

## ARTICLE 9 REVIEW COMMITTEE

### Statutory Modification Issues List

This list summarizes issues that suggest possible statutory modifications to the Official Text of Article 9 of the Uniform Commercial Code. The issues were identified by the Article 9 Review Committee for consideration by a drafting committee if the Uniform Law Conference and the American Law Institute decide to appoint one. The list was formulated by the Review Committee in telephone conferences held on April 14, April 23, May 12, May 27, June 9 and June 16, 2008.

The list first sets forth issues relating to filing. It then proceeds to set forth issues that have arisen in case law. It next sets forth issues that are suggested by non-uniform amendments unrelated to filing. The list then sets forth other issues.

At the end of the list are additional issues suggested by the Review Committee for consideration as modifications to the Official Comments to Article 9. These are issues that the Review Committee did not believe needed to be addressed by statutory modifications but which the Review Committee thought might be usefully addressed by modifications to the Official Comments, presumably within the prerogative of the reporter appointed for the drafting committee.

Each issue listed, whether suggested as an issue to be addressed in the Official Text or as an issue to be addressed in the Official Comments, is followed by a brief explanation of the issue.

#### **I. FILING ISSUES**

##### A. Debtor name

###### 1. *Individual debtor name*

Issue: Whether Article 9 should provide a more certain rule to determine the name of a debtor who is an individual.

Explanation: Section 9-502(a)(1) provides that a financing statement must, among other requirements, provide the name of the debtor in order for the financing statement to be sufficient. Section 9-503(a)(4)(A) states that, if the debtor is an individual who has a name, the financing statement must provide the individual debtor's name. Because under § 9-519 financing statements are indexed by the filing office of each state under the debtor's name, a subsequent searcher will need to know under what debtor name to search for a financing statement. Accordingly, § 9-506 provides that a financing statement is seriously misleading, and is therefore ineffective, if the financing statement provides a debtor name other than the name required by § 9-503(a)(4)(A) unless a search under the required name, using the filing office's standard search logic, will disclose the financing statement.

Article 9 tells us what the debtor's name is if the debtor is a corporation or other registered organization. Under § 9-503(a)(1) that name is the name of the organization indicated on the public record of the debtor's jurisdiction of organization. However, Article 9 does not tell us what the debtor's name is if the debtor is an individual. And courts, in interpreting §§ 9-503(a)(4)(A) and 9-506, have struggled in determining whether a particular financing statement that contains the debtor's name as reflected on his or her birth certificate, driver's license, passport or other identification, or even a debtor's nickname or commonly used name, is the correct name of the debtor for the financing statement to be sufficient.

Recently, several states - Nebraska, Tennessee and Texas - have passed non-uniform amendments to their Article 9 to attempt to resolve this issue. Nebraska has enacted legislation to the effect that a financing statement containing the debtor's last name is sufficient.<sup>1</sup> Tennessee<sup>2</sup> and Texas permit the name of the debtor as reflected on his or her driver's license to be sufficient.

If a drafting committee considers a uniform statutory solution for determining the name of an individual debtor for purposes of satisfying the sufficiency requirements for a financing statement, that solution would logically apply as well to the sufficiency on a financing statement of the name of an individual who is a trustee or a settlor of a trust for purposes of § 9-503(a)(3) or who is a decedent for purposes of § 9-503(a)(2).

## 2. *Registered organization name*

Issue: Whether Article 9 should further define the public record indicating the name of a debtor that is a registered organization.

Explanation: Under § 9-503(a)(1) a financing statement sufficiently provides the name of a debtor that is a registered organization only if it provides the name of the debtor indicated on the public record of the debtor's jurisdiction of organization. However, some states maintain more than one public record showing a debtor's name. For example, a state may maintain as a public record the charter document of the organization, and it may also maintain as a public record an on-line searchable data base for organizations of the same type. For a variety of reasons, the debtor's name in one public record may vary from the debtor's name in another public record. The International Association of Commercial Administrators ("IACA") has proposed that states amend Article 9 to provide that the name of the debtor as set forth in its charter document be determinative.

The resolution of this issue may also relate to the definition of "registered organization" in § 9-102(a)(70). The definition states that a "registered organization" is "an organization organized solely under the law of a single State or the United States and as to which the State or the United States *must maintain* a public record showing the organization to have been organized" (emphasis added). Most state public records laws were written without Article 9 in mind. Thus, in many states the duty of the state to maintain public records relating to organizations is not always clear, even if the state does in practice maintain the public records. Because the public record that provides the debtor's name for purposes of § 9-503(a)(1) would likely be the public record that the state "must maintain" for

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<sup>1</sup> A subsequent amendment delayed the effective date of the Nebraska legislation for an additional year.

<sup>2</sup> Tennessee's amendment initially permitted the debtor's name as reflected on any of several identification documents to be sufficient, but the legislation was subsequently amended to follow the Texas approach.

the organization, consideration might also be given to providing a further explanation of the “must maintain” reference in the definition, perhaps in an expanded Official Comment if not in the definition of “registered organization” itself.<sup>3</sup>

### 3. *Trust name*

Issue: Whether § 9-503(a)(3) should be stated expressly not to apply to a business trust that is a registered organization.

Explanation: Section 9-503(a)(3) sets forth the rules for determining the name of a debtor that is a trust or a trustee acting with respect to property held in trust. However, it is possible that a trust may be a business trust that is itself a registered organization. In that case, there has been some confusion in practice as to whether the debtor’s name should be determined under § 9-503(a)(3) or, alternatively, under § 9-503(a)(1) which provides the rules for determining the name of a registered organization. While the Review Committee believes that the better interpretation is that the debtor’s name should be determined under the registered organization rules, Delaware has enacted a non-uniform amendment that makes this result clear under the statute.

#### B. Transmitting utilities

Issue: Whether a filing designating a debtor as a transmitting utility must be made in the initial financing statement.

Explanation: Section 9-515(f) permits a financing statement to designate a debtor as a transmitting utility. If the debtor is so designated, the financing statement does not have a specific lapse date. Instead, the financing statement is effective until a termination statement is filed.

Because the definition of “financing statement” in § 9-109(a)(39) includes all amendments relating to the financing statement, filing offices have had to address the filing of an amendment designating the debtor as a transmitting utility when the initial financing statement did not designate the debtor as a transmitting utility. In such a case, a filing office, which has already given the initial financing statement a specific lapse date, is often not operationally capable, without undue cost or expense, of eliminating the lapse date in order to give effect to the amendment.

IACA has proposed that the states amend § 9-515(f) so that the debtor may be designated as a transmitting utility only in the initial financing statement. The change would make § 9-515(f) consistent with § 9-515(b), which provides a thirty-year lapse date for an initial financing statement filed in connection with a public-finance transaction or manufactured-home transaction.

#### C. Forms

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<sup>3</sup> The discussion in this memorandum on debtor names in the context of filing is not intended to suggest that a drafting committee might not consider other debtor name filing issues, such as those relating to foreign individual names, names in foreign alphabets and accented, hyphenated or like names that may challenge a filing office’s indexing or search logic. These issues are not highlighted in this memorandum because even understanding them and appreciating whether statutory adjustments may be desirable would require a dialogue with IACA and filing officers in which the Review Committee has not had the time or opportunity to engage.

Issue: Whether the approval of changes to the initial financing statement form and amendment form should be delegated to IACA or to a state's secretary of state.

Explanation: Section 9-521(a) provides that, if a filing office accepts an initial financing statement in written form, it must accept an initial financing statement in the form set forth in that subsection. Section 9-521(b) contains a similar provision for an amendment and also sets forth a statutory form of amendment. Now that the statutory forms of initial financing statement and amendment have been in use since 2001, IACA has recommended a few changes to the forms. To accommodate these and possible further changes over time, IACA has proposed that states amend their Article 9 so that the forms of initial financing statement and amendment would be deleted from the statute and so that IACA itself would approve the forms from time to time. In a state that is not permitted by its constitution or other law to delegate the approval process to IACA, IACA recommends that the state's Article 9 be amended to provide that the forms be approved by the state's secretary of state. The California State Bar UCC Committee has objected to the proposal to amend § 9-521 out of concern that the amendment might result in no single written form of financing statement or amendment being accepted in all states.<sup>4</sup>

D. Correction statement

Issue: Whether the provisions of Article 9 providing for a correction statement should be reexamined.

Explanation: To address concerns about “bogus” filings against a debtor, § 9-518 permits a debtor to file a “correction statement” to indicate that a filed record is incorrect or wrongfully filed. The filing of a correction statement is for informational purposes only. It does not affect the effectiveness of a filed financing statement.

In practice secured parties have attempted to file correction statements even though § 9-518 permits a correction statement to be filed only by a debtor. This practice has often arisen when a secured party's financing statement has been wrongfully terminated by another secured party's termination statement that incorrectly referred to the file number of the financing statement of the first secured party. Of course, under § 9-510 the termination statement, filed without authorization of the first secured party, would be ineffective.

IACA has proposed that states amend their Article 9 so that a correction statement would be capable of being filed by a secured party or by anyone else who was entitled to file the initial financing statement. The California State Bar UCC Committee has objected to the proposal out of concern that the amendment would encourage the filing of extraneous records that do not affect the effectiveness or lack of effectiveness of financing statements, thus “clogging” the records of the filing offices and burdening both filing offices and subsequent searchers.

If the IACA proposal is not considered favorably by a drafting committee, consideration might also be given to whether Sec. 9-518 should be retained. Under other provisions of Article 9, the financing statement is not effective. The correction statement

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<sup>4</sup> The California State Bar UCC Committee objection leaves open the possibility that the IACA concerns could be addressed by a modification to the Official Comments to § 9-521.

itself has no legal effect. Even a termination statement would produce only the consequence that the financing statement has become ineffective. That is a consequence that would already be the case for a "bogus filing". Furthermore, non-Article 9 law in various states provides a debtor with some additional remedies, ranging from tort claims for slander of title and the like to judicial procedures by which a "bogus filing" may be removed from the record. In addition, the misuse of the public records and the intentional conduct of the sort involved in making a bogus filing might be a crime under the laws of some states.

## II. ISSUES ARISING UNDER CASE LAW

### A. Commercial Money Center

Issue: Whether a right to payment on chattel paper, if assigned separately from the chattel paper, should be characterized as chattel paper, a payment intangible or an account.

Explanation: The decision in *In re Commercial Money Center*, 350 B.R. 465 (B.A.P. 9th. Cir. 2006), raised the question of whether a payment right "stripped" from chattel paper was still "chattel paper" or whether the payment right becomes a "payment intangible." The answer is important because the sale of a payment intangible enjoys "automatic" perfection under § 9-309(3), while a buyer of chattel paper, to perfect its interest in the chattel paper, must either take possession or control of the chattel paper or file a financing statement against the debtor covering the chattel paper. In addition, the answer would affect certain priority rules, such as the "super-priority" in favor of certain purchasers of chattel paper who take possession or control of the chattel paper. See §§ 9-330(a) and (b).

The existing Official Comments to Article 9 are inconclusive on the characterization issue. Compare § 9-109, Official Comment 5 to § 9-102, Official Comment 5.d. There is also a question as to whether the problem is limited to "true lease" chattel paper given that § 9-203(g) would already appear to address chattel paper in which the payment right is secured by a security interest. That section provides that a security interest securing a payment right is transferred with the payment right and would support a characterization that the payment right, when transferred, is still chattel paper unless perhaps the security interest is disclaimed by the transferee.

If a drafting committee determines that a payment right "stripped" from chattel paper should not be characterized as chattel paper, it might consider whether the payment right should be characterized as an account instead of a payment intangible.

The *Commercial Money Center* decision has created priority concerns for chattel paper purchasers in practice, and the California State Bar UCC Committee has urged that the PEB address the issue.

### B. Highland Capital

Issue: Whether the definitions of "promissory note" and "security" may need to be clarified so that a conventional promissory note issued as part of a class or series is not viewed as a security.

Explanation: In its decision in *Highland Capital Management v. Schneider*, 866 N.E.2d 1020 (N.Y. 2007), the New York Court of Appeals concluded that promissory notes

that were part of a class or series constituted “securities” under § 8-102(a)(15). In order to reach that conclusion, the court found that the promissory notes were represented by certificates “the transfer of which may be registered upon books maintained for that purpose by or on behalf of the issuer” as required by §8-102(a)(15)(i). The court came to this conclusion even though the issuer maintained no transfer books, because, as the dissent put it, “it is always theoretically possible there could be books on which transfers of anything could be registered.”

While technically the decision involves an Article 8 rather than an Article 9 issue, the decision influences the characterization of collateral under Article 9. The decision has created confusion in Article 9 practice as to the proper characterization of some types of promissory notes and even “uncertificated” certificates of deposit.

Presumably, if the drafting committee were to consider addressing the *Highland Capital* decision, it would consult with those at the Uniform Law Conference and the American Law Institute who were active in the drafting of Article 8.

### **III. ISSUES SUGGESTED BY NON-UNIFORM AMENDMENTS UNRELATED TO FILING**

#### **A. Control of a deposit account or securities account**

Issue: Whether the methods of obtaining control of a deposit account or securities account should be expanded.

Explanation: Delaware amended its §§ 9-104, 9-106 and 8-106 effective July 2007 to provide additional methods for a secured party to achieve control of a securities account and a deposit account and to clarify that the additional methods of control do not impose any implied duties not expressly agreed to by the securities intermediary or the depository bank. New Delaware § 9-104(a)(4) provides an additional method for the secured party to achieve control: the authentication by the debtor, secured party and securities intermediary of a record that (i) is conspicuously denominated a control agreement, (ii) identifies the specific deposit account, and (iii) addresses the disposition of the funds in the deposit account or the right to direct such disposition. Parallel provisions were added to §§ 8-106(c) and 8-106(d) for uncertificated securities and securities entitlements. New Delaware § 9-104(a)(5) provides an additional method for the secured party to achieve control of a deposit account where the name on the deposit account is the name of the secured party or indicates that the secured party has a security interest in the deposit account, thus not requiring that the secured party become a customer of the bank. A parallel provision was added to § 9-106(d) for securities accounts.

To the extent that an expansion of the methods of control, along the lines of the Delaware amendments, would allow a secured party to achieve control, even if the secured party is unable, without further action by the debtor, to direct the disposition of security entitlements from the securities account or funds from the deposit account, the expansion may reflect a policy change that would need to be justified.

#### **B. Location of a federally registered organization**

Issue: Whether § 9-307(f)(2) should be modified to state more completely how federal law may designate the location of a debtor that is a registered organization organized under federal law.

Explanation: 9-307(f)(2) locates a registered organization organized under the law of the United States “in the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location.” Official Comment 5 to § 9-307 notes that banking law often permits a registered organization to designate a main office, home office, or other comparable office, and states that “[d]esignation of such an office constitutes the designation of the State of location for purposes of Section 9-307(f)(2).”

Delaware has adopted a non-uniform version of § 9-307(f)(2) that adds a sentence in the text of the statute similar in substance to the quoted portion of Official Comment 5: “For purposes of paragraph (2) above, if a registered organization designates a main office, a home office, or other comparable office in accordance with the law of the United States, such registered organization is located in the State that such main office, home office, or other comparable office is located.”

The basis for the non-uniform amendment is that a literal reading of the statute itself would not provide a clear rule for the location of a national bank, because the National Bank Act does not, in terms, authorize a bank to designate “its State of location.” As the issuance of Official Comment 5 indicates, the Article 9 drafters understood this point. The Delaware legislature, however, sought to provide more definitive treatment by putting this material in the statute.

The issue often arises in practice, especially opinion practice.

#### **IV. OTHER ISSUES**

##### **A. General provisions**

Issue: Whether the definition of “authenticate” should be conformed to the definition of “sign” in Article 7 (as well as the unenacted revisions to Articles 2 and 2A) insofar as the latter definition applies to electronic forms of signing.

Explanation: The definition of “authenticate” in § 9-102(a)(7) indicates that the term means not only to sign (as that term is defined in Article 1) but also “to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record.” The second portion of this definition is not entirely consistent with the parallel provision in the subsequently-drafted definitions of “sign” in Articles 2, 2A, and 7. In those definitions, drawn from the Uniform Electronic Transactions Act and the federal Electronic Signatures in Global and National Commerce Act (E-SIGN), the relevant language provides that to sign means “with present intention to authenticate or adopt a record, ... to attach to or logically associate with the record an electronic sound, symbol, or process.”

There are several differences between the Article 9 definition and these later definitions. Most notably, only Article 9 requires that the authenticating person/signer take its action with the intent “to identify the person.” It does not appear that the drafters of the

subsequently-drafted Articles intended to cover different circumstances than did the drafters of Article 9. Rather, it appears that the subsequent Articles reflected an effort to define the term more precisely.

Presumably, if the drafting committee were to consider addressing the definition of “authenticate”, it would consult with those at the Uniform Law Conference who were active in the drafting of the Uniform Electronic Transactions Act and those at the Uniform Law Conference and the American Law Institute who were active in the drafting of the Article 2 and 2A amendments and the Article 7 revisions.

Issue: Whether the definition of “certificate of title” should be modified to include a “security-interest statement” as defined in the Uniform Certificate of Title Act (UCOTA) or a similar concept.

Explanation: Under UCOTA, the term “security-interest statement” includes a record created by a secured party that indicates a security interest. The security-interest statement, when filed with the state’s motor vehicle office, may be used to perfect the security interest even if, contrary to another provision of UCOTA, the motor vehicle office issues a certificate of title that does not indicate the security interest. The UCOTA perfection approach creates a possible tension with § 9-311(a)(2), which defers to certificate-of-title statutes that provide for a security interest to be “indicated on the certificate as a condition or result of perfection.”

Issue: Whether the definition of “registered organization” should be clarified as to include or exclude a business trust that is not created by the filing of a record with the Secretary of State’s office.

Explanation: Consistent with other suggested changes regarding clarifying how to treat business or statutory trusts,<sup>5</sup> the definition of “registered organization” could address more clearly the distinction between business trusts that are created by the filing of a record with a state’s secretary of state to create the business trust and common law business trusts that are not initially created by the filing of a record but may subsequently register with the secretary of state to indicate limited liability for the trustees and beneficiaries. The issue often arises in practice and has been mentioned by a representative of IACA in informal discussions.

Issue: Whether § 9-105 should be modified to conform to § 7-106 and UETA § 16.

Explanation: Section 9-105 creates a control test applicable to electronic chattel paper. After it was drafted, UETA created a somewhat different formulation which was followed in revised Article 7 at § 7-106. In particular, the UETA and Article 7 approaches provide a general test and a safe-harbor rule; § 9-105 does not provide a general test.

Presumably, if the drafting committee were to consider addressing § 9-105 in this respect, it would consult with those at the Uniform Law Conference who were active in the drafting of the Uniform Electronic Transactions Act and those at the Uniform Law Conference and the American Law Institute who were active in the drafting of the Article 7 revisions.

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<sup>5</sup> See Part I.A.2 and 3, *supra*.

## B. Attachment

Issue: Whether § 9-210 should be expanded to require the secured party to provide a “pay off” letter as of a date designated in a request by the debtor so long as the secured party receives the request within a period, consistent with the periods in current § 9-210, of not less than 14 days before the date designated.

Explanation: Section 9-210 permits the debtor at any time to request from the secured party a statement of account or a list of collateral. The secured party has 14 days to respond. Anecdotal evidence indicates that the section is seldom used in practice. More typical would be for a debtor to request a “pay off” letter as of a specific date so that the debtor may refinance the secured obligations on that date. A drafting committee might consider expanding § 9-210 to impose on a secured party the obligation to provide a “pay off” letter to the debtor as of a date designated by the debtor so long as the debtor’s request allows the secured party an identical period of at least 14 days following the debtor’s request to provide the pay-off letter.

If the drafting committee decides to address § 9-210 in this respect, it might consider whether any change to § 9-210 would require amendments to the “safe harbor” notice forms in §§ 9-613 and 9-614.

## C. Perfection

Issue: Whether purchase-money status should extend to consumer-goods related intangibles other than software and, if so, whether a purchase-money security interest in intangible collateral related to consumer goods should be automatically perfected.

Explanation: Frequently purchase-money transactions in consumer goods involve the extension of credit for the cost of extended warranties, maintenance services, insurance and other intangibles in addition to the consumer goods that are the focus of the underlying transaction. When the collateral is repossessed, the secured party may also have a claim for rebates due for early termination of the intangible property. In motor vehicle financing, the security interest in the primary collateral is perfected under state certificate-of-title statutes. The purchase-money security interest in other consumer goods is perfected automatically under § 9-309(1). However, any intangibles for which purchase-money credit was extended are not “consumer goods”. They do not enjoy purchase-money status and are not covered by the automatic perfection provisions of § 9-309(1).<sup>6</sup>

To the extent that purchase-money status or the scope of automatic perfection is expanded to encompass intangible collateral related to consumer goods, the expansion may reflect a policy change that would need to be justified.

## D. Priority

Issue: Whether § 9-317(d) should be expanded to cover commercial tort claims and perhaps also other collateral not addressed in § 9-317(b) or (d) and for which a trading market might exist.

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<sup>6</sup> Warranty payments relating to consumer goods may be proceeds, but the proceeds security interest would generally be perfected for a period of only 20 days without further action being taken by the secured party to extend the perfection period. *See* §§ 9-315(c) and (d).

Explanation: Section 9-317 provides the rules governing priority between an unperfected security interest and a competing claim to the collateral. As a general matter, buyers of collateral who give value (and, in the case of tangible collateral, receive delivery) without knowledge of an unperfected security interest take free of the unperfected security interest. *See* §§ 9-317(b) (tangible collateral) and (d) (intangible collateral). Section 9-317(d) addresses only accounts, electronic chattel paper, electronic documents, general intangibles, and investment property other than certificated securities. Because an unperfected security interest generally is enforceable against third parties, *see* § 9-203(b), buyers of other intangible collateral, such as commercial tort claims, take subject to an unperfected security interest. Members of the Review Committee who were active in the drafting of Article 9 think that this outcome is inadvertent.

#### E. Double debtors

Issue: Whether a financing statement filed against an original debtor in one jurisdiction should be effective for a limited period against the new debtor located in another jurisdiction with respect to collateral acquired by, or from a source other than, the original debtor.

Explanation: The public notice afforded by a financing statement filed against a debtor (the “original debtor”) may become compromised when a “new debtor” succeeds to the original debtor’s assets and liabilities. Consider, for example, the case where ABC Corp, an Illinois corporation, merges into XYZ Corp, a Massachusetts corporation. The financing statement filed against ABC in Illinois is seriously misleading with respect to the new debtor’s name (XYZ) and is not filed in XYZ’s location.

Despite the difference in names, the filed financing statement remains effective to perfect to perfect a security interest in property acquired by the new debtor before, and within four months after, the new debtor becomes bound as debtor by the original debtor’s security agreement. *See* § 9-508(b). A security interest that is perfected by the filing against the original debtor in the original debtor’s location generally remains effective for one year after the original debtor transfers the collateral to the new debtor. *See* § 9-316(a)(3). However, if the original debtor and new debtor are located in different jurisdictions, the financing statement filed in the original debtor’s location is not effective to perfect a security interest in collateral that the new debtor acquires from a source other than the original debtor, whether before or after the merger.

Some have expressed concern that a secured party whose debtor (original debtor) merges out of existence enjoys no period of automatic perfection with respect to collateral acquired by the survivor (new debtor) from sources other than the original debtor, if the survivor is located in a different jurisdiction from the original debtor. A drafting committee might consider whether such a “grace period” is desirable and, if so, whether the creation of a grace period would require any corresponding changes to the rules governing priority between a security interest granted by the original debtor to one secured party and a security interest in the same collateral granted by the new debtor to a different secured party.

The new-debtor rules are analogous to those applicable to a single debtor who changes both its name and its location. Despite the difference in names, the filed financing statement remains effective to perfect a security interest in property acquired by the debtor

before, and within four month after, the debtor changes its name. *See* § 9-507(c); *cf.* § 9-508(b). As regards collateral owned by the debtor before the relocation, a security interest that is perfected by the filing in the debtor’s original location generally remains effective for four months after the debtor relocates to another jurisdiction. *See* § 9-316(a)(2); *cf.* § 9-316(a)(3).<sup>7</sup> However, a financing statement filed in the debtor’s original location is not effective to perfect a security interest in collateral that the debtor acquires after it relocates. If a drafting committee thinks that a “grace period” is desirable in the setting of a new debtor, it may wish to consider whether a “grace period” is desirable in the debtor-relocation setting as well.

Providing “grace periods” in these contexts may reflect a policy change that would need to be justified.

#### F. Third party rights

Issue: Whether § 9-406(e) should be clarified as to whether, on an enforcement disposition by the secured party of a payment intangible or promissory note subject to a contractual anti-assignment term, the term is treated under § 9-406(d) (ineffective) or § 9-408(a) (effective if effective under other law).

Explanation: Sections 9-406(d) and 9-408(a) create a bifurcated approach for promissory notes and payment intangibles with respect to contractual anti-assignment terms. If a security interest in a promissory note or payment intangible secures an obligation, § 9-406(d) applies and fully overrides a contractual anti-assignment term. If the promissory note or payment intangible is sold, § 9-408(a) applies and only partially overrides a contractual anti-assignment term; the buyer’s security interest may attach and be perfected but may not be enforced without the consent of the account debtor or the maker if the term is enforceable under other law.

However, § 9-406(e) states that § 9-406(d) does not apply to a sale of a payment intangible or promissory note. It is unclear whether § 9-406(e), when referring to a sale, refers only to a sale of payment intangible or promissory note that is itself a security interest and is therefore addressed in § 9-408(a) or whether the subsection is broader and includes a disposition by sale under § 9-610. Under the former interpretation, a contractual anti-assignment term would be overridden by § 9-406(d) on a disposition by sale; under the latter interpretation, it would not. The issue for a drafting committee is whether § 9-406(e) should be clarified and, if so, with what result.

The solution may implicate the need to clarify more generally a policy choice involving security interests in payment intangibles and promissory notes that contain contractual anti-assignment terms. If a security interest in a payment intangible or promissory note secures an obligation, § 9-406(d) permits a secured party to exercise its right of collection under § 9-607 against the account debtor or the maker notwithstanding an otherwise effective contractual anti-assignment term. However, if the security interest was the interest of a buyer of the payment intangible or promissory note, § 9-408(a) would not permit the secured party to exercise its right of collection in the face of an otherwise effective contractual anti-assignment term without the consent of the account debtor or the maker. The

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<sup>7</sup> This period is shorter than the one-year period applicable to collateral transferred to a new debtor because a transfer of collateral may be more difficult to discover than a relocation of the debtor’s chief executive office.)

difference in treatment of the contractual anti-assignment term with respect to the account debtor or the maker depending upon whether the security interest secures an obligation or is a sale would seem to suggest inconsistent policy choices between §§ 9-406(d) and 9-408(a) that may need to be addressed in connection with addressing any clarification of § 9-406(e).

Issue: If a drafting committee decides not to address § 9-406(e), or if it decides to clarify § 9-406(e) so that a contractual anti-assignment term is overridden on a sale by disposition under § 9-610, whether a payment intangible that is an interest in a partnership or limited liability company should be excluded from the operation of §§ 9-406(d) and 9-408(a).

Explanation: Concerns about the effect of §§ 9-406(d) and 9-408(a) on contractual anti-assignment terms relating to ownership interests in unincorporated business organizations, especially partnerships and limited liability companies, have caused Delaware, Kentucky, and Virginia to adopt non-uniform provisions excluding their application to those interests from §§ 9-406 and 9-408. The PEB is developing a Commentary that will address the issue, but, if the ambiguity in § 9-406(e) is not addressed or is addressed so that a contractual anti-assignment term is overridden on sale by disposition, it is possible that the Commentary will not be able to respond to the totality of the concerns raised. In that case, a drafting committee may wish to consider a uniform statutory solution to address the concerns.

#### G. Choice of law

Issue: Whether to clarify that § 9-307(c) has no application to a registered organization.

Explanation: Determining which jurisdiction's law governs perfection, the effect of perfection or non-perfection, or priority of a security interest under the choice-of-law rules in §§ 9-301 and 9-305(c) often requires a preliminary determination of where a debtor is "located." That location is determined by § 9-307. The rules in that section are complex, consisting of a three-part general rule in § 9-307(b) and a series of exceptions. The general rule is that a debtor who is an individual is located at his or her residence, and a debtor that is an organization is located at its place of business or chief executive office, as applicable.

Two important exceptions to the general rule are found in §§ 9-307(c) and 9-307(e). Section 9-307(c) provides that subsection (b) "applies only if [the law of the jurisdiction to which subsection (b) points] generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor is located in the District of Columbia." Subsection (e) provides that "a registered organization that is organized under the law of a State is located in that State."

Consider the case of a debtor incorporated in Delaware but whose chief executive office is in a foreign jurisdiction whose law does not generally require filing as a condition of priority over a lien creditor. A fair reading of § 9-307(c) reflects the clear intent of the drafters: the debtor is located in Delaware by virtue of § 9-307(e). But it may be possible to read § 9-307(c) incorrectly as providing that the debtor is located in the District of Columbia. This is because the first sentence of that subsection provides that, in light of the law of the foreign jurisdiction, subsection (b) does not apply and the second sentence provides that "if subsection (b) does not apply, the debtor is located in the District of Columbia." This reading

is possible because, unlike subsection (b), subsection (c) does not state that its rules are subject to rules appearing elsewhere in § 9-307.

A drafting committee might consider revising § 9-307 to avoid the incorrect reading or providing an expanded Official Comment to do so. The drafting committee might also consider clarifying that subsection (c) has no application to a debtor described in subsections (f), (i), and (j), or alternatively it might consider an expanded Official Comment to guide the reader to the same result.

#### H. Enforcement

Issue: Whether § 9-607(b) should permit a buyer of a payment right secured by a real estate mortgage to record an assignment of the mortgage upon the default of the account debtor or other person obligated on the collateral.

Explanation: A secured party may have a security interest in a payment right secured by a real estate mortgage. Section 9-607(b) permits the secured party, in connection with the non-judicial enforcement of the mortgage, to record documents in the real estate records to establish the secured party's right as assignee to enforce the mortgage. Prior to default, the secured party does not have the right to record. Section 9-607(b)'s reference to "default" appears to refer to the debtor's (mortgagee's) default on its obligations to the secured party. However, if the secured party is a buyer of the payment right, § 9-607(b) does not appear to permit the secured party to record the documents upon the default of the account debtor or any other person obligated on the collateral (mortgagor). The result is that the benefit of the subsection may not extend to buyers of payments rights when it likely should.

Issue: Whether it should be clarified that, even if the debtor agrees otherwise, a secured party may not acquire collateral at its own private disposition except in accordance with § 9-620.

Explanation: It is commonly understood that a debtor may not waive the application of the prohibition in § 9-610(c)(2), which generally prohibits a secured party from acquiring collateral at its own private disposition. However, a reference to § 9-610(c)(2) is not contained in § 9-602's list of provisions of Part 6 not capable of being waived by the debtor. The explanation for the omission is that a secured party's acquisition of collateral at its own private disposition is equivalent to an acceptance by the secured party of collateral in whole or, in a transaction that is not a consumer transaction, partial satisfaction of the secured obligations. *See* Official Comment 2 to § 9-624. Because the consent or acquiescence (failure to object) of the debtor is required for the acceptance and because the requirement of the debtor's consent or acquiescence may not under § 9-602(10) be waived by the debtor, the waiver issue under § 9-610(c)(2) appears to be addressed.

However, the question of whether § 9-610(c)(2) may be waived by the debtor continually arises in practice, and the explanation set forth above, which requires a reading of an Official Comment to an entirely different section of Article 9, may not be apparent to many practitioners.

Issue: Whether § 9-610(c)(2), which generally prohibits a secured party from acquiring collateral at its own private disposition, should also prohibit an affiliate of the secured party from doing so.

Explanation: Pursuant to § 9-610(c)(2), the secured party may purchase collateral at a public disposition, but may do so at a private disposition “only if the collateral is of a kind that is customarily sold on a recognized market or the subject of widely distributed standard price quotations.” It is clear that the rationale is that only in a private disposition of the sort described in the quoted language is the situation such that, like a public disposition, the private disposition will be at a market price or will it be obvious that the private sale was commercially reasonable. Although § 9-615(f) gives special scrutiny to a disposition not only to a secured party but also to “a person related to the secured party, or a secondary obligor,” nothing in § 9-610(c)(2), prohibits an affiliate of the secured party from purchasing the collateral at a private disposition at which the secured party cannot purchase.<sup>8</sup> In light of the presence of the quoted language in § 9-615(f), juxtaposed with its absence in § 9-610(c)(2), it may be less likely that courts would read § 9-610(c)(2) as also covering “persons related to the secured party” that are not agents of the secured party. Yet, the dangers associated with a disposition to a person related to a secured party are no less in § 9-610(c)(2) than in § 9-615(f).

A drafting committee might consider revising § 9-610(c)(2) to prohibit private dispositions to persons related to the secured party to the same extent as they are prohibited to the secured party itself. In doing so, the drafting committee might consider whether such a revision would reflect a policy change that would need to be justified.

Issue: Whether the caption to § 9-625(c) referring to consumer-goods transactions should be changed to refer to consumer goods to conform to the text of § 9-625(c)(2).

Explanation: The text of § 9-625(c)(2) covers consumer goods even if the transaction itself is not a consumer-goods transaction. However, the caption suggests that the text applies only if the security interest arises in a “consumer-goods transaction”. For example, a security interest in the debtor’s personal automobile (a consumer good) that secures a loan to the debtor’s business would not fall within the definition of “consumer-goods transaction” in § 9-102(a)(24) because the transaction is not primarily for the debtor’s personal, family or household purposes. Although the caption indicates that § 9-625(c) does not cover such a security interest, the text does cover it.

Issue: Whether the reference in § 9-627(a) to “acceptance” should be deleted.

Explanation: Section 9-627 provides that the fact that a higher price might have been obtained from the enforcement of a security interest is not of itself sufficient to preclude the secured party from showing that “the collection, enforcement, disposition, or acceptance [of the collateral] was made in a commercially reasonable manner”. The reference to “acceptance” is inappropriate, because an “acceptance” of collateral under § 9-620 is not subject to a commercial reasonableness test.

#### I. Other

Issue: Whether Article 11 should be repealed as no longer relevant.

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<sup>8</sup> If the affiliate is an agent of the secured party, its action might be deemed to be that of the secured party under agency principles incorporated by § 1-103(b), but an affiliate of a secured party will not always be its agent.

Explanation: When the Uniform Commercial Code was originally promulgated, it included a separate Article – Article 10 – that provided, *inter alia*, for its effective date and transition rules for transactions entered into before the effective date. When Article 9 was revised in 1972, it was similarly accompanied by an Article – Article 11 – containing provisions for the effective date of the revisions as well as transition rules for transactions entered into before the effective date of the revisions.<sup>9</sup> It is now 36 years since the promulgation of the 1972 amendments and over a quarter-century since their widespread enactment. As such, it is quite unlikely that there are more than a trivial number of outstanding transactions (if any) that were entered into before the effective date of the 1972 amendments and for which transition rules to the 1972 text of Article 9 (now supplanted by revised Article 9) remain relevant.

### **Official Comments Modification Issues List**

In its review of issues that might be addressed by a drafting committee for statutory modifications to the Official Text of Article 9, the Review Committee considered other issues that it thought would be more appropriately addressed, if at all, by changes to the Official Comments. Those issues are set forth below. The list is not intended to be exhaustive of other modifications to the Official Comments that might be desirable based on the considerations of a drafting committee and which presumably would be within prerogative of the drafting committee's reporter based on the guidance of the drafting committee.

Issue: Whether an Official Comment should indicate by illustration what is sufficient for an e-mail to be “authenticated.”

Explanation: Several provisions in Article 9 require that a record be “authenticated.” Many have noted that the definition of “authenticate” in § 9-102(a)(7)(B) does not provide clear guidance as to whether an e-mail is authenticated. Consider three situations in which a person composes and sends an e-mail. In the first situation, the person types the text of the message and also types his or her name at the end of the message, and then enters the command to send the message to the recipient. In the second situation, the person types the text of the message, but does not type his or her name at the end of the message, and enters the command to send the message to the recipient. In the third situation, the person types the text of the message and does not type his or her name at the end of the message; when the sender enters the command to send the message to the recipient, however, the sender's name is automatically added to the bottom of the message as a result of an option previously selected by the sender in configuring his or her e-mail system. It seems clear that the first situation describes an authenticated e-mail. It is less clear, though, whether the second and third situations fulfill the requirements for authentication.<sup>10</sup>

Issue: Whether the *Enron* debt trading case, distinguishing between a “sale” and an “assignment” of a loan, should be addressed in the Official Comments.

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<sup>9</sup> Article 11 is preceded by the following legend: “This draft was prepared by the Reporters and has not been passed upon by the Review Committee, the Permanent Editorial Board, the American Law Institute, or the National Conference of Commissioners on Uniform State Laws. It is submitted as a working draft which may be adapted as appropriate in each state. The ‘Discussions’ [the comments following each section] were written by the Reporters to assist in understanding the purpose of the drafts.” The legend suggests that, as a technical matter, Article 11 might not be part of the “Official Text” of the UCC. Nonetheless, it is generally treated as such and, for purposes of this report, the Review Committee has treated it as such.

<sup>10</sup> It does not appear that conforming the definition of “authenticate” to parallel definitions in Articles 2, 2A, and 7, the subject of the recommendation in Part IV.A, *supra*, will resolve this issue.

Explanation: In connection with claims trading the question sometimes arises as to whether the obligor on a debt may assert claims and defenses against the transferee of the claim. Traditionally this issue has been analyzed by considering whether the transferee qualifies as a holder in due course (in the case of a claim embodied in a negotiable instrument) or other good faith purchaser for value (in the case of other claims), in which case the obligor generally may not assert claims and defenses against the transferee. In addressing this issue with respect to the bankruptcy rights of a transferee, the court in *Enron Corp. v. Springfield Assocs., L.L.C. (In re Enron Corp.)*, 379 B.R. 425 (Bankr. S.D.N.Y. 2007), by interpreting several cases under state law, has articulated a distinction between “assignments” and “sales.” According to the court, a claim of a transferee who takes by sale is not subject to equitable subordination or disallowance under the Bankruptcy Code, while a claim that is taken by assignment is subject to these disabilities. No such distinction appears in the Uniform Commercial Code. The Official Comments might confirm that, when the term “assignment” is used in the Uniform Commercial Code, the term includes a sale and is not distinct from a sale. Cf. Official Comment 26 to § 9-102.

Issue: Whether an Official Comment to § 9-104 should clarify that § 8-106(d)(3) reflects a principle of agency law that is also applicable to § 9-104.

Explanation: Section 8-103(d)(3) provides that a purchaser may achieve control of a security entitlement if another person has control on behalf of the purchaser or, if the person already has control, acknowledges that it has control on behalf of the purchaser. No similar provision is contained in § 9-104 addressing control of a deposit account. However, under § 1-103, the law of principal and agent applies to the Uniform Commercial Code unless displaced by a particular provision. An Official Comment might be provided to § 9-104 to overcome any negative inference regarding the ability of an agent to have control for its principal under § 9-104.

Issue: Whether an Official Comment should address the role, if any, of the parties’ intent in interpreting § 9-109(a)(1).

Explanation: Section 9-109(a)(1) restates the traditional rule that Article 9’s rules apply to a transaction “regardless of its form” if it creates what amounts to a security interest in personal property. Thus, courts have felt free to recharacterize sales as secured transactions when the economic effects of the transaction made that appropriate. It is inherent in that rule that the parties cannot control application of the statute by mere pronouncement that a transaction is not (or is) intended to create a security interest. Nevertheless, some courts have continued to look to the intent of the parties, as reflected in the transaction documents, to determine whether to characterize the transaction as a security interest.

Issue: Whether an Official Comment might clarify that § 9-307(c) should apply to the specific collateral in question in contrast to collateral generally.

Explanation: As mentioned above,<sup>11</sup> § 9-307(b) provides the general rules for determining where a given debtor is located for purposes of the choice-of-law rules in Article 9. Under § 9-307(b), a non-US debtor normally would be located in a foreign jurisdiction

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<sup>11</sup> Part IV.G, *supra*.

and foreign law would govern perfection. If foreign law affords no public notice of security interests, the general rules yield unacceptable results. Accordingly, § 9-307(c) provides that the general rules for determining the location of a debtor apply only if they yield a location that is “a jurisdiction whose law generally requires information concerning the existence of a nonpossessory security interest to be made generally available in a filing, recording, or registration system as a condition or result of the security interest’s obtaining priority over the rights of a lien creditor with respect to the collateral.” If the location lacks such a public-notice system for the collateral in question, then the general rules in § 9-307(b) do not apply, the debtor is located in the District of Columbia, and the law of the District of Columbia governs perfection. Some have read § 9-307(c) to refer to collateral generally rather to the particular collateral at issue. The latter reading would require a broader and more difficult inquiry than § 9-307(c) requires.

Issue: Whether an Official Comment should clarify how the priority rules apply to a security interest that, under § 9-309(3) or (4), is perfected upon attachment and without filing, but as to which a financing statement nevertheless has been filed.

Explanation: The “first-to-file-or-perfect” rule of § 9-322(a) governs the priority of conflicting security interests arising from successive sales of a payment intangible or promissory note. A security interest that arises upon the sale of payment intangibles or promissory notes is “automatically” perfected under § 9-309(3) or (4). There is a question whether, by filing a financing statement covering a payment intangible or promissory note that may be sold in the future, a buyer may establish priority based on the time of filing rather than on the later time when the security interest becomes automatically perfected (i.e., when the security interest attaches, which normally is the time of the sale).

If a drafting committee decides to address this issue in an Official Comment, it may wish to consider whether to address other security interests for which § 9-309 provides automatic perfection. In this regard, the drafting committee may wish to take into account §§ 9-320(b) and 9-324(g). Under the former section, the resolution of a priority contest between a buyer of consumer goods and the holder of a perfected purchase-money security interest in those goods turns on whether a financing statement has been filed with respect to the purchase-money security interest, even if the purchase-money security interest is automatically perfected under § 9-309(1). The latter section provides that, in some cases, § 9-322(a) resolves the priority of conflicting purchase-money security interests in consumer goods.

Issue: Whether an Official Comment to § 9-316(d) should make clear that § 9-316(d) does not apply in cases where perfection is accomplished in one state by a method other than compliance with that state’s certificate-of-title law, the debtor relocates to a state whose certificate-of-title law governs perfection, and then the goods become covered by a certificate in the new state.

Explanation: § 9-316(d) is not ambiguous, but its application when a secured party is perfected in one state by a method other than notation of its security interest on the certificate-of-title and the goods then become covered by a certificate of title issued by another state is complex and might be clarified by an Official Comment. More specifically, there is some concern that the distinction between § 9-316(a) and § 9-316(d) might not be obvious. For example, assume that perfection of a security interest in a boat in State A is not governed by a certificate-of-title statute in State A whereas the opposite is true in State B. If

a secured party's security interest in the boat is perfected by filing (or otherwise, as by automatic perfection in the case of a purchase-money security interest in consumer goods) in State A and the debtor relocates to State B, § 9-316(a) applies and § 9-316(d) does not. The reason subsection (d) does not apply is that as soon as the debtor relocates, the law of State B governs perfection under § 9-301(1) and the requirement of subsection (d) that the goods "be perfected by the law of another jurisdiction when the goods become covered by a certificate of title" issued by State B cannot be satisfied. An explanatory Official Comment might note that subsection (d) applies only when the debtor remains in the jurisdiction where non-certificate-of-title perfection was accomplished and the goods become covered by a certificate of title issued by another jurisdiction.

Issue: Whether an Official Comment should clarify that, when a debtor converts from one entity to another entity (e.g., a partnership converts to a limited liability company) and the applicable state entity conversion statute provides that the converted entity is the "same" entity as the converting entity, Article 9 follows the applicable state law and treats the converting entity and the converted entity as the same entity.

Explanation: Article 9 has several rules that address the transfer of collateral or the change in location of the debtor. When the debtor transfers collateral to another person, that person becomes the debtor. If the transferee debtor is located in a different state than the transferor, then the secured party of the transferor has one year to file a financing statement (or otherwise to perfect) against the transferee if the secured party wants to maintain continuous priority. Section 9-316(a)(3). If the debtor retains the collateral, but changes its (the debtor's) location, then as to existing collateral the secured party of the debtor has four months to file a financing statement in the debtor's new location (or otherwise to perfect the security interest). Section 9-316(a)(2). Some entity statutes provide that, if an entity in one state converts to become an entity formed under the law of another state, the surviving entity is the "same" entity as the disappearing entity. Because Article 9 follows other law in this regard, the Article 9 rules applicable to the change in location of the debtor, rather than the rules that would apply to a transfer of collateral, govern perfection issues.<sup>12</sup>

Issue: Whether, in a priority dispute between SP1 and SP2 as to the post-merger accounts in the following fact pattern, an Official Comment should clarify that the dispute is resolved under § 9-326, not § 9-322(a).

ABC and XYZ are registered organizations located in the same state. SP1 has a filed perfected security interest in existing and after-acquired accounts of ABC. SP2 has a filed perfected security interest in existing and after-acquired accounts of XYZ. ABC merges into XYZ. SP1 files against XYZ during § 9-508(b)'s four-month grace period.

Explanation: In this fact pattern, XYZ is a "new debtor" from SP1's perspective, and so SP1's security interest attaches to accounts acquired by XYZ after the merger. *See* § 9-203(d), (e). Even if SP1 takes no action, the financing statement that SP1 filed against ABC is effective to perfect a security interest in accounts that XYZ acquires during the four-month period following the merger. *See* §§ 9-509(a) and (b). SP2's security interest also attaches to accounts acquired by its debtor, XYZ, after the merger. Section 9-326(a) operates to

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<sup>12</sup> A drafting committee might survey applicable state statutes that view converting entities as the same entities as the converted entities in order to determine whether the suggested approach of following law other than Article 9 might lead to any undesirable outcomes on priority issues.

subordinate SP1's security interest to SP2's with respect to "collateral in which a new debtor has or acquires rights," but only if SP1's security interest is "perfected by a filed financing statement that is effective solely under Section 9-508." Without § 9-508, SP1's financing statement would have no effect with respect to the accounts acquired by XYZ after the merger. Accordingly, SP1's financing statement would be "effective solely under Section 9-508" with respect to that collateral, and § 9-326(a) would subordinate SP1's security interest in that collateral to SP2's.

Note, however, that even without § 9-508, SP1's financing statement would be effective against other collateral owned by XYZ, specifically, any accounts acquired from ABC as part of the merger. *See* §§ 9-507(a) and 9-508(c). An Official Comment might provide guidance to the effect that one must look only at the collateral in question when determining whether a financing statement "is effective solely under Section 9-508."

Issue: Whether an Official Comment should explain that a fixture filing for a debtor that is a transmitting utility must be made in the central filing office in each state in which the fixtures are located rather than in the central filing office in the state in which the debtor is located.

Explanation: Section 9-501(b) permits a financing statement for which the debtor is a transmitting utility to be filed in the central filing office of the state. Under § 9-301(1), as a general matter, the financing statement would be filed in the state in which the transmitting utility debtor is located. Section 9-501(b) goes on, though, to provide in a second sentence that a fixture filing against a transmitting utility debtor may also be filed in the central filing office. Some have read this sentence to suggest that the fixture filing should be made in the central filing office of the state in which the transmitting utility debtor is located. However, because under § 9-301(3)(A) the perfection of a security interest in fixtures is governed by the law of the state in which the fixtures are located, the better reading of the sentence, when considered together with § 9-301(3)(A), is that a transmitting utility debtor fixture filing must be made in the central filing office of each state in which the fixtures are located, not as a single fixture filing in central filing office of the state in the which the debtor is located.

Issue: Whether an Official Comment to § 9-509 should explain the circumstances in which an assignee of a security interest may be impliedly authorized by the assignor to file an assignment to the assignee of the assignor's filed financing statement covering the collateral.

Explanation: Section 9-509(d)(1) provides that, in the case of an assignment of a security interest, the "secured party of record" must authorize the filing of any amendment to the financing statement that shows the new holder of the security interest as the successor secured party of record. In some transactions involving the sale of an obligation secured by a security interest, the parties may not think to include an express authorization for the transferee of the security interest to file an amendment to the financing statement to show the transferee as the successor secured party of record. Article 9 does not require that the "authorization" be in an authenticated record, and it would seem that the authorization would often be implied as part of the transfer itself.

Issue: Whether the last two sentences of Official Comment 3 to § 9-509, providing for later ratification by the debtor of the filing of a financing statement by the secured party without the debtor's authorization in an authenticated record, should be modified to refer to

the Restatement 3d of Agency's provisions addressing the ratification by a principal of the prior acts of its agent.

Explanation: Section 9-510 provides that a filed record (e.g., a financing statement) is effective only to the extent that it was filed by a person that may file it under § 9-509. Section 9-509 generally provides that a person may file an initial financing statement only if the debtor authorizes the filing in an authenticated record. The section specifically provides that, by authenticating a security agreement, a debtor authorizes the filing of an initial financing statement covering the collateral described in the security agreement. Secured parties often file an initial financing statement while the details of a financing are being negotiated and before the debtor authenticates a security agreement. If the debtor has not authorized the filing of such a financing statement in an authenticated record, then the financing statement is ineffective. However, the debtor's subsequent authentication of the security agreement would ratify the filing and make the financing statement effective. *See* Official Comment 3 to § 9-509 (explaining that law other than Article 9, "including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record" under § 9-509).

Some have questioned whether, for purposes of the first-to-file-or-perfect rule in § 9-322(a), the priority of a financing statement whose filing has been ratified should date from the date of filing or from the date of ratification. Inasmuch as the public notice afforded by an unratified financing statement is equal to that of a financing statement whose filing was authorized *ab initio*, there is no reason not to date the priority of a ratified filing from the date of filing. Although Restatement (3d) of Agency § 4.02 might be read to suggest otherwise, Comment *e* to that section explains that "If other law provides rules for priority of rights, that other law governs. *See, e.g., U.C.C. §§ 9-322 and 9-509 and Comment 3 to § 9-509 (last sentence).*" The last two sentences of Official Comment 3 to § 9-509 might be modified to refer to Comment *e* to § 4.02 of the Restatement (3d) of Agency.

Issue: Whether the Official Comments to §§ 9-613 and 9-614 should explain how a notification of an internet disposition may comply with those sections.

Explanation: Sections 9-613 and 9-614 provide that a notification of a disposition of collateral must provide the time and place of a public disposition or the time after which any other disposition is to be made. Each section also provides a safe-harbor form of notification that, when properly completed, is sufficient to comply with the requirements of the section. The use of on-line auctions for the disposition of collateral has become widespread. Secured parties have found that the internet expands the marketplace for repossessed goods and other collateral and that it is an efficient marketplace that benefits both secured party and debtor. However, neither §§ 9-613 and 9-614, nor the Official Comments, give guidance to secured parties on how to comply with the notification requirements, or use the safe harbor forms, when disposing of collateral through on-line sales and auctions.

Issue: Whether it should be clarified by an Official Comment to § 9-706 that § 9-506(c) applies to an "in lieu" initial financing statement.

Explanation: During the transition period following the enactment of revised Article 9, and today under more limited circumstances, secured parties file "in-lieu" initial financing statements in a new filing office to move filing office records evidencing perfection by filing of a security interest from one jurisdiction to another as required by the choice-of-law and

filing rules of Article 9. In addition to the information required by Part 5 of Article 9 for an initial financing statement, the “in-lieu” initial financing statement must contain the information required by §§ 9-706(c)(2) and (3). The additional information relates to the financing statement filed in the original filing office and dates the priority of the secured party’s security interest from a date established by the original filing. However, if there is a minor error in the additional information required by § 9-706, a court could find the error not to be covered by the minor errors rule of § 9-506 because of a reference in § 9-506 to “the requirements of this part....” The reference to “this part” of Article 9 is to Part 5 of Article 9, suggesting that the provision has no application to the transition rules in Part 7.