 obligation, expenses, and attorney’s fees” in subsections (c)(3) and (c)(4) embrace
14 the application rules in Sections 9-608(a) and 9-614(a).

15 Unless the secured party proves that compliance with Part 6 would have
16 yielded a smaller amount, the amount that a complying collection, enforcement, or
17 disposition would have yielded is deemed to be equal to the amount of the secured
18 obligation, together with expenses and attorney’s fees. Thus, the secured party may
19 not recover any deficiency unless it meets this burden.

20 y. **Consumer-Goods Transactions.** Although subsection (c) adopts a
21 version of the rebuttable presumption rule for transactions other than consumer-
22 goods transactions, with certain exceptions it does not specify the effect of a secured
23 party’s noncompliance in consumer-goods transactions. (The exceptions are the
24 provisions for the recovery of damages in Section 9-624.) Courts construing former
25 Section 9-507 disagreed about the consequences of a secured party’s failure to
26 comply with the requirements of former Part 5. Three general approaches emerged.
27 Some courts have held that a noncomplying secured party may not recover a
28 deficiency (the “absolute bar” rule). Other courts have held that the debtor can
29 offset against a claim to a deficiency all damages recoverable under former Section
30 9-507 resulting from the secured party’s noncompliance (the “offset” rule). A
31 plurality of courts considering the issue has held that the noncomplying secured
32 party is barred from recovering a deficiency unless it overcomes a rebuttable
33 presumption that compliance with former Part 5 would have yielded an amount
34 sufficient to satisfy the secured debt. In addition to the nonuniformity resulting
35 from court decisions, some States have enacted special rules governing the
36 availability of deficiencies. The silence in this section with respect to consumer-
37 goods transactions when a secured party fails to comply with Part 6 leaves courts
38 free to continue to apply established law.

1 **SECTION 9-626. DETERMINATION OF WHETHER CONDUCT WAS**
2 **COMMERCIALY REASONABLE.**

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

8 (b) A disposition of collateral is made in a commercially reasonable manner
9 if the disposition is made:

10 (1) in the usual manner on any recognized market therefor;

11 (2) at the price current in any recognized market at the time of the
12 disposition; or

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

15 (c) A collection, enforcement, disposition, or acceptance is commercially
16 reasonable if it has been approved:

17 (A) in any judicial proceeding;

18 (B) by any [court appointed] bona fide creditors' committee; [or]

19 (C) by any [court appointed] representative of creditors[; or

20 (D) by any assignee for the benefit of creditors].

21 (d) Approval under subsection (c) need not be obtained and lack of approval

1 does not mean that the collection, enforcement, disposition, or acceptance is not
2 commercially reasonable.

3 Reporters' Comments

4 1. **Source.** Former Section 9-507(2).

5 2. **Relationship of Price to Commercial Reasonableness.** Some
6 observers have found the notion contained in subsection (a) (former Section
7 9-507(2)) (the fact that a better price could have been obtained does not establish
8 lack of commercial reasonableness) to be inconsistent with that found in Section
9 9-610(b) (former Section 9-504(3) (every aspect of the sale, including its terms,
10 must be commercially reasonable). The Drafting Committee perceives no
11 inconsistency, but it favors an explanation of the relationship between price and
12 commercial reasonableness in the Official Comments. See, e.g., Section 9-610,
13 Comment 10.

14 The law long has grappled with the problem of dispositions of personal and
15 real property that comply with applicable procedural requirements (e.g., advertising,
16 notice to interested persons, etc.) but which yield an extremely low price. This
17 Article addresses that issue in Section 9-614(h). That section contains a special rule
18 for determining deficiencies in complying dispositions that yield an unreasonably
19 low price. The section applies only when the transferee is the secured party, a
20 person related to the secured party, or a secondary obligor. A low price is relevant
21 to whether a disposition has been commercially reasonable only to the extent that a
22 low price suggests the need for careful judicial scrutiny of other aspects of the
23 disposition. In fact, where the price is extremely low, other aspects of the
24 disposition (e.g., the time and manner) might well have been commercially
25 unreasonable. But if they were not, then the disposition complies with the
26 requirements of this Article.

27 3. **“Recognized Market.”** The concept of a “recognized market” in
28 subsections (b)(1) and (2) is quite limited; it applies only to markets where there are
29 standardized price quotations for property that is essentially fungible, such as stock
30 exchanges.

31 **SECTION 9-627. NONLIABILITY AND LIMITATION ON LIABILITY**
32 **OF SECURED PARTY; LIABILITY OF SECONDARY OBLIGOR.**

1 (a) Unless a secured party knows that a person is a debtor or secondary
2 obligor, knows the identity of the person, and knows how to communicate with the
3 person:

4 (1) the secured party is not liable to the person or to a secured party or
5 lienholder that has filed a financing statement against the person for failure to
6 comply with this article; and

7 (2) the secured party's failure to comply with this article does not affect
8 the liability of the person for a deficiency.

9 (b) A secured party is not liable to any person, and a person's liability for a
10 deficiency is not affected, because of any act or omission, other than the failure to
11 send a notification required by Section 9-611(b)(2), that occurs before the secured
12 party knows that the person is a debtor or a secondary obligor or knows that the
13 person has a security interest or other lien in the collateral.

14 (c) A secured party is not liable to any person, and a person's liability for a
15 deficiency is not affected, because of any act or omission arising out of the secured
16 party's reasonable belief that a transaction is not a consumer-goods transaction or a
17 consumer transaction or that goods are not consumer goods, if the secured party's
18 belief is based on:

19 (1) its reasonable reliance on a debtor's representation concerning the
20 purpose for which collateral was to be used, acquired, or held; or

21 (2) an obligor's representation concerning the purpose for which a

1 secured obligation was incurred.

2 ~~(d) A secured party is not liable to any person under Section 9-624(d) if the~~
3 ~~secured party proves that its failure to comply with this part was not intentional and~~
4 ~~resulted from a good-faith error notwithstanding the secured party's maintenance of~~
5 ~~procedures reasonably adapted to avoid the failure. Examples of a good-faith error~~
6 ~~include clerical, calculation, computer malfunction, programing, and printing errors.~~
7 ~~An error of legal judgment concerning the secured party's rights and duties under~~
8 ~~this part is not a good-faith error.~~

9 ~~(e) The total recovery under Section 9-624(d) in a class action or a series of~~
10 ~~class actions arising out of the same noncompliance by the same secured party shall~~
11 ~~not be more than the lesser of \$500,000 or one percent of the net worth of the~~
12 ~~secured party.~~

13 ~~(d) A secured party is not liable to any person under Section 9-624(c)(2) for~~
14 ~~its failure to comply with Section 9-614A(e)(1).~~

15 Reporters' Comments

16 **Changes from Prior Draft:**

17 We have modified Subsection (d) to exclude noncompliance with
18 Section 9-614A entirely from the scope of statutory damage liability under Section
19 9-624(c)(2). We believe that this reflects the Drafting Committee's intentions in
20 deciding that the \$500 liquidated damages provided by Section 9-624(e) and (f)
21 should apply fully to noncompliance with Section 9-614(c)(2), but only if there is a
22 pattern or practice in the case of Section 9-614(c)(1). Former Part 5 contained no
23 noncompliance damage provisions analogous to the \$500 damages contained in
24 Section 9-624(e). The fortuity of moving to Part 6 the list of types of
25 noncompliance that previously were scattered around Article 9 should not expose

1 secured parties to the potentially disproportionate damages imposed by Section 9-
2 624(c)(2). If the (normally much larger) damages under Section 9-624(c)(2) applied
3 to noncompliance with Section 9-614A, the \$500 damages imposed by Section 9-
4 624(e) and (f) would be virtually meaningless.

5 1. **Source.** New.

6 2. **Exculpatory Provisions.** Subsections (a), (b), and through (c) contain
7 exculpatory provisions that should be read in conjunction with Section 9-605.
8 Without this group of provisions, a secured party could incur liability to unknown
9 persons and under circumstances that would not allow the secured party to protect
10 itself. The broadened definition of the term “debtor” underscores the need for these
11 provisions.

12 ~~**SECTION 9-628. ATTORNEY’S FEES IN CONSUMER GOODS**~~

13 ~~**SECURED TRANSACTIONS.** If the secured party's compliance with this article~~
14 ~~is placed in issue in an action with respect to a consumer goods secured transaction,~~
15 ~~the following rules apply:~~

16 (1) ~~If the secured party would have been entitled to attorney's fees as the~~
17 ~~prevailing party, the court shall award to a consumer debtor or consumer obligor~~
18 ~~prevailing on the issue the costs of the action and reasonable attorney's fees.~~

19 (2) ~~In other cases, the court may award to a consumer debtor or consumer~~
20 ~~obligor prevailing on that issue the costs of the action and reasonable attorney's fees.~~

21 (3) ~~In determining the attorney's fees, the amount of the recovery on behalf~~
22 ~~of the prevailing consumer debtor or consumer obligor is not controlling.~~

1

PART 7

2

TRANSITION

3

SECTION 9-701. EFFECTIVE DATE. This [Act] takes effect

4

SECTION 9-702. SAVINGS CLAUSE.

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[To be added]

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APPENDIX

SECTION 1-201. GENERAL DEFINITIONS. Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

* * *

(9) “Buyer in ordinary course of business” means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller’s own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a pre-existing contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under ~~Section [2-XXX]~~ Article 2 may be a buyer in ordinary course of business. A person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt is

1 not a buyer in ordinary course of business.

2 * * *

3 (32) “Purchase includes taking by sale, discount, negotiation, mortgage,
4 pledge, lien, security interest, issue or re-issue, gift, or any other voluntary
5 transaction creating an interest in property.

6 * * *

7 (37) “Security interest means . . . The term also includes any interest of a
8 consignor and a buyer of accounts, chattel paper, a healthcare insurance receivable,
9 or a payment intangible in a transaction that is subject to Article 9. The special
10 property interest of a buyer of goods on identification of those goods to a contract
11 for sale under Section 2-501 is not a “security interest , but a buyer may also
12 acquire a “security interest by complying with Article 9. Except as otherwise
13 provided in [Sections 2-401 and] 2-505, the right of a seller or lessor of goods to
14 retain or acquire possession of the goods is not a “security interest , but a seller or
15 lessor may [also] acquire a “security interest by complying with Article 9. [The
16 retention or reservation of title by a seller of goods notwithstanding shipment or
17 delivery to the buyer (Section 2-401) is limited in effect to a reservation of a
18 “security interest.]

19 (38) “Send in connection with any writing or notice means to deposit in
20 the mail or deliver for transmission by any other usual means of communication
21 with postage or cost of transmission provided for and properly addressed to any

1 address reasonable under the circumstances and in the case of an instrument to an
2 address specified thereon or otherwise agreed, ~~or if there be none to any address~~
3 ~~reasonable under the circumstances~~. The receipt of any writing or notice within the
4 time at which it would have arrived if properly sent has the effect of a proper
5 sending.

6 * * *

7 Reporters' Comments

8 **Changes from Prior Draft:**

9 A. The definition of "buyer in ordinary course of business" has been revised
10 slightly. It now refers to a right to recover the goods "under Article 2" rather than
11 "under Section [2-XXX].

12 B. The definition of "security interest" has been revised to make clear that,
13 with certain exceptions, *in rem* rights of sellers and lessors under Articles 2 and 2A
14 are not "security interests." Among the rights that are not security interests are the
15 right to withhold delivery under Section 2-702(1), 2-703(a), or 2A-525, the right to
16 stop delivery under Section 2-705 or 2A-526, and the right to reclaim under Section
17 2-507(2) or 2-702(2).

18 C. The definition of "send" has been broadened.

19 **SECTION 2-210. DELEGATION OF PERFORMANCE; ASSIGNMENT**
20 **OF RIGHTS. [Marked to show changes from Official Text]**

21 * * *

22 (2) Unless otherwise agreed all rights of either seller or buyer can be
23 assigned except where the assignment would materially change the duty of the other
24 party, or increase materially the burden or risk imposed on him by his contract, or

1 rights of the consignor and consignee. Former Sections 2-326(3) and 9-114, both of
2 which have been deleted, governed the rights of creditors of the consignee in a true
3 consignment. These sections have been replaced by new provisions in Article 9.
4 See, e.g., Sections 9-112(a)(4); 9-104(b); 9-315A.. These provisions are quite
5 similar to those found in former Section 2-326(3). If a true consignment is not a
6 “consignment” as defined in Section 9-102 and thus is not governed by Article 9,
7 law other than the Uniform Commercial Code governs the rights of the consignee’s
8 creditors.

9 2. **Consignments for Security.** Some transactions that the parties denominate
10 as “consignments” in fact are sales in which the seller retains an interest in the
11 goods to secure their price. The Uniform Commercial Code treats these
12 consignments as treated like other secured sales. Article 2 applies to the sales
13 aspect of the transaction (e.g., the terms of the contract for sale), whereas Article 9
14 governs the security aspects.

15 **SECTION 2-502. BUYER'S RIGHT TO GOODS ON SELLER'S**
16 **REPUDIATION, FAILURE TO DELIVER OR INSOLVENCY.** [Marked to
17 **show changes from Official Text]**

18 (1) Subject to subsections (2) and (3) and even though the goods have not
19 been shipped a buyer who has paid a part or all of the price of goods in which he has
20 a special property under the provisions of the immediately preceding section may on
21 making and keeping good a tender of any unpaid portion of their price recover them
22 from the seller if:

23 (a) in the case of goods bought for personal, family, or household
24 purposes, the seller repudiates or fails to deliver as required by the contract; or

25 (b) in other cases, the seller becomes insolvent within ten days after
26 receipt of the first installment on their price.

1 subsection (3) will take free of a security interest that attaches to the goods after the
2 goods have been identified to the contract. The buyer will take free even if the
3 buyer does not buy in ordinary course and even if the security interest is perfected.
4 Of course, to the extent that the buyer pays the price after the security interest
5 attaches, the payments will constitute proceeds of the security interest.

6 **SECTION 5-118. SECURITY INTEREST OF ISSUER OR NOMINATED**
7 **PERSON.**

8 (a) An issuer or nominated person has a security interest in a document
9 presented under a letter of credit and any identifiable proceeds of the collateral to
10 the extent that the issuer or nominated person honors or gives value for the
11 presentation.

12 (b) Subject to subsection (c), as long as and to the extent that an issuer or
13 nominated person has not been reimbursed or has not otherwise recovered the value
14 given with respect to a security interest under subsection (a), the security interest
15 continues and is subject to Article 9, but:

16 (1) a security agreement is not necessary to make the security interest
17 enforceable under Section ~~9-203(a)(1)~~; 9-203(b)(3); and

18 (2) the security interest is perfected and it has priority over conflicting
19 [perfected] security interests in the collateral or its proceeds.

20 (c) A security interest that arises under this section is subject to the rights of
21 a subsequent purchaser under Section 9-327 or [Section] 9-328 or a transferee under
22 Section 9-329.

1 **SECTION 8-102. DEFINITIONS.**

2 * * *

3 **[Marked to show changes from Official Comments]**

4 Official Comment

5 * * *

6 7. "Entitlement holder." This term designates those who hold financial
7 assets through intermediaries in the indirect holding system. Because many of the
8 rules of Part 5 impose duties on securities intermediaries in favor of entitlement
9 holders, the definition of entitlement holder is, in most cases, limited to the person
10 specifically designated as such on the records of the intermediary. The last sentence
11 of the definition covers the relatively unusual cases where a person may acquire a
12 security entitlement under Section 8-501 even though the person may not be
13 specifically designated as an entitlement holder on the records of the securities
14 intermediary.

15 A person may have an interest in a security entitlement, and may even have
16 the right to give entitlement orders to the securities intermediary with respect to it,
17 even though the person is not the entitlement holder. For example, a person who
18 holds securities through a securities account in its own name may have given
19 discretionary trading authority to another person, such as an investment adviser.
20 Similarly, the control provisions in Section 8-106 and the related provisions in
21 Article 9 are designed to facilitate transactions in which a person who holds
22 securities through a securities account uses them as collateral in an arrangement
23 where the securities intermediary has agreed that if the secured party so directs the
24 intermediary will dispose of the positions. In such arrangements, the debtor remains
25 the entitlement holder but has agreed that the secured party can initiate entitlement
26 orders. Moreover, an entitlement holder may be acting for another person as a
27 nominee, agent, trustee, or in another capacity. Unless the entitlement holder is
28 itself acting as a securities intermediary for the other person, in which case the other
29 person would be an entitlement holder with respect to the securities entitlement, the
30 relationship between an entitlement holder and another person for whose benefit the
31 entitlement holder holds a securities entitlement is governed by other law.

32 8. "Entitlement order." This term is defined as a notification communicated
33 to a securities intermediary directing transfer or redemption of the financial asset to
34 which an entitlement holder has a security entitlement. The term is used in the rules

1 for the indirect holding system in a fashion analogous to the use of the terms
2 "indorsement" and "instruction" in the rules for the direct holding system. If a
3 person directly holds a certificated security in registered form and wishes to transfer
4 it, the means of transfer is an indorsement. If a person directly holds an
5 uncertificated security and wishes to transfer it, the means of transfer is an
6 instruction. If a person holds a security entitlement, the means of disposition is an
7 entitlement order. An entitlement order includes a direction under Section 8-508 to
8 the securities intermediary to transfer a financial asset to the account of the
9 entitlement holder at another financial intermediary or to cause the financial asset to
10 be transferred to the entitlement holder in the direct holding system (e.g., the
11 delivery of a securities certificate registered in the name of the former entitlement
12 holder). As noted in Comment 7, an entitlement order need not be initiated by the
13 entitlement holder in order to be effective, so long as the entitlement holder has
14 authorized the other party to initiate entitlement orders. See Section 8-107(b).

15 **SECTION 8-106. CONTROL.**

16 (a) A purchaser has "control" of a certificated security in bearer form if the
17 certificated security is delivered to the purchaser.

18 (b) A purchaser has "control" of a certificated security in registered form if
19 the certificated security is delivered to the purchaser, and:

20 (1) the certificate is indorsed to the purchaser or in blank by an effective
21 indorsement; or

22 (2) the certificate is registered in the name of the purchaser, upon
23 original issue or registration of transfer by the issuer.

24 (c) A purchaser has "control" of an uncertificated security if:

25 (1) the uncertificated security is delivered to the purchaser; or

26 (2) the issuer has agreed that it will comply with instructions originated
27 by the purchaser without further consent by the registered owner.

1 (d) A purchaser has "control" of a security entitlement iff:
2 (1) the purchaser becomes the entitlement holder; ~~or~~
3 ~~{(1)}~~{(2)} the securities intermediary has agreed that it will comply with
4 entitlement orders originated by the purchaser without further consent by the
5 entitlement holder; or
6 ~~{(2)}~~{(3)} another person has control of the security entitlement on
7 behalf of the purchaser or, having previously acquired control of the security
8 entitlement, acknowledges that it has control on behalf of the purchaser.
9 (e) If an interest in a security entitlement is granted by the entitlement
10 holder to the entitlement holder's own securities intermediary, the securities
11 intermediary has control.
12 (f) A purchaser who has satisfied the requirements of subsection (c)(2) or
13 (d)~~{(1)}~~{(2)} has control even if the registered owner in the case of subsection (c)(2)
14 or the entitlement holder in the case of subsection (d)~~{(1)}~~{(2)} retains the right to
15 make substitutions for the uncertificated security or security entitlement, to originate
16 instructions or entitlement orders to the issuer or securities intermediary, or
17 otherwise to deal with the uncertificated security or security entitlement.
18 (g) An issuer or a securities intermediary may not enter into an agreement of
19 the kind described in subsection (c)(2) or (d)~~{(1)}~~{(2)} without the consent of the
20 registered owner or entitlement holder, but an issuer or a securities intermediary is
21 not required to enter into such an agreement even though the registered owner or

1 entitlement holder so directs. An issuer or securities intermediary that has entered
2 into such an agreement is not required to confirm the existence of the agreement to
3 another party unless requested to do so by the registered owner or entitlement
4 holder.

5 **Reporters' Comments**

6 **Discussion Question:** Should the substance of subsection (f) be made
7 applicable to situations in which control of collateral is obtained by a method other
8 than those specified in that subsection? We see no reason why it should be so
9 limited.

10 **Changes From Prior Draft:**

11 A. During its November, 1997, meeting the Drafting Committee asked us to
12 revise the draft by deleting the means of obtaining control specified in subsection
13 (d)(1), if we could do so without changing the meaning of the statute. During its
14 February, 1998, meeting the Drafting Committee asked us to retain subsection
15 (d)(1).

16 B. Official Comment 7 has been revised to include, once again, the example
17 of a debtor-entitlement holder's default as a condition to a purchaser's right to give
18 entitlement orders that would not impair the purchaser's control.

19 **[Revised] Official Comment**

20 **[Marked to show changes from Official Comment]**

21 1. The concept of "control" plays a key role in various provisions dealing
22 with the rights of purchasers, including secured parties. See Sections 8-303
23 (protected purchasers); 8-503(e) (purchasers from securities intermediaries); 8-510
24 (purchasers of security entitlements from entitlement holders); ~~9-115(4)~~ 9-312
25 (perfection of security interests); ~~9-115(5)~~ 9-324 (priorities among conflicting
26 security interests).

27 Obtaining "control" means that the purchaser has taken whatever steps are
28 necessary, given the manner in which the securities are held, to place itself in a

1 position where it can have the securities sold, without further action by the owner.

2 * * *

3 4. Subsection (d) specifies the means by which a purchaser can obtain
4 control over a security entitlement. ~~Three~~ ~~Two~~ mechanisms are possible,
5 analogous to those provided in subsection (c) for uncertificated securities. Under
6 subsection (d)(1), a purchaser has control if it is the entitlement holder. This
7 subsection would apply whether the purchaser holds through the same intermediary
8 that the debtor used, or has the securities position transferred to its own
9 intermediary. Subsection (d)(2) provides that a purchaser has control if the
10 securities intermediary has agreed to act on entitlement orders originated by the
11 purchaser if no further consent by the entitlement holder is required. Under
12 subsection (d)(2), control may be achieved even though the original entitlement
13 holder transferor remains listed as the entitlement holder. Finally, a purchaser may
14 obtain control under subsection (d)(3) if another person has control and the person
15 acknowledges that it has control on the purchaser's behalf. Control under
16 subsection (d)(3) parallels the delivery of certificated securities and uncertificated
17 securities under Section 8-301.

18 This section specifies only the minimum requirements that such an
19 arrangement must meet to confer “control ; the details of the arrangement can be
20 specified by agreement. The arrangement might cover all of the positions in a
21 particular account or subaccount, or only specified positions. There is no
22 requirement that the control party's right to give entitlement orders be exclusive.
23 The arrangement might provide that only the control party can give entitlement
24 orders, or that either the entitlement holder or the control party can give entitlement
25 orders. See subsection (f).

26 The following examples illustrate the application of rules of subsection (d):

27 Example 1. Debtor grants Alpha Bank a security interest in a security
28 entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds
29 through an account with Able & Co. Alpha also has an account with Able.
30 Debtor instructs Able to transfer the shares to Alpha, and Able does so by
31 crediting the shares to Alpha's account . Alpha ~~Bank~~ has control of the 1000
32 shares under subsection (d)(1). Although Debtor remains the beneficial owner
33 of the securities entitlement as between Debtor and Alpha, Able has agreed to
34 act on Alpha's entitlement orders because, as between Able and, ~~because Alpha~~
35 ~~Bank,~~ Alpha has become is the entitlement holder. See Section 8-506.

36 Example 2. Debtor grants Alpha Bank a security interest in a security

1 entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds
2 through an account with Able & Co. Alpha ~~Bank~~ does not have an account with
3 Able. Alpha ~~Bank~~ uses Beta as its securities custodian. Debtor instructs Able
4 to transfer the shares to Beta, for the account of Alpha ~~Bank~~, and Able does so.
5 Alpha ~~Bank~~ has control of the 1000 shares under subsection (d)(1). As in
6 Example 1, although Debtor remains the beneficial owner of the securities
7 entitlement as between Debtor and Alpha, Beta has agreed to act on Alpha's
8 entitlement orders because, as between Beta and Alpha, because Alpha has
9 become is the entitlement holder.

10 Example 3. Debtor grants Alpha Bank a security interest in a security
11 entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds
12 through an account with Able & Co. Debtor, Able, and Alpha ~~Bank~~ enter into
13 an agreement under which Debtor will continue to receive dividends and
14 distributions, and will continue to have the right to direct dispositions, but
15 Alpha ~~Bank~~ also has the right to direct dispositions. Alpha ~~Bank~~ has control of
16 the 1000 shares under subsection (d)(2).

17 Example 4. Able & Co., a securities dealer, grants Alpha Bank a security
18 interest in a security entitlement that includes 1000 shares of XYZ Co. stock
19 that Able holds through an account with Clearing Corporation. Able causes
20 Clearing Corporation to transfer the shares into Alpha's ~~Alpha Bank's~~ account at
21 Clearing Corporation. As in Example 1, Alpha ~~Bank~~ has control of the 1000
22 shares under subsection (d)(1).

23 Example 5. Able & Co., a securities dealer, grants Alpha Bank a security
24 interest in a security entitlement that includes 1000 shares of XYZ Co. stock
25 that Able holds through an account with Clearing Corporation. Alpha ~~Bank~~
26 does not have an account with Clearing Corporation. It holds its securities
27 through Beta Bank, which does have an account with Clearing Corporation.
28 Able causes Clearing Corporation to transfer the shares into Beta's ~~Beta Bank's~~
29 account at Clearing Corporation. Beta ~~Bank~~ credits the position to Alpha's
30 account with Beta ~~Bank~~. As in Example 2, Alpha ~~Bank~~ has control of the 1000
31 shares under subsection (d)(1).

32 Example 6. Able & Co. a securities dealer, grants Alpha Bank a security
33 interest in a security entitlement that includes 1000 shares of XYZ Co. stock
34 that Able holds through an account with Clearing Corporation. Able causes
35 Clearing Corporation to transfer the shares into a pledge account, pursuant to an
36 agreement under which Able will continue to receive dividends, distributions,
37 and the like, but Alpha ~~Bank~~ has the right to direct dispositions. As in Example

1 3, Alpha ~~Bank~~ has control of the 1000 shares under subsection (d)(2).

2 Example 7. Able & Co. a securities dealer, grants Alpha Bank a security
3 interest in a security entitlement that includes 1000 shares of XYZ Co. stock
4 that Able holds through an account with Clearing Corporation. Able, Alpha,
5 and Clearing Corporation enter into an agreement under which Clearing
6 Corporation will act on instructions from Alpha with respect to the XYZ Co.
7 stock carried in Able's account, but Able will continue to receive dividends,
8 distributions, and the like, and will also have the right to direct dispositions. As
9 in Example 3, Alpha ~~Bank~~ has control of the 1000 shares under subsection
10 (d)(2).

11 Example 8. Able & Co. a securities dealer, holds a wide range of securities
12 through its account at Clearing Corporation. Able enters into an arrangement
13 with Alpha Bank pursuant to which Alpha provides financing to Able secured
14 by securities identified as the collateral on lists provided by Able to Alpha on a
15 daily or other periodic basis. Able, Alpha, and Clearing Corporation enter into
16 an agreement under which Clearing Corporation agrees that if at any time Alpha
17 directs Clearing Corporation to do so, Clearing Corporation will transfer any
18 securities from Able's account at Alpha's instructions. Because Clearing
19 Corporation has agreed to act on Alpha's instructions with respect to any
20 securities carried in Able's account, at the moment that Alpha's security interest
21 attaches to securities listed by Able, Alpha obtains control of those securities
22 under subsection (d)(2). There is no requirement that Clearing Corporation be
23 informed of which securities Able has pledged to Alpha.

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

37 5. For a purchaser to have "control" under subsection (c)(2) or (d)(2), it is

1 essential that the issuer or securities intermediary, as the case may be, actually be a
2 party to the agreement. If a debtor gives a secured party a power of attorney
3 authorizing the secured party to act in the name of the debtor, but the issuer or
4 securities intermediary does not specifically agree to this arrangement, the secured
5 party does not have "control" within the meaning of subsection (c)(2) or (d)(2)
6 because the issuer or securities intermediary is not a party to the agreement. The
7 secured party does not have control under subsection (c)(1) or (d)(1) because,
8 although the power of attorney might give the secured party authority to act on the
9 debtor's behalf as an agent, the secured party has not actually become the registered
10 owner or entitlement holder.

11 * * *

12 7. The term "control" is used in a particular defined sense. The
13 requirements for obtaining control are set out in this section. The concept is not to
14 be interpreted by reference to similar concepts in other bodies of law. In particular,
15 the requirements for "possession" derived from the common law of pledge are not
16 to be used as a basis for interpreting subsection (c)(2) or (d)(2). Those provisions
17 are designed to supplant the concepts of "constructive possession" and the like. A
18 principal purpose of the "control" concept is to eliminate the uncertainty and
19 confusion that results from attempting to apply common law possession concepts to
20 modern securities holding practices.

21 The key to the control concept is that the purchaser has the ~~present~~ ability to
22 have the securities sold or transferred without further action by the transferor.
23 There is no requirement that the powers held by the purchaser be exclusive. For
24 example, in a secured lending arrangement, if the secured party wishes, it can allow
25 the debtor to retain the right to make substitutions, ~~or~~ to direct the disposition of the
26 uncertificated security or security entitlement, or otherwise to give instructions or
27 entitlement orders. (As explained in Section 8-102, Comment 8, an entitlement
28 order includes a direction under Section 8-508 to the securities intermediary to
29 transfer a financial asset to the account of the entitlement holder at another financial
30 intermediary or to cause the financial asset to be transferred to the entitlement
31 holder in the direct holding system (e.g., by delivery of a securities certificate
32 registered in the name of the former entitlement holder).) Subsection (f) is included
33 to make clear the general point stated in subsections (c) and (d) that the test of
34 control is whether the purchaser has obtained the requisite power, not whether the
35 debtor has retained other powers. There is no implication that retention by the
36 debtor of powers other than those mentioned in subsection (f) is inconsistent with
37 the purchaser having control. Nor is there a requirement that the purchaser's
38 powers be unconditional, provided that further consent of the entitlement holder is

1 not a condition.

2 Example 10. Debtor grants to Alpha Bank and to Beta Bank a security
3 interest in a security entitlement that includes 1000 shares of XYZ Co. stock
4 that Debtor holds through an account with Able & Co. By agreement among
5 the parties, Alpha's security interest is senior and Beta's is junior. Able
6 agrees to act on the entitlement orders of either Alpha or Beta. Alpha and
7 Beta each has control under subsection (d)(2). Moreover, Beta has control
8 notwithstanding a term of Able's agreement to the effect that Able's
9 obligation to act on Beta's entitlement orders is conditioned on the Alpha's
10 consent. The crucial distinction is that Able's agreement to act on Beta's
11 entitlement orders is not conditioned on Debtor's further consent.

12 Example 11. Debtor grants to Alpha Bank a security interest in a
13 security entitlement that includes 1000 shares of XYZ Co. stock that Debtor
14 holds through an account with Able & Co. Able agrees to act on the
15 entitlement orders of Alpha, but Alpha's right to give entitlement orders to
16 the securities intermediary is conditioned on the Debtor's default.
17 Alternatively, Alpha's right to give entitlement orders is conditioned upon
18 Alpha's statement to Able that Debtor is in default. Because Able's
19 agreement to act on Beta's entitlement orders is not conditioned on Debtor's
20 further consent, Alpha has control of the securities entitlement under either
21 alternative.

22 In many situations, it will be better practice for both the securities intermediary and
23 the purchaser to insist that any conditions relating in any way to the entitlement
24 holder be effective only as between the purchaser and the entitlement holder. That
25 practice would avoid the risk that the securities intermediary could be caught
26 between conflicting assertions of the entitlement holder and the purchaser as to
27 whether the conditions in fact have been met. Nonetheless, the existence of
28 unfulfilled conditions effective against the intermediary would not preclude the
29 purchaser from having control.

30 **SECTION 8-110. APPLICABILITY; CHOICE OF LAW.**

31 **[Marked to reflect changes from former text]**

32 * * *

33 (e) The following rules determine a "securities intermediary's jurisdiction"

1 for purposes of this section:

2 (1) If an agreement between the securities intermediary and its
3 entitlement holder expressly provides ~~specifies that it is governed by the law of a~~
4 ~~particular jurisdiction~~ the securities intermediary's jurisdiction for purposes of this
5 part, this article, or this act, that jurisdiction is the securities intermediary's
6 jurisdiction.

7 (2) If paragraph (1) does not apply and an agreement between the
8 securities intermediary and entitlement holder expressly provides that it is governed
9 by the law of a particular jurisdiction, that jurisdiction is the securities
10 intermediary's jurisdiction.

11 (3) ~~(2)~~ If neither paragraph (i) nor paragraph (ii) applies and an
12 agreement between the securities intermediary and its entitlement holder does not
13 specify the governing law as provided in paragraph (1), but expressly provides
14 specifies that the securities account is maintained at an office in a particular
15 jurisdiction, that jurisdiction is the securities intermediary's jurisdiction.

16 (4) ~~(3)~~ If none of paragraph (i), (ii), or (iii) applies an agreement
17 between the securities intermediary and its entitlement holder does not specify a
18 jurisdiction as provided in paragraph (1) or (2), the securities intermediary's
19 jurisdiction is the jurisdiction in which is located the office identified in an account
20 statement as the office serving the entitlement holder's account.

21 (5) ~~(4)~~ If none of the other paragraphs applies an agreement between the

1 securities intermediary and its entitlement holder does not specify a jurisdiction as
2 provided in paragraph (1) or (2) and an account statement does not identify an office
3 serving the entitlement holder's account as provided in paragraph (3), the securities
4 intermediary's jurisdiction is the jurisdiction in which is located the chief executive
5 office of the securities intermediary.

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

11 **Reporters' Comments**

12 This section has been revised to provide more flexibility for the parties to
13 select the security intermediary's jurisdiction. See also Sections 9-304(b) (bank's
14 jurisdiction); 9-305(a)(5) (commodity intermediary's jurisdiction).

15 **SECTION 8-302. RIGHTS OF PURCHASER.**

16 **[Marked to reflect changes from former text]**

17 (a) Except as otherwise provided in subsections (b) and (c), a purchaser
18 ~~upon delivery of a certificated or uncertificated security to a purchaser, the~~
19 ~~purchaser~~ acquires all rights in the security that the transferor had or had power to
20 transfer.

21 (b) A purchaser of a limited interest acquires rights only to the extent of the

1 interest purchased.

2 (c) A purchaser of a certificated security who as a previous holder had
3 notice of an adverse claim does not improve its position by taking from a protected
4 purchaser.

5 **Reporters' Comment**

6 The proposed change to Section 8-302(a) is for clarification only. The pre-
7 1994 version of Article 8 provided (in pre-1994 Section 8-301(1)) that a purchaser
8 acquired a transferor's rights in a security "upon transfer. The 1994 revisions
9 eliminated the "transfer concept. In its place, the term "delivery was included in
10 Section 8-302(a). The change proposed in this draft is intended to preclude any
11 possible negative implication that a "delivery under Section 8-301 is a condition
12 precedent to a purchase of an interest in a security. For example, a secured party
13 may become a purchaser if it is granted a security interest in investment property.
14 The security interest may be perfected without delivery (e.g., by filing). Similarly, a
15 purchaser may obtain "control of an uncertificated security under Section 8-
16 106(c)(2), even though no delivery has occurred.

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18 **SECTION 8-502. ASSERTION OF ADVERSE CLAIM AGAINST**

19 **ENTITLEMENT HOLDER.** An action based on an adverse claim to a financial
20 asset, whether framed in conversion, replevin, constructive trust, equitable lien, or
21 other theory, may not be asserted against a person who acquires a security
22 entitlement under Section 8-501 for value and without notice of the adverse claim.

23 **[Revised] Official Comment**

24 **[Marked to show changes from Official Comment]**

25 1. The section provides investors in the indirect holding system with
26 protection against adverse claims by specifying that no adverse claim can be
27 asserted against a person who acquires a security entitlement under Section 8-501
28 for value and without notice of the adverse claim. It plays a role in the indirect

1 holding system analogous to the rule of the direct holding system that protected
2 purchasers take free from adverse claims (Section 8-303).

3 This section does not use the locution "takes free from adverse claims"
4 because that could be confusing as applied to the indirect holding system. The
5 nature of indirect holding system is that an entitlement holder has an interest in
6 common with others who hold positions in the same financial asset through the
7 same intermediary. Thus, a particular entitlement holder's interest in the financial
8 assets held by its intermediary is necessarily "subject to" the interests of others. See
9 Section 8-503. The rule stated in this section might have been expressed by saying
10 that a person who acquires a security entitlement under Section 8-501 for value and
11 without notice of adverse claims takes "that security entitlement" free from adverse
12 claims. That formulation has not been used, however, for fear that it would be
13 misinterpreted as suggesting that the person acquires a right to the underlying
14 financial assets that could not be affected by the competing rights of others claiming
15 through common or higher tier intermediaries. A security entitlement is a complex
16 bundle of rights. This section does not deal with the question of what rights are in
17 the bundle. Rather, this section provides that once a person has acquired the bundle,
18 someone else cannot take it away on the basis of assertion that the transaction in
19 which the security entitlement was created involved a violation of the claimant's
20 rights.

21 2. Because securities trades are typically settled on a net basis by book-entry
22 movements, it would ordinarily be impossible for anyone to trace the path of any
23 particular security, no matter how the interest of parties who hold through
24 intermediaries is described. Suppose, for example, that S has a 1000 share position
25 in XYZ common stock through an account with a broker, Able & Co. S's identical
26 twin impersonates S and directs Able to sell the securities. That same day, B places
27 an order with Baker & Co., to buy 1000 shares of XYZ common stock. Later, S
28 discovers the wrongful act and seeks to recover "her shares." Even if S can show
29 that, at the stage of the trade, her sell order was matched with B's buy order, that
30 would not suffice to show that "her shares" went to B. Settlement between Able
31 and Baker occurs on a net basis for all trades in XYZ that day; indeed Able's net
32 position may have been such that it received rather than delivered shares in XYZ
33 through the settlement system.

34 In the unlikely event that this was the only trade in XYZ common stock
35 executed in the market that day, one could follow the shares from S's account to B's
36 account. The plaintiff in an action in conversion or similar legal action to enforce a
37 property interest must show that the defendant has an item of property that belongs
38 to the plaintiff. In this example, B's security entitlement is not the same item of

1 property that formerly was held by S, it is a new package of rights that B acquired
2 against Baker under Section 8-501. Principles of equitable remedies might,
3 however, provide S with a basis for contending that if the position B received was
4 the traceable product of the wrongful taking of S's property by S's twin, a
5 constructive trust should be imposed on B's property in favor of S. See G. Palmer,
6 The Law of Restitution § 2.14. Section 8-502 ensures that no such claims can be
7 asserted against a person, such as B in this example, who acquires a security
8 entitlement under Section 8-501 for value and without notice, regardless of what
9 theory of law or equity is used to describe the basis of the assertion of the adverse
10 claim.

11 In the above example, S would ordinarily have no reason to pursue B unless
12 Able is insolvent and S's claim will not be satisfied in the insolvency proceedings.
13 Because S did not give an entitlement order for the disposition of her security
14 entitlement, Able must recredit her account for the 1000 shares of XYZ common
15 stock. See Section 8-507(b).

16 3. The following examples illustrate the operation of Section 8-502.

17 Example 1. Thief steals bearer bonds from Owner. Thief delivers the bonds
18 to Broker for credit to Thief's securities account, thereby acquiring a security
19 entitlement under Section 8-501(b). Under other law, Owner may have a claim
20 to have a constructive trust imposed on the security entitlement as the traceable
21 product of the bonds that Thief misappropriated. Because Thief was himself the
22 wrongdoer, Thief obviously had notice of Owner's adverse claim. Accordingly,
23 Section 8-502 does not preclude Owner from asserting an adverse claim against
24 Thief.

25 Example 2. Thief steals bearer bonds from Owner. Thief owes a personal
26 debt to Creditor. Creditor has a securities account with Broker. Thief agrees to
27 transfer the bonds to Creditor as security for or in satisfaction of his debt to
28 Creditor. Thief does so by sending the bonds to Broker for credit to Creditor's
29 securities account. Creditor thereby acquires a security entitlement under
30 Section 8-501(b). Under other law, Owner may have a claim to have a
31 constructive trust imposed on the security entitlement as the traceable product of
32 the bonds that Thief misappropriated. Creditor acquired the security entitlement
33 for value, since Creditor acquired it as security for or in satisfaction of Thief's
34 debt to Creditor. See Section 1-201(44). If Creditor did not have notice of
35 Owner's claim, Section 8-502 precludes any action by Owner against Creditor,
36 whether framed in constructive trust or other theory. Section 8-105 specifies
37 what counts as notice of an adverse claim.

1 Example 3. Father, as trustee for Son, holds XYZ Co. shares in a securities
2 account with Able & Co. In violation of his fiduciary duties, Father sells the
3 XYZ Co. shares and uses the proceeds for personal purposes. Father dies, and
4 his estate is insolvent. Assume -- implausibly -- that Son is able to trace the
5 XYZ Co. shares and show that the "same shares" ended up in Buyer's securities
6 account with Baker & Co. Section 8-502 precludes any action by Son against
7 Buyer, whether framed in constructive trust or other theory, provided that Buyer
8 acquired the security entitlement for value and without notice of adverse claims.

9 Example 4. Debtor holds XYZ Co. shares in a securities account with Able
10 & Co. As collateral for a loan from Bank, Debtor grants Bank a security interest
11 in the security entitlement to the XYZ Co. shares. Bank perfects by a method
12 which leaves Debtor with the ability to dispose of the shares. See Section
13 9-115. In violation of the security agreement, Debtor sells the XYZ Co. shares
14 and absconds with the proceeds. Assume -- implausibly -- that Bank is able to
15 trace the XYZ Co. shares and show that the "same shares" ended up in Buyer's
16 securities account with Baker & Co. Section 8-502 precludes any action by
17 Bank against Buyer, whether framed in constructive trust or other theory,
18 provided that Buyer acquired the security entitlement for value and without
19 notice of adverse claims.

20 Example 5. Debtor owns controlling interests in various public companies,
21 including Acme and Ajax. Acme owns 60% of the stock of another public
22 company, Beta. Debtor causes the Beta stock to be pledged to Lending Bank as
23 collateral for Ajax's debt. Acme holds the Beta stock through an account with a
24 securities custodian, C Bank, which in turn holds through Clearing Corporation.
25 Lending Bank is also a Clearing Corporation participant. The pledge of the Beta
26 stock is implemented by Acme instructing C Bank to instruct Clearing
27 Corporation to debit C Bank's account and credit Lending Bank's account.
28 Acme and Ajax both become insolvent. The Beta stock is still valuable.
29 Acme's liquidator asserts that the pledge of the Beta stock for Ajax's debt was
30 wrongful as against Acme and seeks to recover the Beta stock from Lending
31 Bank. Because the pledge was implemented by an outright transfer into
32 Lending Bank's account at Clearing Corporation, Lending Bank acquired a
33 security entitlement to the Beta stock under Section 8-501. Lending Bank
34 acquired the security entitlement for value, since it acquired it as security for a
35 debt. See Section 1-201(44). If Lending Bank did not have notice of Acme's
36 claim, Section 8-502 will preclude any action by Acme against Lending Bank,
37 whether framed in constructive trust or other theory.

38 Example 6. Debtor grants Alpha Co. a security interest in a security

1 entitlement that includes 1000 shares of XYZ Co. stock that Debtor holds
2 through an account with Able & Co. Alpha also has an account with Able.
3 Debtor instructs Able to transfer the shares to Alpha, and Able does so by
4 crediting the shares to Alpha's account. Alpha has control of the 1000 shares
5 under Section 8-106(d). (The facts to this point are identical to those in Section
6 8-106, Comment 4, Example 1, except that Alpha Co. was Alpha Bank.) Under
7 Section 8-502 Debtor cannot assert an adverse claim against Alpha with respect
8 to Alpha's security interest. Debtor's only adverse claim of which Alpha has
9 notice consists of Debtor's remaining rights under Article 9, such as Debtor's
10 right of redemption. See Section 9-621. Alpha next grants Beta Co. a security
11 interest in the 1000 shares included in Alpha's security entitlement. See Section
12 9-207(d)(3). Alpha instructs Able to transfer the shares to Gamma Co., Beta's
13 custodian. Able does so, and Gamma credits the 1000 shares to Beta's account.
14 Beta now has control under Section 8-106(d). If the transaction took place with
15 Debtor's permission, Debtor has no adverse claim to assert against Beta. Even
16 if Debtor did hold an adverse claim, if Beta did not have notice of Debtor's
17 claim, Section 8-502 will preclude any action by Debtor against Beta, whether
18 framed in constructive trust or other theory.

19 4. Although this section protects entitlement holders against adverse claims,
20 it does not protect them against the risk that their securities intermediary will not
21 itself have sufficient financial assets to satisfy the claims of all of its entitlement
22 holders. Suppose that Customer A holds 1000 shares of XYZ Co. stock in an
23 account with her broker, Able & Co. Able in turn holds 1000 shares of XYZ Co.
24 through its account with Clearing Corporation, but has no other positions in XYZ
25 Co. shares, either for other customers or for its own proprietary account. Customer
26 B places an order with Able for the purchase of 1000 shares of XYZ Co. stock, and
27 pays the purchase price. Able credits B's account with a 1000 share position in
28 XYZ Co. stock, but Able does not itself buy any additional XYZ Co. shares. Able
29 fails, having only 1000 shares to satisfy the claims of A and B. Unless other
30 insolvency law establishes a different distributional rule, A and B would share the
31 1000 shares held by Able pro rata, without regard to the time that their respective
32 entitlements were established. See Section 8-503(b). Section 8-502 protects
33 entitlement holders, such as A and B, against adverse claimants. In this case,
34 however, the problem that A and B face is not that someone is trying to take away
35 their entitlements, but that the entitlements are not worth what they thought. The
36 only role that Section 8-502 plays in this case is to preclude any assertion that A has
37 some form of claim against B by virtue of the fact that Able's establishment of an
38 entitlement in favor of B diluted A's rights to the limited assets held by Able.

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**SECTION 8-510. RIGHTS OF PURCHASER OF SECURITY
ENTITLEMENT FROM ENTITLEMENT HOLDER.**

(a) In a case not covered by the priority rules in Article 9 or the rules stated in subsection (c), a ~~An~~ action based on an adverse claim to a financial asset or security entitlement, whether framed in conversion, replevin, constructive trust, equitable lien, or other theory, may not be asserted against a person who purchases a security entitlement, or an interest therein, from an entitlement holder if the purchaser gives value, does not have notice of the adverse claim, and obtains control.

(b) If an adverse claim could not have been asserted against an entitlement holder under Section 8-502, the adverse claim cannot be asserted against a person who purchases a security entitlement, or an interest therein, from the entitlement holder.

(c) In a case not covered by the priority rules in Article 9, a purchaser for value of a security entitlement, or an interest therein, who obtains control has priority over a purchaser of a security entitlement, or an interest therein, who does not obtain control. Purchasers who have control rank equally, except that a securities intermediary as purchaser has priority over a conflicting purchaser who has control unless otherwise agreed by the securities intermediary.

Reporters' Comment

1 The proposed new language in is for clarification only. It conforms
2 subsection (a) to subsection (c) and makes clear that the Article 9 priority rules,
3 when applicable, are controlling.