

D R A F T

FOR DISCUSSION ONLY

**AMENDMENTS TO UNIFORM
COMMERCIAL CODE ARTICLE 9**

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

For Drafting Committee Meeting, February 6-8, 2009

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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January 13, 2009

**DRAFTING COMMITTEE ON AMENDMENTS TO UNIFORM COMMERCIAL CODE
ARTICLE 9**

The Committee appointed by and representing the National Conference of Commissioners on Uniform State Laws in amending this Act consists of the following individuals:

EDWIN SMITH, 1 Federal St., 30th Flr., Boston, MA 02110-1726, *Chair*

CARL S. BJERRE, Univeristy of Oregon School of Law, 1515 Agate St., Eugene, OR
97403-1221

THOMAS J. BUITEWEG, 121 W. Washington, Suite 300, Ann Arbor, MI 48104

JOHN T. McGARVEY, 601 W. Main St., Louisville, KY 40202

SANDRA S. STERN, 909 Third Ave., Fifth Flr., New York, NY 10022

JAMES J. WHITE, 625 S. State St., Room 1035, Ann Arbor, MI 48109-1215

STEVEN L. HARRIS, Chicago-Kent College of Law, 565 West Adams St., Chicago, IL
60661-3691, *Reporter*

EX OFFICIO

MARTHA LEE WALTERS, Oregon Supreme Court, 1163 State St., Salem, OR 97301-2563,
President

WILLIAM H. HENNING, University of Alabama School of law, Box 870382, Tuscaloosa, AL
35487-0382, *Division Chair*

AMERICAN BAR ASSOCIATION ADVISOR

STEPHEN L. SEPINUCK , 721 N. Cincinnati, OH P.O. Box 3528, Spokane, WA 99220-3582,
ABA Advisor

JOHN FRANCIS HILSON, 515 S. Flower St., Ste. 2400, F1 25, Los Angeles, CA 90071-2229
ABA Section Advisor

EXECUTIVE DIRECTOR

JOHN A. SEBERT, 111 N. Wabash Ave., Suite 1010, Chicago, IL 60602, *Executive Director*

Copies of this Act may be obtained from:
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS
111 N. Wabash Ave., Suite 1010
Chicago, Illinois 60602
312/450-6600
www.nccusl.org

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AMENDMENTS TO UNIFORM COMMERCIAL CODE ARTICLE 9

[Agenda Item III.A.]

SECTION 9-607. COLLECTION AND ENFORCEMENT BY SECURED PARTY.

(a) [Collection and enforcement generally.] If so agreed, and in any event after default, a secured party:

* * *

(3) may enforce the obligations of an account debtor or other person obligated on collateral and exercise the rights of the debtor with respect to the obligation of the account debtor or other person obligated on collateral to make payment or otherwise render performance to the debtor, and with respect to any property that secures the obligations of the account debtor or other person obligated on the collateral;

* * *

(b) [Nonjudicial enforcement of mortgage.] If necessary to enable a secured party to exercise under subsection (a)(3) the right of a debtor to enforce a mortgage nonjudicially,

the secured party may record in the office in which a record of the mortgage is recorded:

(1) a copy of the security agreement that creates or provides for a security interest in the obligation secured by the mortgage; and

(2) the secured party's sworn affidavit in recordable form stating that:

(A) a default has occurred with respect to the obligation secured by the mortgage [and assigned to the secured party]; and

(B) the secured party is entitled to enforce the mortgage nonjudicially.

Reporter's Note

1 1. The amendment to paragraph (b)(2)(A) is for clarification only; it does not reflect a
2 change in meaning. Accordingly, the amendment should apply to all transactions governed by
3 Article 9, including those that were entered into before the effective date of the amendment.

4 2. Subsection (a) is left unamended. There appears to be no need to clarify that the
5 phrase “after default” refers to a default with respect to the obligations secured by the security
6 interest in question. The phrase appears frequently in Part 6, see, e.g., Sections 9-609(a), 9-
7 610(a), 9-612(b), 9-616(c)(1)(A), 9-617(a), 9-620(c), 9-624(a), and qualifying in subsection (a)
8 might suggest that the phrase is intended to have a different meaning there from the meaning
9 elsewhere.

10 *[Agenda Item III.B.]*

11 **SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND DUTIES.** Except
12 as otherwise provided in Section 9-624, to the extent that they give rights to a debtor or obligor
13 and impose duties on a secured party, the debtor or obligor may not waive or vary the rules
14 stated in the following listed sections:

15 * * *

16 (7) Sections 9-610(b), 9-611, 9-613, and 9-614, which deal with disposition of collateral;

17 * * *

18 (10) Sections 9-620, 9-621, and 9-622, which deal with acceptance of collateral in
19 satisfaction of obligation;

20 * * *

21 **Official Comment**

22 1. **Source.** Former Section 9-501(3).

23 2. **Waiver: In General.** Section 1-102(3) addresses which provisions of the UCC are
24 mandatory and which may be varied by agreement. With exceptions relating to good faith,
25 diligence, reasonableness, and care, immediate parties, as between themselves, may vary its
26 provisions by agreement. However, in the context of rights and duties after default, our legal

1 system traditionally has looked with suspicion on agreements that limit the debtor’s rights and
2 free the secured party of its duties. As stated in former Section 9-501, Comment 4, “no
3 mortgage clause has ever been allowed to clog the equity of redemption.” The context of default
4 offers great opportunity for overreaching. The suspicious attitudes of the courts have been
5 grounded in common sense. This section, like former Section 9-501(3), codifies this
6 long-standing and deeply rooted attitude. The specified rights of the debtor and duties of the
7 secured party may not be waived or varied except as stated. Provisions that are not specified in
8 this section are subject to the general rules in Section 1-102(3).

9 **3. Nonwaivable Rights and Duties.** This section revises former Section 9-501(3) by
10 restricting the ability to waive or modify additional specified rights and duties: (i) duties under
11 Section 9-207(b)(4)(C), which deals with the use and operation of consumer goods, (ii) the right
12 to a response to a request for an accounting, concerning a list of collateral, or concerning a
13 statement of account (Section 9-210), (iii) the duty to collect collateral in a commercially
14 reasonable manner (Section 9-607), (iv) the implicit duty to refrain from a breach of the peace in
15 taking possession of collateral under Section 9-609, (v) the duty to apply noncash proceeds of
16 collection or disposition in a commercially reasonable manner (Sections 9-608 and 9-615), (vi)
17 the right to a special method of calculating a surplus or deficiency in certain dispositions to a
18 secured party, a person related to secured party, or a secondary obligor (Section 9-615), (vii) the
19 duty to give an explanation of the calculation of a surplus or deficiency (Section 9-616), (viii)
20 the right to limitations on the effectiveness of certain waivers (Section 9-624), and (ix) the right
21 to hold a secured party liable for failure to comply with this Article (Sections 9-625 and 9-626).
22 For clarity and consistency, this Article uses the term “waive or vary” instead of “renounc[e] or
23 modify[],” which appeared in former Section 9-504(3).

24 This section provides generally that the specified rights and duties “may not be waived or
25 varied.” However, it does not restrict the ability of parties to agree to settle, compromise, or
26 renounce claims for past conduct that may have constituted a violation or breach of those rights
27 and duties, even if the settlement involves an express “waiver.”

28 Section 9-610(c) limits the circumstances under which a secured party may purchase at
29 its own private disposition. Transactions of this kind are equivalent to “strict foreclosures” and
30 are governed by Sections 9-620, 9-621, and 9-622. With the exception of Section 9-620(e), the
31 provisions of these sections cannot be waived by the debtor or a secondary obligor. See Section
32 9-624(b).

33 **4. Waiver by Debtors and Obligors.** The restrictions on waiver contained in this
34 section apply to obligors as well as debtors. This resolves a question under former Article 9 as
35 to whether secondary obligors, assuming that they were “debtors” for purposes of former Part 5,
36 were permitted to waive, under the law of suretyship, rights and duties under that Part.

37 **5. Certain Post-Default Waivers.** Section 9-624 permits post-default waivers in
38 limited circumstances. These waivers must be made in agreements that are authenticated. Under
39 Section 1-201, an “‘agreement’ means the bargain of the parties in fact.” In considering waivers

1 under Section 9-624 and analogous agreements in other contexts, courts should carefully
2 scrutinize putative agreements that appear in records that also address many additional or
3 unrelated matters.

4 **SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.**

5 * * *

6 (c) [**Purchase by secured party.**] A secured party may purchase collateral:

7 (1) at a public disposition; or

8 (2) at a private disposition only if the collateral is of a kind that is customarily
9 sold on a recognized market or the subject of widely distributed standard price quotations.

10 **Official Comment**

11 * * *

12 7. **Public vs. Private Dispositions.** This Part maintains two distinctions between
13 “public” and other dispositions: (i) the secured party may buy at the former, but normally not at
14 the latter (Section 9-610(c)), and (ii) the debtor is entitled to notification of “the time and place
15 of a public disposition” and notification of “the time after which” a private disposition or other
16 intended disposition is to be made (Section 9-613(1)(E)). It does not retain the distinction under
17 former Section 9-504(4), under which transferees in a noncomplying public disposition could
18 lose protection more easily than transferees in other noncomplying dispositions. Instead, Section
19 9-617(b) adopts a unitary standard. Although the term is not defined, as used in this Article, a
20 “public disposition” is one at which the price is determined after the public has had a meaningful
21 opportunity for competitive bidding. “Meaningful opportunity” is meant to imply that some
22 form of advertisement or public notice must precede the sale (or other disposition) and that the
23 public must have access to the sale (disposition).

24 A secured party’s purchase of collateral at its own private disposition is equivalent to a
25 “strict foreclosure” and is governed by Sections 9-620, 9-621, and 9-622. With the exception of
26 Section 9-620(e), the provisions of these sections cannot be waived by the debtor or a secondary
27 obligor. See Section 9-624(b).

28 * * *

29 **SECTION 9-624. WAIVER.**

1 (a) **[Waiver of disposition notification.]** A debtor or secondary obligor may waive the
2 right to notification of disposition of collateral under Section 9-611 only by an agreement to that
3 effect entered into and authenticated after default.

4 (b) **[Waiver of mandatory disposition.]** A debtor may waive the right to require
5 disposition of collateral under Section 9-620(e) only by an agreement to that effect entered into
6 and authenticated after default.

7 (c) **[Waiver of redemption right.]** Except in a consumer-goods transaction, a debtor or
8 secondary obligor may waive the right to redeem collateral under Section 9-623 only by an
9 agreement to that effect entered into and authenticated after default.

10 **Official Comment**

11 1. **Source.** Former Sections 9-504(3), 9-505, 9-506.

12 2. **Waiver.** This section is a limited exception to Section 9-602, which generally
13 prohibits waiver by debtors and obligors. It makes no provision for waiver of the rule
14 prohibiting a secured party from buying at its own private disposition. Transactions of this kind
15 are equivalent to “strict foreclosures” and are governed by Sections 9-620, 9-621, and 9-622.

16 *[Agenda Item III.C.]*

17 **SECTION 9-625. REMEDIES FOR SECURED PARTY’S FAILURE TO**
18 **COMPLY WITH ARTICLE.**

19 * * *

20 (c) **[Persons entitled to recover damages; statutory damages ~~in consumer-goods~~**
21 **transaction if collateral is consumer goods.]** Except as otherwise provided in Section 9-628:

22 (1) a person that, at the time of the failure, was a debtor, was an obligor, or held a
23 security interest in or other lien on the collateral may recover damages under subsection (b) for

1 its loss; and

2 (2) if the collateral is consumer goods, a person that was a debtor or a secondary
3 obligor at the time a secured party failed to comply with this part may recover for that failure in
4 any event an amount not less than the credit service charge plus 10 percent of the principal
5 amount of the obligation or the time-price differential plus 10 percent of the cash price.

6 * * *

7 *[Agenda Item III.D.]*

8 **SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.**

9 * * *

10 (b) [**Commercially reasonable disposition.**] Every aspect of a disposition of collateral,
11 including the method, manner, time, place, and other terms, must be commercially reasonable. If
12 commercially reasonable, a secured party may dispose of collateral by public or private
13 proceedings, by one or more contracts, as a unit or in parcels, and at any time and place and on
14 any terms.

15 * * *

16 **Official Comment**

17 * * *

18 2. **Commercially Reasonable Dispositions.** Subsection (a) follows former Section 9-
19 504 by permitting a secured party to dispose of collateral in a commercially reasonable manner
20 following a default. Although subsection (b) permits both public and private dispositions,
21 including dispositions conducted over the Internet, “every aspect of a disposition . . . must be
22 commercially reasonable.” This section encourages private dispositions on the assumption that
23 they frequently will result in higher realization on collateral for the benefit of all concerned.
24 Subsection (a) does not restrict dispositions to sales; collateral may be sold, leased, licensed, or
25 otherwise disposed. Section 9-627 provides guidance for determining the circumstances under

1 which a disposition is “commercially reasonable.”

2 * * *

3 **SECTION 9-613. CONTENTS AND FORM OF NOTIFICATION BEFORE**
4 **DISPOSITION OF COLLATERAL: GENERAL.** Except in a consumer-goods transaction,
5 the following rules apply:

6 (1) The contents of a notification of disposition are sufficient if the notification:

7 (A) describes the debtor and the secured party;

8 (B) describes the collateral that is the subject of the intended disposition;

9 (C) states the method of intended disposition;

10 (D) states that the debtor is entitled to an accounting of the unpaid indebtedness
11 and states the charge, if any, for an accounting; and

12 (E) states the time and place of a public disposition or the time after which any
13 other disposition is to be made.

14 * * *

15 **Official Comment**

16 * * *

17 2. **Contents of Notification.** To comply with the “reasonable authenticated notification”
18 requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a
19 consumer-goods transaction, the contents of a notification that includes the information set forth
20 in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The
21 reference to “time” of disposition means here, as it did in former Section 9-504(3), not only the
22 hour of the day but also the date.) Although a secured party may choose to include additional
23 information concerning the transaction or the debtor’s rights and obligations, no additional
24 information is required unless the parties agree otherwise. A notification that lacks some of the
25 information set forth in paragraph (1) nevertheless may be sufficient if found to be reasonable by
26 the trier of fact, under paragraph (2). A properly completed sample form of notification in

1 paragraph (5) or in Section 9-614(a)(3) is an example of a notification that would contain the
2 information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of
3 the notification is required.

4 A notification of a public disposition by auction conducted over the Internet satisfies
5 paragraph (1)(E) if it states the date and time of the scheduled beginning and end of the auction
6 and the Uniform Resource Locator (URL) or other Internet address where information about the
7 collateral may be obtained and bids may be placed.

8 [Agenda Item IV.]

9 **ARTICLE 11 – EFFECTIVE DATE AND TRANSITION PROVISIONS**

10 * * *

11 Legislative Note: Article 11 affects transactions that were entered into before the effective date
12 of the 1972 amendments to Article 9, which were supplanted by the version of Article 9 that has
13 been in effect in all States since at least January 1, 2002. Inasmuch as very few, if any, of these
14 transactions remain outstanding, States may wish to repeal Article 11.

15 [Agenda Item V.]

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

17 (a) [Article 9 definitions.] In this article:

18 * * *

19 (4) “Accounting”, except as used in “accounting for”, means:

20 (A) in a consumer transaction, a record:

21 ~~(A)~~(i) authenticated by a secured party;

22 ~~(B)~~(ii) indicating the aggregate unpaid secured obligations as of a
23 date not more than 35 days earlier or 35 days later than the date of the record; and

24 ~~(C)~~(iii) identifying the components of the obligations in reasonable
25 detail; and

1 (B) in a transaction other than consumer transactions, a record:

2 (i) authenticated by a secured party;

3 (ii) indicating as of the date of the record, the amount that, if
4 received by the secured party, would entitle the debtor to the filing of a termination statement
5 under Section 9-513(c); and

6 (C) identifying the components of the obligations in reasonable detail.

7 * * *

8 **SECTION 9-210. REQUEST FOR ACCOUNTING; REQUEST REGARDING**
9 **LIST OF COLLATERAL OR STATEMENT OF ACCOUNT.**

10 (a) **[Definitions.]** In this section:

11 (1) “Request” means a record of a type described in paragraph (2), (3), or (4).

12 (2) “Request for an accounting” means a record authenticated by a debtor
13 requesting that the recipient provide an accounting of the unpaid obligations secured by
14 collateral and reasonably identifying the transaction or relationship that is the subject of the
15 request.

16 * * *

17 (b) **[Duty to respond to requests.]** Subject to subsections (c), (d), (e), and (f), a secured
18 party, other than a buyer of accounts, chattel paper, payment intangibles, or promissory notes or
19 a consignor, shall comply with a request within 14 days after receipt:

20 (1) in the case of a request for an accounting, by authenticating and sending to the
21 debtor or to a person designated by the debtor in a request for an accounting, an accounting; and

22 (2) in the case of a request regarding a list of collateral or a request regarding a

1 statement of account, by authenticating and sending to the debtor an approval or correction.

2 * * *

3 (e) **[Request for accounting or regarding statement of account; no interest in**
4 **obligation claimed.]** A person that receives a request for an accounting or a request regarding a
5 statement of account, claims no interest in the obligations when it receives the request, and
6 claimed an interest in the obligations at an earlier time shall comply with the request within 14
7 days after receipt by sending to the debtor an authenticated record:

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

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

11 (f) **[Charges for responses.]** A debtor is entitled without charge to one response to a
12 request under this section during any six-month period. The secured party may require payment
13 of a charge not exceeding \$25 for each additional response.

14 **Reporter's Note**

15 The foregoing is based on a proposal submitted by Robert Zadek.

16 *[Agenda Item VI.]*

17 **SECTION 9-317. INTERESTS THAT TAKE PRIORITY OVER OR TAKE FREE** 18 **OF SECURITY INTEREST OR AGRICULTURAL LIEN.**

19 * * *

20 (b) **[Buyers that receive delivery.]** Except as otherwise provided in subsection (e), a
21 buyer, other than a secured party, of tangible chattel paper, documents, goods, instruments, or a

1 security certificate takes free of a security interest or agricultural lien if the buyer gives value
2 and receives delivery of the collateral without knowledge of the security interest or agricultural
3 lien and before it is perfected.

4 (c) **[Lessees that receive delivery.]** Except as otherwise provided in subsection (e), a
5 lessee of goods takes free of a security interest or agricultural lien if the lessee gives value and
6 receives delivery of the collateral without knowledge of the security interest or agricultural lien
7 and before it is perfected.

8 (d) **[Licensees and buyers of certain collateral.]** A licensee of a general intangible or a
9 buyer, other than a secured party, of ~~accounts, electronic chattel paper, general intangibles, or~~
10 ~~investment property~~ collateral other than tangible chattel paper, documents, goods, instruments,
11 or a certificated security takes free of a security interest if the licensee or buyer gives value
12 without knowledge of the security interest and before it is perfected.

13 * * *

14 **Official Comment**

15 * * *

16 **6. Purchasers Other Than Secured Parties.** Subsections (b), (c), and (d) afford
17 priority over an unperfected security interest to certain purchasers (other than secured parties) of
18 collateral. They derive from former Sections 9-301(1)(c), 2A-307(2), and 9-301(d). Former
19 Section 9-301(1)(c) and (1)(d) provided that unperfected security interests are “subordinate” to
20 the rights of certain purchasers. But, as former Comment 9 suggested, the practical effect of
21 subordination in this context is that the purchaser takes free of the security interest. To avoid
22 any possible misinterpretation, subsections (b) and (d) of this section use the phrase “takes free.”

23 Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected
24 by physical delivery of the representative piece of paper (tangible chattel paper, documents,
25 instruments, and security certificates). To obtain priority, a buyer must both give value and
26 receive delivery of the collateral without knowledge of the existing security interest and before
27 perfection. Even if the buyer gave value without knowledge and before perfection, the buyer
28 would take subject to the security interest if perfection occurred before physical delivery of the

1 collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods.
2 Note that a lessee of goods in ordinary course of business takes free of all security interests
3 created by the lessor, even if perfected. See Section 9-321.

4 Normally, there will be no question when a buyer of chattel paper, documents,
5 instruments, or security certificates “receives delivery” of the property. See Section 1-201
6 (defining “delivery”). However, sometimes a buyer or lessee of goods, such as complex
7 machinery, takes delivery of the goods in stages and completes assembly at its own location.
8 Under those circumstances, the buyer or lessee “receives delivery” within the meaning of
9 subsections (b) and (c) when, after an inspection of the portion of the goods remaining with the
10 seller or lessor, it would be apparent to a potential lender to the seller or lessor that another
11 person might have an interest in the goods.

12 The rule of subsection (b) obviously is not appropriate where the collateral consists of
13 intangibles and there is no representative piece of paper whose physical delivery is the only or
14 the customary method of transfer. Therefore, with respect to such intangibles (including
15 accounts, electronic chattel paper, general intangibles, and investment property other than
16 certificated securities), subsection (d) gives priority to any buyer who gives value without
17 knowledge, and before perfection, of the security interest. A licensee of a general intangible
18 takes free of an unperfected security interest in the general intangible under the same
19 circumstances. Note that a licensee of a general intangible in ordinary course of business takes
20 rights under a nonexclusive license free of security interests created by the licensor, even if
21 perfected. See Section 9-321.

22 Unless Section 9-109 excludes the transaction from this Article, a buyer of accounts,
23 chattel paper, payment intangibles, or promissory notes is a “secured party” (defined in Section
24 9-102), and subsections (b) and (d) do not determine priority of the security interest created by
25 the sale. Rather, the priority rules generally applicable to competing security interests apply.
26 See Section 9-322.

27 * * *

28 **Reporter’s Note**

29 The application of subsection (d) is expanded to cover buyers of all types of collateral
30 that are not capable of possession. Although in all likelihood the amendment reflects the
31 intention of the Article 9 Drafting Committee, it appears sufficiently substantive so as to
32 constitute a change in the rule rather than a clarification. If so, the amendment would be
33 inapplicable to transactions entered into before its effective date. The Joint Review Committee
34 may wish to express a view as to whether the result under the amendment might be reached
35 today under Section 1-103(a) (the UCC “must be liberally construed and applied to promote its
36 underlying purposes and policies”).

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

3 (a) [Article 9 definitions.] In this article:

4 * * *

5 (7) “Authenticate” means:

6 (A) to sign; or

7 (B) ~~to execute or otherwise adopt a symbol, or encrypt or similarly~~

8 ~~process a record in whole or in part, with the present intent of the authenticating person to~~

9 ~~identify the person and adopt or accept a record. with present intent to authenticate or adopt a~~

10 ~~record, to attach to or logically associate with the record an electronic sound, symbol, or process~~

11 **Official Comment**

12 **9. Definitions Relating to Medium Neutrality.**

13 * * *

14 b. **“Authenticate”;** **“Communicate”;** **“Send.”** The terms “authenticate” and
15 “authenticated” generally replace “sign” and “signed.” “Authenticated” replaces and broadens
16 the definition of “signed,” in Section 1-201, to encompass authentication of all records, not just
17 writings. (References to authentication of, e.g., an agreement, demand, or notification mean, of
18 course, authentication of a record containing an agreement, demand, or notification.) The terms
19 “communicate” and “send” also contemplate the possibility of communication by nonwritten
20 media. These definitions include the act of transmitting both tangible and intangible records.
21 The definition of “send” replaces, for purposes of this Article, the corresponding term in Section
22 1-201. The reference to “usual means of communication” in that definition contemplates an
23 inquiry into the appropriateness of the method of transmission used in the particular
24 circumstances involved.

25 **Reporter’s Note**

26 The definition has been conformed to the definition of “sign” in Section 7-102(a)(11).

2 SECTION 9-105. CONTROL OF ELECTRONIC CHATTEL PAPER.

3 (a) [General rule: control of electronic chattel paper.] A secured party has control of
4 electronic chattel paper if a system employed for evidencing the transfer of interests in the
5 chattel paper reliably establishes the secured party as the person to which the chattel paper was
6 [issued or] transferred [assigned].

7 (b) [Specific facts giving control.] A system satisfies subsection (a), and a secured
8 party has control of electronic chattel paper, if the record or records comprising the chattel paper
9 are created, stored, and assigned in such a manner that:

10 (1) a single authoritative copy of the record or records exists which is unique,
11 identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

12 [Paragraph (b)(2)—Alternative A]

13 (2) the authoritative copy identifies the secured party as the assignee of the record
14 or records;

15 [Paragraph (b)(2)—Alternative B]

16 (2) the authoritative copy identifies the secured party as: ~~the assignee of the~~
17 ~~record or records~~

18 (A) the person to which the record or records were issued; or

19 (B) if the authoritative copy indicates that the record or records have been
20 transferred, the person to which the record or records were most recently [transferred]
21 [assigned];

22 [Paragraph (b)(2)—Alternative C]

1 (2) the authoritative copy identifies the secured party as ~~the assignee of the record~~
2 ~~or records~~ the person to which the record or records were most recently [transferred] [assigned];

3 *[End of Alternatives]*

4 (3) the authoritative copy is communicated to and maintained by the secured party
5 or its designated custodian;

6 (4) copies or ~~revisions~~ amendments that add or change an identified assignee of
7 the authoritative copy can be made only with the [participation] [consent] of the secured party;

8 (5) each copy of the authoritative copy and any copy of a copy is readily
9 identifiable as a copy that is not the authoritative copy; and

10 (6) any ~~revision~~ amendment of the authoritative copy is readily identifiable as an
11 authorized or unauthorized ~~revision~~.

12 **Reporter's Note**

13 1. This Section has been revised to conform to Section 7-106, which defines control of
14 an electronic document of title. Section 7-106 differs from Section 9-105 in three substantive
15 ways.

16 First, whereas Section 9-105 contemplates that a person (secured party) having control of
17 electronic chattel paper is an assignee of chattel paper, Section 7-106 (which is not limited to
18 secured parties) expands the control concept to include a person to which an electronic document
19 of title is issued. Pending the Committee's determination whether Section 9-105 should likewise
20 apply to a secured party to which electronic chattel paper has been issued, paragraphs (a) and
21 (b)(2)(B) of the draft present bracketed alternatives. Also bracketed is the choice of using
22 language of "transfer" or "assignment."

23 Second, Section 9-105(4) requires the "participation" of the secured party. Section 7-
24 106(b)(4) replaces "participation" with "consent." Official Comment 4 to Section 9-105(4)
25 suggests that these two words are not synonyms: "[P]aragraph (4) contemplates that control
26 requires that it be a physical impossibility (or sufficiently unlikely or implausible so as to
27 approach practical impossibility) to add or change an identified assignee without the
28 participation of the secured party (or its authorized representative). It would not be enough for
29 the assignor merely to agree that it will not change the identified assignee without the assignee-
30 secured party's consent."

1 The Joint Review Committee should consider whether either of these substantive changes
2 is appropriate. Implicit in the Joint Review Committee's decision to conform Section 9-105 to
3 Section 7-106 is its approval of the third substantive change: Satisfaction of the requirements
4 currently enumerated in Section 9-105 would become sufficient, but not necessary, to establish
5 control. Control may arise under the general standard (new subsection (a)) even where the
6 specific requirements are not satisfied.

7 2. The change from current Section 9-105 to the revised Section *ipso facto* may result in
8 a secured party's achieving control of electronic chattel paper. In these circumstances, control
9 would date from the effective date of the revision and would not relate back.

10 [Agenda Item VIII.]

11 **SECTION 9-316. ~~CONTINUED PERFECTION OF SECURITY INTEREST~~**
12 **FOLLOWING EFFECT OF CHANGE IN GOVERNING LAW.**

13 * * *

14 **(h) [Effect on filed financing statement of change in governing law.]** A financing
15 statement filed pursuant to the law of the jurisdiction designated in Section 9-301(1) or 9-305(c)
16 is effective to perfect a security interest in collateral to which a security interest attaches within
17 four months after the debtor changes its location to another jurisdiction if the financing statement
18 otherwise would have been effective to perfect a security interest in the collateral. If a security
19 interest that is perfected by a financing statement that is effective under the preceding sentence
20 becomes perfected under the law of the other jurisdiction before the earlier of the time the
21 financing statement would have become ineffective under the law of the jurisdiction designated
22 in Section 9-301(1) or 9-305(c) or the expiration of the four-month period, it remains perfected
23 thereafter. If the security interest does not become perfected under the law of the other
24 jurisdiction before the earlier time or event, it becomes unperfected and is deemed never to have
25 been perfected as against a purchaser of the collateral for value.

1 **Reporter’s Note**

2 1. Where a debtor changes its location, the law governing perfection generally changes
3 also. See Section 9-301(1). Current Section 9-316 addresses security interests that are perfected
4 (i.e., that have attached and as to which any required perfection step has been taken) before the
5 debtor changes its location. It does not apply to security interests that have not attached before
6 the debtor’s location changes. Suppose, for example, that Debtor is an individual who resides in
7 Pennsylvania. Lender perfects a security interest in Debtor’s inventory by filing in
8 Pennsylvania. Then, without Lender’s knowledge, Debtor’s principal residence is relocated to
9 New Jersey. Under Section 9-316, Lender’s security interest in inventory on hand as of the
10 relocation date remains perfected for four months thereafter (or, if earlier, until perfection would
11 have ceased under Pennsylvania law). However, although Lender’s security interest attaches to
12 inventory that Debtor acquires after relocating to New Jersey, the security interest is unperfected
13 because Lender has not filed in New Jersey.

14 New subsection (h) would change the result. In the example, Lender’s filing in
15 Pennsylvania would be effective to perfect a security interest in inventory acquired by Debtor
16 within the four months after Debtor relocates (assuming that the financing statement would not
17 have become ineffective earlier). The security interest will remain continuously perfected if,
18 before the expiration of the four-month period (and before the financing statement would have
19 become ineffective), the security interest is perfected under the law of New Jersey. Otherwise,
20 the security interest will become unperfected at the end of the four-month period (or, if earlier,
21 when perfection would have ceased) and will be deemed never to have been perfected.

22 Under current law, a competing secured party generally can rely on the public record in
23 New Jersey to determine its priority as to collateral acquired by Debtor post-relocation.
24 However, under new subsection (h), the priority of Lender’s security interest might be based on
25 its Pennsylvania filing. This possibility imposes a new risk on competing creditors.

26 2. Although new subsection (h) is likely to be most useful to creditors having a security
27 interest in inventory and receivables, it would apply to all kinds of collateral.

28 3. The addition of subsection (h) will require explanatory and other changes to the
29 Official Comments. The revised Comments will also explain the application of this subsection
30 to entities that convert from one organizational form to another.

31 *[Agenda Item IX.A.]*

32 **SECTION 9-326. PRIORITY OF SECURITY INTERESTS CREATED BY NEW**
33 **DEBTOR.**

1 in which the new debtor has or acquires rights before or within four months after the new debtor
2 becomes bound under Section 9-203(d), if the financing statement otherwise would have been
3 effective to perfect a security interest in the collateral.

4 (2) A security interest that is perfected by the financing statement and which
5 becomes perfected under the law of the other jurisdiction before the earlier of (i) the expiration
6 of the four-month period or (ii) the time the financing statement would have become ineffective
7 under the law of the jurisdiction designated in Section 9-301(1) or 9-305(c) remains perfected
8 thereafter.

9 (3) A security interest that is perfected by the financing statement but which does
10 not become perfected under the law of the other jurisdiction before the earlier time or event
11 becomes unperfected and is deemed never to have been perfected as against a purchaser of the
12 collateral for value.

13 **Reporter's Note**

14 1. New subsection (i) is similar to new subsection (h). Whereas the latter addresses a
15 given debtor's change of location, the former addresses situations in which a successor to the
16 debtor becomes bound as debtor by the original debtor's security agreement. See Section 9-
17 203(d).

18 Consider the difficulty faced by Lender under the facts of Official Comment 5 to Section
19 9-316:

20 Debtor is a Pennsylvania corporation. Debtor grants to Lender a security interest in
21 Debtor's existing and after-acquired inventory. Lender perfects by filing in
22 Pennsylvania. Debtor's shareholders decide to "reincorporate" in Delaware. They form
23 a Delaware corporation (Newcorp) into which they merge Debtor. By virtue of the
24 merger, Newcorp becomes bound by Debtor's security agreement. See Section 9-203.
25 After the merger, Newcorp acquires inventory to which Lender's security interest
26 attaches. Because Newcorp is located in Delaware, Delaware law governs perfection of a
27 security interest in Newcorp's inventory. See Sections 9-301, 9-307.

28 Delaware's current Section 9-316(a) applies to the pre-merger collateral that was

1 transferred from Debtor to Newcorp, and in which Lender held a security interest perfected
2 under Pennsylvania law. Under this section, Lender's security interest in the transferred
3 collateral remains perfected for one year after the merger (assuming that perfection would not
4 have ceased earlier under Pennsylvania law). Because Lender's financing statement was filed in
5 Pennsylvania and not Delaware, current Section 9-316(a) would have no application to inventory
6 acquired by Newcorp, a Delaware corporation, after the merger. For the same reason, Lender's
7 security interest in Newcorp's post-merger inventory would be unperfected until Lender files
8 against Newcorp in Delaware.

9 Under new subsection (i), however, the financing statement filed in Pennsylvania would
10 be effective to perfect a security interest that attaches to the post-merger collateral. The new
11 subsection would eliminate the risk that a change in Debtor's location would result in security
12 interests in post-relocation collateral being unperfected until Lender discovers the relocation and
13 files in Delaware. The perfection afforded by the Pennsylvania financing statement would end
14 four months after the merger (reincorporation) unless Lender perfects under Delaware law within
15 the four-month period (or, if earlier, before the financing statement would have become
16 ineffective under Pennsylvania law).

17 2. In many cases, an original debtor (Debtor, a Pennsylvania corporation) will merge
18 into a corporation (Survivor, a Delaware corporation) that has been operating before the merger.
19 In these cases, subsection (i) would affect Lender's security interest not only in inventory
20 acquired by Survivor after the merger but also in inventory held by Survivor at the time of the
21 merger. Where Lender files against Debtor's inventory in Pennsylvania before the merger,
22 amended Section 9-316 would yield the following results (assuming that the financing statement
23 would not have become ineffective under Pennsylvania law):

24 a. *Transferred inventory.* Lender's perfected security interest in the inventory
25 that Survivor acquired from Debtor would remain perfected for one year after the
26 merger. See subsection (a). If Lender perfects under Delaware law within the
27 year, then the security interest would remain perfected thereafter. See subsection
28 (b).

29 b. *Survivor's pre-merger inventory.* Lender's security interest in collateral that
30 Survivor had on hand at the time of the merger would attach and become
31 perfected when Survivor becomes a new debtor. It would remain perfected for
32 four months after Survivor becomes a new debtor. If Lender perfects under
33 Delaware law within the four-month period, then the security interest would
34 remain perfected thereafter. See subsection (i).

35 c. *Inventory acquired post-merger.* Lender's security interest in collateral that
36 Survivor acquires within four months after Survivor becomes a new debtor would
37 become perfected when Survivor acquires the collateral. If Lender perfects under
38 Delaware law within the four-month period, then the security interest would
39 remain perfected thereafter. See subsection (i).

1 3. The cases described in Note 2 also may give rise to a “double-debtor” problem, in
2 which Lender and Survivor’s secured parties hold competing security interests in the same
3 inventory. Section 9-326 contains the priority rules addressing this problem. They have been
4 amended to take account of new subsection (i).

5 4. Although new subsection (i) is likely to be most useful to creditors having a security
6 interest in inventory and receivables, it would apply to all kinds of collateral.

7 5. The addition of subsection (i) will require explanatory and other changes to the
8 Official Comments. The revised Comments will also explain the application of this subsection
9 to entities that convert from one organizational form to another.

10 **SECTION 9-326. PRIORITY OF SECURITY INTERESTS CREATED BY NEW**
11 **DEBTOR.**

12 (a) **[Subordination of security interest created by new debtor.]** Subject to subsection
13 (b), a security interest created by a new debtor which is perfected by a filed financing statement
14 that is effective solely under Section 9-508 or Sections 9-508 and 9-316(i) in collateral in which
15 a new debtor has or acquires rights is subordinate to a security interest in the same collateral
16 which is perfected other than by a filed financing statement that is effective solely under Section
17 9-508 or Sections 9-508 and 9-316(i).

18 (b) **[Priority under other provisions; multiple original debtors.]** The other provisions
19 of this part determine the priority among conflicting security interests in the same collateral
20 perfected by filed financing statements that are effective solely under Section 9-508 or Sections
21 9-508 and 9-316(i). However, if the security agreements to which a new debtor became bound
22 as debtor were not entered into by the same original debtor, the conflicting security interests rank
23 according to priority in time of the new debtor's having become bound.

24 **Reporter’s Note**

25 Section 9-326 resolves the priority of conflicting security interests in situations like the
26 following:

1 SP-D holds a security interest in the existing and after-acquired inventory of Debtor, a
2 Pennsylvania corporation. In 2007 SP-D perfected its security interest by filing a
3 financing statement against Debtor in Pennsylvania. SP-S holds a security interest in the
4 existing and after-acquired inventory of Survivor, which also is a Pennsylvania
5 corporation. In 2008 SP-S perfected its security interest by filing a financing statement
6 against Survivor in Pennsylvania. In 2009 Debtor merges into Survivor.

7 Under current law, SP-D’s security interest would attach to inventory that Survivor had
8 on hand at the time of the merger or acquired after the merger. Section 9-508 makes SP-D’s
9 financing statement effective to perfect its security interest in this inventory, even though the
10 financing statement was filed against Debtor. The first-to-file-or-perfect rule (Section 9-
11 322(a)(1)) would award priority to SP-D. However, it is subject to Section 9-326, which awards
12 priority to SP-S. Section 9-326 identifies the subordinated security interest as one that is
13 “perfected by a filed financing statement that is effective solely under Section 9-508.”

14 Suppose instead that Survivor is a Delaware corporation and that SP-S perfected by filing
15 in Delaware. As in the previous example, SP-D’s security interest would attach to inventory that
16 Survivor had on hand at the time of the merger or acquired after the merger. Here, SP-D faces
17 two problems: Not only does SP-D’s financing statement name Debtor and not Survivor, but it
18 also is filed where Debtor is located (Pennsylvania) and not where Survivor is located
19 (Delaware). Section 9-508 solves the first problem for SP-D, but not the second. Thus, until SP-
20 D files in Delaware, SP-D’s security interest in inventory that Survivor had on hand at the time
21 of the merger or acquired after the merger would be unperfected.

22 New subsection (i) would address this second problem by making SP-D’s Pennsylvania
23 filing effective with respect to inventory that Survivor had at the time of the merger and
24 inventory that Survivor acquired within four months after the merger. To insure that the first-to-
25 file-or-perfect rule subordinates a security interest like SP-D’s, Section 9-326 would be amended
26 to subordinate a security interest that is perfected by a financing statement that is “effective
27 solely under Section 9-508 or Sections 9-508 and 9-316(i).”

28 **SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY**
29 **INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.**

30 (a) [**General priority rules.**] Except as otherwise provided in this section, priority
31 among conflicting security interests and agricultural liens in the same collateral is determined
32 according to the following rules:

33 (1) Conflicting perfected security interests and agricultural liens rank according

1 to priority in time of filing or perfection. Priority dates from the earlier of the time a filing
2 covering the collateral is first made or the security interest or agricultural lien is first perfected, if
3 there is no period thereafter when there is neither filing nor perfection.

4 * * *

5 (b) [**Time of perfection: proceeds and supporting obligations.**] For the purposes of
6 subsection (a)(1):

7 (1) the time of filing or perfection as to a security interest in collateral is also the
8 time of filing or perfection as to a security interest in proceeds; ~~and~~

9 (2) the time of filing or perfection as to a security interest in collateral supported
10 by a supporting obligation is also the time of filing or perfection as to a security interest in the
11 supporting obligation; and

12 (3) the time of filing or perfection as to a security interest in collateral which
13 remains perfected under Section 9-316(i)(2) is the time the security interest becomes perfected
14 under the law of the other jurisdiction.

15 * * *

16 **Reporter's Note**

17 Consider this example:

18 SP-D holds a security interest in the existing and after-acquired inventory of
19 Debtor, a Pennsylvania corporation. In 2007 SP-D perfected its security interest
20 by filing a financing statement against Debtor in Pennsylvania. SP-S holds a
21 security interest in the existing and after-acquired inventory of Survivor, a
22 Delaware corporation. In 2008 SP-S perfected its security interest by filing a
23 financing statement against Survivor in Delaware. In 2009 Debtor merges into
24 Survivor. Shortly after the merger, Survivor acquires additional inventory.

25 SP-S's security interest would attach to the post-merger inventory and would be
26 perfected by SP-S's filing in Delaware. SP-D's security interest also would attach to the post-

1 merger inventory and, under new Section 9-316(i), would be a perfected security interest until
2 four months after the merger. Because SP-D’s security interest would be perfected by a
3 financing statement that is “effective solely under . . . Sections 9-508 and 9-316(i),” Section 9-
4 326(a) would subordinate SP-D’s security interest to SP-S’s.

5 Now suppose that SP-D files an initial financing statement against Survivor in Delaware
6 before the expiration of the four-month period. Under new Section 9-316(i)(2), SP-D’s security
7 interest in the inventory that Survivor acquired post-merger would remain perfected after the
8 period expires. SP-D’s Delaware filing should not, however, elevate the priority of SP-D’s
9 subordinate security interest. SP-S was the first to file against Survivor; Debtor never had an
10 interest in the collateral in question, which Survivor acquired independently of the merger. But
11 once SP-D files against Survivor in Delaware, SP-D’s security interest in this collateral no
12 longer would be perfected by a financing statement that is “effective solely under . . . Sections 9-
13 508 and 9-316(i)” and so no longer would be covered by the subordination rule in Section 9-
14 326(a).

15 The amendments to Section 9-322(a) and (b) would preserve the subordination by dating
16 SP-D’s priority, for purposes of the first-to-file-or-perfect rule, from the time of its Delaware
17 filing. The amendments would relieve SP-S, which was the first secured party to file against
18 Survivor, from any need to check for subsequent filings by competing secured parties. (Note
19 that the amendments would not affect the rule in Section 9-325(a), which governs the priority of
20 security interests in inventory that Debtor transferred to Survivor in the merger.)

21 *[Agenda Item X.]*

22 *[no draft]*

23 *[Agenda Item XI.]*

24 **SECTION 8-106. CONTROL.**

25 * * *

26 (d) A purchaser has “control” of a security entitlement if:

27 (1) the purchaser becomes the entitlement holder; ~~or~~

28 (2) the securities intermediary has agreed that it will comply with entitlement
29 orders originated by the purchaser without further consent by the entitlement holder; or

30 (3) another person has control of the security entitlement on behalf of the

1 purchaser or, having previously acquired control of the security entitlement, acknowledges that it
2 has control on behalf of the purchaser.

3 **Official Comment**

4 * * *

5 4. Subsection (d) specifies the means by which a purchaser can obtain control of a
6 security entitlement. Three mechanisms are possible, analogous to those provided in subsection
7 (c) for uncertificated securities. Under subsection (d)(1), a purchaser has control if it is the
8 entitlement holder. This subsection would apply whether the purchaser holds through the same
9 intermediary that the debtor used, or has the securities position transferred to its own
10 intermediary. Subsection (d)(2) provides that a purchaser has control if the securities
11 intermediary has agreed to act on entitlement orders originated by the purchaser if no further
12 consent by the entitlement holder is required. Under subsection (d)(2), control may be achieved
13 even though the original entitlement holder remains as the entitlement holder. Finally, a
14 purchaser may obtain control under subsection (d)(3) if another person has control and the
15 person acknowledges that it has control on the purchaser's behalf. Control under subsection
16 (d)(3) parallels the delivery of certificated securities and uncertificated securities under Section
17 8-301. Of course, the acknowledging person cannot be the debtor.

18 **SECTION 9-104. CONTROL OF DEPOSIT ACCOUNT.**

19 (a) **[Requirements for control.]** A secured party has control of a deposit account if:

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

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

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

26 **Official Comment**

27 * * *

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

Under subsection (a)(2), a secured party may obtain control by obtaining the bank’s authenticated agreement that it will comply with the secured party’s instructions without further consent by the debtor. The analogous provision in Section 8-106 does not require that the agreement be authenticated. An agreement to comply with the secured party’s instructions suffices for “control” of a deposit account under this section even if the bank’s agreement is subject to specified conditions, e.g., that the secured party’s instructions are accompanied by a certification that the debtor is in default. (Of course, if the condition is the *debtor’s* further consent, the statute explicitly provides that the agreement would *not* confer control.) See revised Section 8-106, Comment 7.

Under subsection (a)(3), a secured party may obtain control by becoming the bank’s “customer,” as defined in Section 4-104. As the customer, the secured party would enjoy the right (but not necessarily the exclusive right) to withdraw funds from, or close, the deposit account. See Sections 4-401(a), 4-403(a).

Subsection (a) contains no analogue to Section 8-106(d)(3), which provides that a purchaser has control of a security entitlement if another person has control of the security entitlement on behalf of the purchaser or if the other person, having previously acquired control of the security entitlement, acknowledges that it has control on behalf of the purchaser. However, inasmuch as subsection (a) does not displace the common law of agency, see Section 1-103(b), a secured party has control of a deposit account if its agent has control. Of course, the debtor cannot qualify as an agent for the secured party for purposes of the secured party’s having control. Cf. Section 9-313, Comment 3.

* * *

[Agenda Item XII.A.]

SECTION 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

(a) **[Article 9 definitions.]** In this article:

* * *

(10) “Certificate of title” means a certificate of title with respect to which a

1 statute provides for the security interest in question to be indicated on the certificate as a
2 condition or result of the security interest's obtaining priority over the rights of a lien creditor
3 with respect to the collateral.

4 * * *

5 **SECTION 9-311. PERFECTION OF SECURITY INTERESTS IN PROPERTY**
6 **SUBJECT TO CERTAIN STATUTES, REGULATIONS, AND TREATIES.**

7 (a) **[Security interest subject to other law.]** Except as otherwise provided in
8 subsection (d), the filing of a financing statement is not necessary or effective to perfect a
9 security interest in property subject to:

10 (1) a statute, regulation, or treaty of the United States whose requirements for a
11 security interest's obtaining priority over the rights of a lien creditor with respect to the property
12 preempt Section 9-310(a);

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

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

20 (b) **[Compliance with other law.]** Compliance with the requirements of a statute,
21 regulation, or treaty described in subsection (a) for obtaining priority over the rights of a lien
22 creditor is equivalent to the filing of a financing statement under this article. Except as

1 otherwise provided in subsection (d) and Sections 9-313 and 9-316(d) and (e) for goods covered
2 by a certificate of title, a security interest in property subject to a statute, regulation, or treaty
3 described in subsection (a) may be perfected only by compliance with those requirements, and a
4 security interest so perfected remains perfected notwithstanding a change in the use or transfer of
5 possession of the collateral.

6 * * *

7 **Reporter's Note**

8 The underlying premise of Section 9-311(b), which defers to the perfection requirements
9 of certificate-of-title statutes, is that notation of a security interest on the certificate of title
10 affords notice of the security interest to third parties. Accordingly, the definition of “certificate
11 of title” in Section 9-102(a)(10) covers only those certificates “with respect to which a statute
12 provides for the security interest in question to be indicated on the certificate as a condition or
13 result of the security interest’s obtaining priority over the rights of a lien creditor with respect to
14 the collateral.”

15 Some certificate-of-title statutes arguably permit or require that security interests in
16 goods subject to the statute be noted on the certificate (or that an application for a certificate
17 provide information concerning security interests in the goods) but do not specify the
18 requirements “for obtaining priority over the rights of a lien creditor.” To date, the only reported
19 case on the issue appears to be *In re Harper*, 516 F.2d 1180 (10th Cir. 2008). In *Harper*, a
20 security interest in the debtor’s vehicle was noted on a certificate of title issued by by the
21 Muscogee (Creek) Nation. The Nation’s certificate-of-title requirements state that “[n]otice of
22 liens against said vehicle shall be placed upon said title upon request of the lending institution.”
23 The court held, however, that the certificate in question was not a “certificate of title” as defined
24 in Article 9:

25 The language contained in the title for identifying a first and second lienholder cannot
26 substitute for some Nation law concerning the legal effect of such identification. The
27 Nation statute allowing for lien notation at the request of a lending institution . . . never
28 mentions the word “perfection” let alone indicates that lien notation is required to
29 perfect a security interest in a vehicle. Nor is there any indication of whether perfection
30 occurs upon application for a title or when the application is issued noting the lien.

31 *Harper*, 510 F.2d at 1187-88.

32 The Joint Review Committee may wish to consider whether Article 9 should be revised
33 so that, where a certificate-of-title statute (1) requires (or permits) a security interest in goods

1 subject to the statute to be noted on the certificate (or that an application for a certificate provide
2 information concerning security interests in the goods) but (2) does not specify the requirements
3 for obtaining priority over the rights of a lien creditor, a security interest is perfected by notation
4 (or by submission of an application providing the information).

5 *[Agenda Item XII.B.]*

6 **SECTION 9-316. CONTINUED PERFECTION OF SECURITY INTEREST**
7 **FOLLOWING CHANGE IN GOVERNING LAW.**

8 (a) **[General rule: Effect on perfection of change in governing law.]** A security
9 interest perfected pursuant to the law of the jurisdiction designated in Section 9-301(1) or
10 9-305(c) remains perfected until the earliest of:

11 (1) the time perfection would have ceased under the law of that jurisdiction;

12 (2) the expiration of four months after a change of the debtor's location to another
13 jurisdiction; or

14 (3) the expiration of one year after a transfer of collateral to a person that thereby
15 becomes a debtor and is located in another jurisdiction.

16 * * *

17 (d) **[Goods covered by certificate of title from this state.]** Except as otherwise
18 provided in subsection (e), a security interest in goods covered by a certificate of title which is
19 perfected by any method under the law of another jurisdiction when the goods become covered
20 by a certificate of title from this State remains perfected until the security interest would have
21 become unperfected under the law of the other jurisdiction had the goods not become so covered.

22 (e) **[When subsection (d) security interest becomes unperfected against purchasers.]**

23 A security interest described in subsection (d) becomes unperfected as against a purchaser of the

1 goods for value and is deemed never to have been perfected as against a purchaser of the goods
2 for value if the applicable requirements for perfection under Section 9-311(b) or 9-313 are not
3 satisfied before the earlier of:

4 (1) the time the security interest would have become unperfected under the law of
5 the other jurisdiction had the goods not become covered by a certificate of title from this State;

6 or

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

8 * * *

9 **Official Comment**

10 * * *

11 **5. Goods Covered by Certificate of Title.** Subsections (d) and (e) address continued
12 perfection of a security interest in goods covered by a certificate of title. The following
13 examples explain the operation of those subsections.

14 **Example 8:** Debtor's automobile is covered by a certificate of title issued by Illinois.
15 Lender perfects a security interest in the automobile by complying with Illinois'
16 certificate-of-title statute. Thereafter, Debtor applies for a certificate of title in Indiana.
17 Six months thereafter, Creditor acquires a judicial lien on the automobile. Under Section
18 9-303(b), Illinois law ceases to govern perfection; rather, once Debtor delivers the
19 application and applicable fee to the appropriate Indiana authority, Indiana law governs.
20 Nevertheless, under Indiana's Section 9-316(d), Lender's security interest remains
21 perfected until it would become unperfected under Illinois law had no certificate of title
22 been issued by Indiana. (For example, Illinois' certificate-of-title statute may provide
23 that the surrender of an Illinois certificate of title in connection with the issuance of a
24 certificate of title by another jurisdiction causes a security interest noted thereon to
25 become unperfected.) If Lender's security interest remains perfected, it is senior to
26 Creditor's judicial lien.

27 **Example 9:** Under the facts in Example 8, five months after Debtor applies for an
28 Indiana certificate of title, Debtor sells the automobile to Buyer. Under subsection (e)(2),
29 because Lender did not reperfect within the four months after the goods became covered
30 by the Indiana certificate of title, Lender's security interest is deemed never to have been
31 perfected against Buyer. Under Section 9-317(b), Buyer is likely to take free of the
32 security interest. Lender could have protected itself by perfecting its security interest

1 either under Indiana’s certificate-of-title statute, see Section 9-311, or, if it had a right to
2 do so under an agreement or Section 9-609, by taking possession of the automobile. See
3 Section 9-313(b).

4 The results in Examples 8 and 9 do not depend on the fact that the original perfection was
5 achieved by notation on a certificate of title. Subsection (d) applies regardless of the method by
6 which a security interest is perfected under the law of another jurisdiction when the goods
7 became covered by a certificate of title from this State.

8 **Example 9A.** Debtor, who lives in Mississippi, owns a recreational boat that is subject
9 to Lender’s security interest. Mississippi’s certificate-of-title laws do not cover
10 watercraft, and so Lender perfects by filing a financing statement in Mississippi. Debtor
11 wishes to use the boat exclusively on a lake in Alabama, but Alabama law prohibits
12 Debtor from doing so without first applying for an Alabama certificate of title. When
13 Debtor delivers an application for an Alabama certificate to the appropriate authority and
14 pays the applicable fee, the boat becomes covered by an Alabama certificate of title and
15 Alabama law governs perfection, the effect of perfection or nonperfection, and priority of
16 the security interest. See Section 9-303. Under Alabama’s Section 9-316(d), Lender’s
17 security interest remains perfected until it would have become unperfected under
18 Mississippi law had the boat not become covered by the Alabama certificate of title (e.g.,
19 because the effectiveness of the filed financing statement lapses). However, as against a
20 purchaser of the boat for value, Lender’s security interest would become unperfected and
21 would be deemed never to have been perfected if Lender fails to reperfect under
22 Alabama’s Section 9-311(b) or 9-313 in a timely manner. See subsection (e).

23 Section 9-337 affords protection to a limited class of persons buying or acquiring a
24 security interest in the goods while a security interest is perfected under the law of another
25 jurisdiction but after this State has issued a clean certificate of title.

26 * * *

27 **Reporter’s Note**

28 New Example 9A clarifies the operation of Section 9-316(d). Consider the following
29 variation:

30 Debtor, who lives in Mississippi, owns a recreational boat that is subject to Lender’s
31 security interest. Mississippi’s certificate-of-title laws do not cover watercraft, and so
32 Lender perfects by filing a financing statement in Mississippi. After the filing, Debtor
33 moves to Alabama and applies for an Alabama certificate of title for the boat.

34 One might argue that the analysis of Example 9A would apply equally to the variation,
35 i.e., that Alabama’s Section 9-316(d) would determine the outcome. On the other hand, one
36 might argue that Alabama’s Section 9-316(d) would not apply because, “when the goods

1 [became] covered by a certificate of title from this State,” (i.e., Alabama), Lender’s security
2 interest in the boat was not perfected “under the law of another jurisdiction.” Rather, once
3 Debtor moved to Alabama and Alabama law began to govern perfection of the security interest,
4 the security interest was perfected under the law of Alabama, i.e., under Alabama’s Section 9-
5 316(a). The Joint Review Committee may wish to consider whether the existing statute clearly
6 supports only one of the suggested results and, if the statute does not, whether and how the issue
7 should be expressly resolved.

8 *[Agenda Item XIII.]*

9 *[Section 9-406, paragraphs (d) & (e)—Alternatives A & B]*

10 **SECTION 9-406. DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF**
11 **ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS**
12 **ON ASSIGNMENT OF ACCOUNTS, CHATTEL PAPER, PAYMENT INTANGIBLES,**
13 **AND PROMISSORY NOTES INEFFECTIVE.**

14 * * *

15 (d) **[Term restricting assignment generally ineffective.]** Except as otherwise provided
16 in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term in an
17 agreement between an account debtor and an assignor or in a promissory note is ineffective to
18 the extent that it:

19 (1) prohibits, restricts, or requires the consent of the account debtor or person
20 obligated on the promissory note to the assignment or transfer of, or the creation, attachment,
21 perfection, or enforcement of a security interest in, the account, chattel paper, payment
22 intangible, or promissory note; or

23 (2) provides that the assignment or transfer or the creation, attachment, perfection,
24 or enforcement of the security interest may give rise to a default, breach, right of recoupment,

1 claim, defense, termination, right of termination, or remedy under the account, chattel paper,
2 payment intangible, or promissory note.

3 *[Alternative A]*

4 (e) **[Inapplicability of subsection (d) to certain sales.]** Subsection (d) does not apply
5 to the sale, including a sale pursuant to a disposition (Section 9-610), of a payment intangible or
6 promissory note.

7 *[Alternative B]*

8 (e) **[Inapplicability of subsection (d) to certain sales.]** Subsection (d) does not apply
9 to the sale, other than a sale pursuant to a disposition (Section 9-610), of a payment intangible or
10 promissory note.

11 *[Section 9-406, paragraphs (d) & (e)—Alternative C]*

12 **SECTION 9-406. DISCHARGE OF ACCOUNT DEBTOR; NOTIFICATION OF**
13 **ASSIGNMENT; IDENTIFICATION AND PROOF OF ASSIGNMENT; RESTRICTIONS**
14 **ON ASSIGNMENT OF ACCOUNTS; AND CHATTEL PAPER, PAYMENT**
15 **INTANGIBLES, AND PROMISSORY NOTES INEFFECTIVE.**

16 (d) **[Term restricting assignment generally ineffective.]** Except as otherwise provided
17 in subsection (e) and Sections 2A-303 and 9-407, and subject to subsection (h), a term in an
18 agreement between an account debtor on an account or chattel paper and an assignor ~~or in a~~
19 ~~promissory note~~ is ineffective to the extent that it:

20 (1) prohibits, restricts, or requires the consent of the account debtor ~~or person~~
21 ~~obligated on the promissory note~~ to the assignment or transfer of, or the creation, attachment,
22 perfection, or enforcement of a security interest in, the account; or chattel paper, payment

1 ~~intangible, or promissory note; or~~

2 (2) provides that the assignment or transfer or the creation, attachment, perfection,
3 or enforcement of the security interest may give rise to a default, breach, right of recoupment,
4 claim, defense, termination, right of termination, or remedy under the account; or chattel paper;
5 ~~payment intangible, or promissory note.~~

6 (e) ~~[Inapplicability of subsection (d) to payment intangibles.]~~ Subsection (d) does not
7 ~~apply to the sale of a payment intangible or promissory note. [Reserved.]~~

8 *[End of Alternatives]*

9 * * *

10 **Reporter's Note**

11 See the Reporter's Note to Section 9-408.

12 **SECTION 9-408. RESTRICTIONS ON ASSIGNMENT OF PROMISSORY** 13 **NOTES, HEALTH-CARE-INSURANCE RECEIVABLES, AND CERTAIN GENERAL** 14 **INTANGIBLES INEFFECTIVE.**

15 (a) **[Term restricting assignment generally ineffective.]** Except as otherwise provided
16 in subsection (b), a term in a promissory note or in an agreement between an account debtor and
17 a debtor which relates to a health-care-insurance receivable or a general intangible, including a
18 contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent
19 of the person obligated on the promissory note or the account debtor to, the assignment or
20 transfer of, or creation, attachment, or perfection of a security interest in, the promissory note,
21 health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

22 (1) would impair the creation, attachment, or perfection of a security interest; or

1 (2) provides that the assignment or transfer or the creation, attachment, or
2 perfection of the security interest may give rise to a default, breach, right of recoupment, claim,
3 defense, termination, right of termination, or remedy under the promissory note, health-care-
4 insurance receivable, or general intangible.

5 *Paragraph (b)—Alternative A*

6 *(this is paired with § 9-406(e), Alternative A)*

7 (b) [**Applicability of subsection (a) to sales of certain rights to payment.**] Subsection
8 (a) applies to a security interest in a payment intangible or promissory note only if the security
9 interest arises out of a sale, including a sale pursuant to a disposition (Section 9-610), of the
10 payment intangible or promissory note.

11 *Paragraph (b)—Alternative B*

12 *(this is paired with § 9-406(e), Alternative B)*

13 (b) [**Applicability of subsection (a) to sales of certain rights to payment.**] Subsection
14 (a) applies to a security interest in a payment intangible or promissory note only if the security
15 interest arises out of a sale, other than a sale pursuant to a disposition (Section 9-610), of the
16 payment intangible or promissory note.

17 *Paragraphs (a) & (b)—Alternative C*

18 *(this is paired with § 9-406(d) & (e), Alternative C)*

19 (a) [**Term restricting assignment generally ineffective.**] Except as otherwise provided
20 in subsection (b), a term in a promissory note or in an agreement between an account debtor and
21 a debtor which relates to a health-care-insurance receivable or a general intangible, including a
22 contract, permit, license, or franchise, and which term prohibits, restricts, or requires the consent

1 of the person obligated on the promissory note or the account debtor to, the assignment or
2 transfer of, or creation, attachment, or perfection of a security interest in, the promissory note,
3 health-care-insurance receivable, or general intangible, is ineffective to the extent that the term:

4 (1) would impair the creation, attachment, or perfection of a security interest; or

5 (2) provides that the assignment or transfer or the creation, attachment, or
6 perfection of the security interest may give rise to a default, breach, right of recoupment, claim,
7 defense, termination, right of termination, or remedy under the promissory note, health-care-
8 insurance receivable, or general intangible.

9 (b) ~~[Applicability of subsection (a) to sales of certain rights to payment intangibles.]~~

10 ~~Subsection (a) applies to a security interest in a payment intangible or promissory note only if~~
11 ~~the security interest arises out of a sale of the payment intangible or promissory note. [Reserved.]~~

12 *[End of Alternatives]*

13 * * *

14 **Reporter's Note**

15 Section 9-406(a) contains a broad override of contractual restrictions on assignability of
16 receivables. Section 9-408(a) contains a similar, but narrower, override. The most significant
17 difference between the two concerns whether an assignee may enforce the assigned receivable
18 against the account debtor or other obligor, notwithstanding a provision in the underlying
19 contract that purports to prevent an assignee from doing so.

20 The draft contains three pairs of alternatives for addressing the allocation of transactions
21 between the broader override in Section 9-406(a) and the narrower override in Section 9-408(a).

22 The distinction is most likely to matter where the collateral is the right to payment of a
23 loan. Under current law, if the right to payment of the loan is evidenced by chattel paper, then a
24 contractual restriction would not be effective to restrict the assignee's right to enforce against the
25 account debtor. If, however, the right to payment of the loan is evidenced by an instrument, or is
26 a payment intangible, then a contractual restriction would not be effective to restrict the
27 assignee's right to enforce against the account debtor if the assignment is made for collateral
28 purposes. If, however, the assignment is a sale of the payment intangible or promissory note,

1 then Section 9-408(a) applies and the assignee’s right to enforce is limited by any contractual
2 restriction. Whether current Section 9-406 or 9-408 applies to a foreclosure sale of the
3 receivable by an assignee for collateral purposes is unclear.

4 The policy underlying the existing allocation of transactions between the two sections
5 also is not completely clear. If the idea is to protect borrowers who contract for freedom from
6 enforcement by assignees, then Section 9-408(a)—which does not impair otherwise effective
7 contractual restrictions on enforcement by assignees—should apply to all assignees, including
8 those who take an assignment for security and then seek to enforce their security interests by
9 collecting the unpaid loan from the obligor or account debtor under Section 9-607. This
10 approach—which respects otherwise effective contractual restrictions on enforcement regardless
11 of whether the loan is sold or assigned for security—is reflected in Alternative C.

12 Both Alternative A and Alternative B retain the distinction between sales (as to which
13 Section 9-408(a) applies) and assignments for security (as to which Section 9-406(b) applies).
14 These alternatives differ only in their treatment of foreclosure sales. Alternative A would treat
15 foreclosure sales like any other sale: Section 9-408(a) would apply, and the buyer would be
16 bound by a contractual restriction on enforcement, even though the seller was not. Under
17 Alternative B, Section 9-406(a) would leave a buyer at a foreclosure sale free to enforce.

18 Consider this example:

19 Borrower makes a loan to Lender. The loan is not evidenced by chattel paper.
20 The loan agreement (or note) provides that Lender’s rights may not be assigned
21 and, if Lender wrongfully assigns the rights, an assignee may not enforce
22 Borrower’s obligation to pay. Lender assigns the right to payment (i.e., the
23 payment intangible or instrument) to Assignee.

24 If the assignment to Assignee is a sale, then Section 9-408(a) applies and the
25 contractual restrictions are ineffective with respect to the creation, attachment,
26 and perfection of Assignee’s security interest. This would be the result under all
27 three pairs of alternatives.

28 If the assignment to Assignee is for security:

29 Under Alternative A, the restriction would not be effective (i.e., Section 9-
30 406(a) would apply) if Assignee itself sought to collect from Borrower.
31 However, the restriction would be effective (i.e., Section 9-408(a) would
32 apply) if Assignee sold (at foreclosure or otherwise) to a buyer who
33 sought to collect.

34 Under Alternative B, the restriction would not be effective if Assignee
35 itself sought to collect or if Assignee sold to a buyer at foreclosure (and,
36 presumably, if the foreclosure buyer resold). However, the restriction

1 would be effective against nonforeclosure buyers who did not take
2 through a foreclosure buyer.

3 Under Alternative C, the restriction would be effective (i.e., Section 9-
4 408(a) would apply) against all third parties, including Assignee, a buyer
5 from Assignee at foreclosure, and a nonforeclosure buyer.

6 [Agenda Item XIV.]

7 [no draft]

8 [Agenda Item XV.]

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

10 **Official Comment**

11 **5. Receivables-related Definitions.**

12 * * *

13 d. **“General Intangible”;** **“Payment Intangible.”** “General intangible” is the residual
14 category of personal property, including things in action, that is not included in the other defined
15 types of collateral. Examples are various categories of intellectual property and the right to
16 payment of a loan of funds that is not evidenced by chattel paper or an instrument. As used in
17 the definition of “general intangible,” “things in action” includes rights that arise under a license
18 of intellectual property, including the right to exploit the intellectual property without liability
19 for infringement. The definition has been revised to exclude commercial tort claims, deposit
20 accounts, and letter-of-credit rights. Each of the three is a separate type of collateral. One
21 important consequence of this exclusion is that tortfeasors (commercial tort claims), banks
22 (deposit accounts), and persons obligated on letters of credit (letter-of-credit rights) are not
23 “account debtors” having the rights and obligations set forth in Sections 9-404, 9-405, and
24 9-406. In particular, tortfeasors, banks, and persons obligated on letters of credit are not
25 obligated to pay an assignee (secured party) upon receipt of the notification described in Section
26 9-404(a). See Comment 5.h. Another important consequence relates to the adequacy of the
27 description in the security agreement. See Section 9-108.

28 “Payment intangible” is a subset of the definition of “general intangible.” The sale of a
29 payment intangible is subject to this Article. See Section 9-109(a)(3). Virtually any intangible
30 right could give rise to a right to payment of money once one hypothesizes, for example, that the
31 account debtor is in breach of its obligation. The term “payment intangible,” however, embraces
32 only those general intangibles “under which the account debtor’s *principal* obligation is a

1 monetary obligation.” (Emphasis added.)

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

9 A right to the payment of money is frequently buttressed by ancillary covenants, such as
10 covenants in a purchase agreement, note, or mortgage requiring insurance on the collateral or
11 forbidding removal of the collateral, or covenants to preserve the creditworthiness of the
12 promisor, such as covenants restricting dividends and the like. This Article does not treat these
13 ancillary rights separately from the rights to payment to which they relate. For example,
14 attachment and perfection of an assignment of a right to payment of a monetary obligation,
15 whether it be an account or payment intangible, also carries these ancillary rights. Among these
16 ancillary rights are the lessor’s rights with respect to leased goods that arise upon the lessee’s
17 default. See Section 2A-523. Accordingly, and contrary to the opinion in *In re Commercial*
18 *Money Center, Inc.*, 350 B.R. 465 (B.A.P. 9th Cir. 2006), where the lessor’s rights under a lease
19 would constitute chattel paper, an assignment of the lessor’s right to payment under the lease
20 would be chattel paper, even if the assignment purports to exclude those ancillary rights.

21 Every “payment intangible” is also a “general intangible.” Likewise, “software” is a
22 “general intangible” for purposes of this Article. See Comment 25. Accordingly, except as
23 otherwise provided, statutory provisions applicable to general intangibles apply to payment
24 intangibles and software.

25 * * *

26
27 **SECTION 9-109. SCOPE.**

28 * * *

29 **Official Comment**

30 * * *

31 **5. Transfer of Ownership in Sales of Receivables.** A “sale” of an account, chattel
32 paper, a promissory note, or a payment intangible includes a sale of a right in the receivable,
33 such as a sale of a participation interest. The term also includes the sale of an enforcement right.
34 For example, a “[p]erson entitled to enforce” a negotiable promissory note (Section 3-301) may
35 sell its ownership rights in the instrument. See Section 3-203, Comment 1 (“Ownership rights in
36 instruments may be determined by principles of the law of property, independent of Article 3,

1 which do not depend upon whether the instrument was transferred under Section 3-203.”). Also,
2 the right under Section 3-309 to enforce a lost, destroyed, or stolen negotiable promissory note
3 may be sold to a purchaser who could enforce that right by causing the seller to provide the proof
4 required under that section. This Article rejects decisions reaching a contrary result, e.g., *Dennis*
5 *Joslin Co. v. Robinson Broadcasting*, 977 F. Supp. 491 (D.D.C. 1997).

6 Nothing in this section or any other provision of Article 9 prevents the transfer of full and
7 complete ownership of an account, chattel paper, an instrument, or a payment intangible in a
8 transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition
9 of “security interest” in Section 1-201 provides rules for distinguishing sales transactions from
10 those that create a security interest securing an obligation. This Article applies to both types of
11 transactions. The principal effect of this coverage is to apply this Article’s perfection and
12 priority rules to these sales transactions. Use of terminology such as “security interest,”
13 “debtor,” and “collateral” is merely a drafting convention adopted to reach this end, and its use
14 has no relevance to distinguishing sales from other transactions. See PEB Commentary No. 14.

15 Following a debtor’s outright sale and transfer of ownership of a receivable, the debtor-
16 seller retains no legal or equitable rights in the receivable that has been sold. See Section 9-
17 318(a). This is so whether or not the buyer’s security interest is perfected. (A security interest
18 arising from the sale of a promissory note or payment intangible is perfected upon attachment
19 without further action. See Section 9-309.) However, if the buyer’s interest in accounts or
20 chattel paper is unperfected, a subsequent lien creditor, perfected secured party, or qualified
21 buyer can reach the sold receivable and achieve priority over (or take free of) the buyer’s
22 unperfected security interest under Section 9-317. This is so not because the seller of a
23 receivable retains rights in the property sold; it does not. Nor is this so because the seller of a
24 receivable is a “debtor” and the buyer of a receivable is a “secured party” under this Article (they
25 are). It is so for the simple reason that Sections 9-318(b), 9-317, and 9-322 make it so, as did
26 former Sections 9-301 and 9-312. Because the buyer’s security interest is unperfected, for
27 purposes of determining the rights of creditors of and purchasers for value from the debtor-seller,
28 under Section 9-318(b) the debtor-seller is deemed to have the rights and title it sold. Section 9-
29 317 subjects the buyer’s unperfected interest in accounts and chattel paper to that of the debtor-
30 seller’s lien creditor and other persons who qualify under that section.

31 * * *

32 [Agenda Item XVI.]
33

34 **SECTION 9-322. PRIORITIES AMONG CONFLICTING SECURITY**
35 **INTERESTS IN AND AGRICULTURAL LIENS ON SAME COLLATERAL.**

36 (a) [General priority rules.] Except as otherwise provided in this section, priority

1 among conflicting security interests and agricultural liens in the same collateral is determined
2 according to the following rules:

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

7 * * *

8 Official Comment

9 * * *

10 4. **Competing Perfected Security Interests.** When there is more than one perfected
11 security interest, the security interests rank according to priority in time of filing or perfection.
12 “Filing,” of course, refers to the filing of an effective financing statement. “Perfection” refers to
13 the acquisition of a perfected security interest, i.e., one that has attached and as to which any
14 required perfection step has been taken. See Sections 9-308 and 9-309.

15 **Example 1:** On February 1, A files a financing statement covering a certain item of
16 Debtor’s equipment. On March 1, B files a financing statement covering the same
17 equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the
18 equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the
19 same collateral. A has priority even though B’s loan was made earlier and was perfected
20 when made. It makes no difference whether A knew of B’s security interest when A
21 made its advance.

22 The problem stated in Example 1 is peculiar to a notice-filing system under which filing
23 may occur before the security interest attaches (see Section 9-502). The justification for
24 determining priority by order of filing lies in the necessity of protecting the filing system—that is,
25 of allowing the first secured party who has filed to make subsequent advances without each time
26 having to check for subsequent filings as a condition of protection. Note, however, that this
27 first-to-file protection is not absolute. For example, Section 9-324 affords priority to certain
28 purchase-money security interests, even if a competing secured party was the first to file or
29 perfect.

30 Under a notice-filing system, a filed financing statement indicates to third parties that a
31 person may have a security interest in the collateral indicated. With further inquiry, they may
32 discover the complete state of affairs. Where a financing statement that is ineffective when filed

1 becomes effective thereafter, the policy underlying the notice-filing system determines the “time
2 of filing” for purposes of subsection (a)(1). For example, upon the debtor’s ratification of the
3 unauthorized filing of an otherwise sufficient initial financing statement, the filing becomes
4 authorized and the financing statement becomes effective. Because the authorization does not
5 increase the notice value of the financing statement, the time of the unauthorized filing is the
6 “time of filing” for purposes of this subsection (a)(1). A different result would obtain where an
7 initial financing statement is ineffective because the name of the debtor is incorrect and seriously
8 misleading and the filing office changes its standard search logic so that the name on the
9 financing statement no longer is seriously misleading. See Section 9-506(c). Because the
10 financing statement did not afford notice to third parties until the search logic changed and the
11 financing statement became effective, the time of the change is the “time of filing” for purposes
12 of subsection (a)(1).

13 **Example 2:** A and B make non-purchase-money advances secured by the same
14 collateral. The collateral is in Debtor’s possession, and neither security interest is
15 perfected when the second advance is made. Whichever secured party first perfects its
16 security interest (by taking possession of the collateral or by filing) takes priority. It
17 makes no difference whether that secured party knows of the other security interest at the
18 time it perfects its own.

19 The rule of subsection (a)(1), affording priority to the first to file or perfect, applies to
20 security interests that are perfected by any method, including temporarily (Section 9-312) or
21 upon attachment (Section 9-309), even though there may be no notice to creditors or subsequent
22 purchasers and notwithstanding any common-law rule to the contrary. The form of the claim to
23 priority, i.e., filing or perfection, may shift from time to time, and the rank will be based on the
24 first filing or perfection as long as there is no intervening period without filing or perfection. See
25 Section 9-308(c).

26 **Example 3:** On October 1, A acquires a temporarily perfected (20-day) security interest,
27 unfiled, in a negotiable document in the debtor’s possession under Section 9-312(e). On
28 October 5, B files and thereby perfects a security interest that previously had attached to
29 the same document. On October 10, A files. A has priority, even after the 20-day period
30 expires, regardless of whether A knows of B’s security interest when A files. A was the
31 first to perfect and maintained continuous perfection or filing since the start of the 20-day
32 period. However, the perfection of A’s security interest extends only “to the extent it
33 arises for new value given.” To the extent A’s security interest secures advances made
34 by A beyond the 20-day period, its security interest would be subordinate to B’s,
35 inasmuch as B was the first to file.

36 In general, the rule in subsection (a)(1) does not distinguish among various advances
37 made by a secured party. The priority of every advance dates from the earlier of filing or
38 perfection. However, in rare instances, the priority of an advance dates from the time the
39 advance is made. See Example 3 and Section 9-323.

1 **SECTION 9-509. PERSONS ENTITLED TO FILE A RECORD.**

2 * * *

3 **Official Comment**

4 * * *

5 3. **Unauthorized Filings.** Records filed in the filing office do not require signatures for
6 their effectiveness. Subsection (a)(1) substitutes for the debtor’s signature on a financing
7 statement the requirement that the debtor authorize in an authenticated record the filing of an
8 initial financing statement or an amendment that adds collateral. Also, under subsection (a)(1),
9 if an amendment adds a debtor, the debtor who is added must authorize the amendment. A
10 person who files an unauthorized record in violation of subsection (a)(1) is liable under Section
11 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing statement is
12 ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a).
13 Law other than this Article, including the law with respect to ratification of past acts, generally
14 determines whether a person has the requisite authority to file a record under this section. See
15 Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the priority of a
16 security interest perfected by the filing of a financing statement. See Section 9-322, Comment 4.

17 *[Agenda Item XVII.]*

18 **SECTION 9-109. SCOPE.**

19 (a) [**General scope of article.**] Except as otherwise provided in subsections (c) and (d),
20 this article applies to:

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

23 * * *

24 **Official Comment**

25 * * *

26 2. **Basic Scope Provision.** Subsection (a)(1) derives from former Section 9-102(1) and
27 (2). These subsections have been combined and shortened. No change in meaning is intended.
28 Under subsection (a)(1), all consensual security interests in personal property and fixtures are
29 covered by this Article, except for transactions excluded by subsections (c) and (d). As to which

1 transactions give rise to a “security interest,” the definition of that term in Section 1-201 must be
2 consulted. When a security interest is created, this Article applies regardless of the form of the
3 transaction or the name that parties have given to it. Likewise, the subjective intention of the
4 parties with respect to the legal characterization of their transaction is irrelevant to the
5 application of this Article, as it was to the application of former Article 9 under the proper
6 interpretation of former Section 9-102.

7 * * *

8 *[Agenda Item XVIII.A.1.]*

9 **SECTION 9-515. DURATION AND EFFECTIVENESS OF FINANCING**
10 **STATEMENT; EFFECT OF LAPSED FINANCING STATEMENT.**

11 * * *

12 (b) [**Public-finance or manufactured-home transaction.**] Except as otherwise
13 provided in subsections (e), (f), and (g), an initial financing statement filed in connection with a
14 public-finance transaction or manufactured-home transaction is effective for a period of 30 years
15 after the date of filing if it indicates that it is filed in connection with a public-finance transaction
16 or manufactured-home transaction.

17 (f) [**Transmitting utility financing statement.**] If a debtor is a transmitting utility and
18 a filed initial financing statement so indicates, the financing statement is effective until a
19 termination statement is filed.

20 * * *

21 **Reporter’s Note**

22 The amendment to subsection (f) is substantive. It applies only to financing statements
23 filed after its effective date.

SECTION 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF

SECURITY INTERESTS. Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:

* * *

(3) Except as otherwise provided in paragraph (4), while negotiable documents, goods, instruments, money, or tangible chattel paper is located in a jurisdiction, the local law of that jurisdiction governs:

(A) perfection of a security interest in the goods by filing a fixture filing;

(B) perfection of a security interest in timber to be cut; and

(C) the effect of perfection or nonperfection and the priority of a nonpossessory security interest in the collateral.

* * *

Official Comment

* * *

5. Law Governing Perfection: Exceptions. The general rule is subject to several exceptions. It does not apply to goods covered by a certificate of title (see Section 9-303), deposit accounts (see Section 9-304), investment property (see Section 9-305), or letter-of-credit rights (see Section 9-306). Nor does it apply to possessory security interests, i.e., security interests that the secured party has perfected by taking possession of the collateral (see paragraph (2)), security interests perfected by filing a fixture filing (see subparagraph (3)(A)), security interests in timber to be cut (subparagraph (3)(B)), or security interests in as-extracted collateral (see paragraph (4)).

* * *

b. **Fixtures.** Application of the general rule in paragraph (1) to perfection of a security

1 interest in fixtures would yield strange results. For example, perfection of a security interest in
2 fixtures located in Arizona and owned by a Delaware corporation would be governed by the law
3 of Delaware. Although Delaware law would send one to a filing office in Arizona for the place
4 to file a financing statement as a fixture filing, see Section 9-501, Delaware law would not take
5 account of local, nonuniform, real-property filing and recording requirements that Arizona law
6 might impose. For this reason, paragraph (3)(A) contains a special rule for security interests
7 perfected by a fixture filing; the law of the jurisdiction in which the fixtures are located governs
8 perfection, including the formal requisites of a fixture filing. Under paragraph (3)(C), the same
9 law governs priority. Fixtures are “goods” as defined in Section 9-102.

10 The filing of a financing statement to perfect a security interest in collateral of a
11 transmitting utility constitutes a fixture filing with respect to goods that are or become fixtures.
12 See Section 9-501(b). Accordingly, to perfect a security interest in this collateral by a fixture
13 filing, a financing statement should be filed in the office specified by Section 9-501(b) as
14 enacted in the jurisdiction in which the goods are located. Where the fixtures collateral is
15 located in more than one State, filing in more than one State will be necessary to perfect a
16 security interest in all the collateral by a fixture filing. Of course, a security interest in nearly all
17 types of collateral (including fixtures) of a transmitting utility may be perfected by filing in the
18 office specified by Section 9-501(a) as enacted in the jurisdiction in which the transmitting
19 utility is located. However, such a filing will not be effective as a fixture filing except with
20 respect to goods that are located in that jurisdiction.

21 * * *

22 SECTION 9-501. FILING OFFICE.

23 * * *

24 (b) [**Filing office for transmitting utilities.**] The office in which to file a financing
25 statement to perfect a security interest in collateral, including fixtures, of a transmitting utility is
26 the office of []. The financing statement also constitutes a fixture filing as to the collateral
27 indicated in the financing statement which is or is to become fixtures.

28 * * *

29 Official Comment

30 * * *

1 (2) if that record indicates more than one name of the debtor, the name of the
2 debtor which that record states to be the debtor's name.

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

4 (a) [Article 9 definitions.] In this article:

5 * * *

6 (50) "Jurisdiction of organization", with respect to a registered organization,
7 means the jurisdiction under whose law the organization is formed or organized.

8 * * *

9 (67A) "Public organic record" means a record or records composed of the record
10 initially filed with a State or the United States to form or organize an organization and any
11 record filed with the State or the United States which [amends or restates] [effects an amendment
12 or restatement of] the initial record, if the record or records are available to the public for
13 inspection. The term includes an organic record or records of a business trust that is initially
14 filed with a State and any record filed with the State which [amends or restates] [effects an
15 amendment or restatement of] the initial record, if a statute of the State governing business trusts
16 requires that the record or records be filed with the State and the record or records are available
17 to the public for inspection.

18 * * *

19 (70) "Registered organization" means an organization formed or organized solely
20 under the law of a single State or the United States and as to which the State or the United States
21 must maintain a public record showing the organization to have been organized by the filing of a
22 public organic record with the State or United States. The term includes a business trust that is

1 formed or organized under the law of a single State if a statute of the State governing business
2 trusts requires that the business trust's organic record be filed with the State.

3 * * *

4 **Reporter's Note**

5 1. The amendments to Section 9-503 and the related amendments to Sections 9-102 are
6 meant to designate more clearly the public record that is relevant to determining the name of a
7 debtor that is a registered organization. The relevant public record is always a "public organic
8 record," which is defined to be a record that is "filed with the State." A public record that the
9 State creates, such as a certificate of good standing or an index of domestic corporations, would
10 not be a "public organic record" and so would be irrelevant to the determination of the debtor's
11 name under Section 9-503(a)(1).

12 Section 9-503(f) covers two cases where the public organic record may indicate more
13 than one name for the debtor. Under paragraph (1), the name that must be provided in the
14 financing statement is the name that is indicated on the most recently filed public record that is
15 intended to state, amend, or restate the debtor's name. If that record indicates more than one
16 name of the debtor, the name that must be provided is the name that the record states to be the
17 debtor's name.

18 The references to the "public organic record" in Section 9-503(a) and "the most recently
19 filed record" in Section 9-503(f) are not meant to refer to any randomly filed record. Rather,
20 they are meant to refer to the public organic record filed with respect to the debtor and most
21 recently filed record that constitutes part of that public organic record. The Joint Review
22 Committee may wish to consider whether these phrases should be amplified in the text.

23 2. The amendments to the definition of "registered organization" also are meant to
24 clarify that the term includes an organization that is created without the need for a public record
25 but that is "formed" only when a public filing has been made. For example, under Delaware
26 law, a statutory trust is "created by a governing instrument," Del. Code Ann. tit. 12, § 1301, but
27 is "formed at the time of the filing of the initial certificate of trust in the office of the Secretary of
28 State or at any later date or time specified in the certificate of trust." Del. Code Ann. § 1310(b).
29 The second sentence of the definition clarifies that a Massachusetts business trust is a registered
30 organization. The Joint Review Committee may wish to consider whether the application of the
31 second sentence should be extended to all organizations.

32 *[Agenda Item XVIII.C.]*

33 **SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

1 (a) [**Sufficiency of debtor’s name.**] A financing statement sufficiently provides the
2 name of the debtor:

3 (1) if the debtor is a registered organization and is not a trustee acting with respect
4 to property held in trust, only if the financing statement provides the name of the debtor
5 indicated on the public record of the debtor’s jurisdiction of organization which shows the debtor
6 to have been organized;

7 (2) if the debtor is a decedent’s estate, only if the financing statement provides the
8 name of the decedent and indicates that the debtor is an estate;

9 (3) if the debtor is (i) a trust that is not a registered organization or (ii) a trustee
10 acting with respect to property held in trust, only if the financing statement:

11 (A) provides the name specified for the trust in its organic ~~documents~~
12 record or, if no name is specified, provides the name of the settlor and additional information
13 sufficient to distinguish the debtor from other trusts having one or more of the same settlors; and

14 (B) indicates, in the debtor’s name or otherwise, that the debtor is a trust
15 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 organizational name of the debtor; and

19 (B) if the debtor does not have a name, only if it provides the names of the
20 partners, members, associates, or other persons comprising the debtor.

21 * * *

22 **Official Comment**

1 * * *

2 2. **Debtor's Name.** The requirement that a financing statement provide the debtor's
3 name is particularly important. Financing statements are indexed under the name of the debtor,
4 and those who wish to find financing statements search for them under the debtor's name.
5 Subsection (a) explains what the debtor's name is for purposes of a financing statement. If the
6 debtor is a "registered organization" (defined in Section 9-102 so as to ordinarily include
7 corporations, limited partnerships, and limited liability companies), then the debtor's name is the
8 name shown on the public records of the debtor's "jurisdiction of organization" (also defined in
9 Section 9-102). Subsections (a)(2) and (a)(3) contain special rules for decedent's estates and
10 common-law trusts. (Subsection (a)(1) applies to business trusts that are registered
11 organizations; however it does not apply to a trustee acting with respect to property held in trust,
12 even if the trustee is a registered organization.)

13 * * *

14 **Reporter's Note**

15 The amendments are meant to clarify current law. The Joint Review Committee did not
16 discuss the proposed change to subsection (a)(3)(A).

17
18 *[Agenda Item XVIII.D.]*

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

20 (a) [**"Place of business."**] In this section, "place of business" means a place where a
21 debtor conducts its affairs.

22 (b) [**Debtor's location: general rules.**] Except as otherwise provided in this section,
23 the following rules determine a debtor's location:

24 (1) A debtor who is an individual is located at the individual's principal
25 residence.

26 (2) A debtor that is an organization and has only one place of business is located
27 at its place of business.

28 (3) A debtor that is an organization and has more than one place of business is

1 located at its chief executive office.

2 (c) [**Limitation of applicability of subsection (b).**] Subsection (b) applies only if a
3 debtor’s residence, place of business, or chief executive office, as applicable, is located in a
4 jurisdiction whose law generally requires information concerning the existence of a
5 nonpossessory security interest to be made generally available in a filing, recording, or
6 registration system as a condition or result of the security interest’s obtaining priority over the
7 rights of a lien creditor with respect to the collateral. If subsection (b) does not apply, the debtor
8 is located in the District of Columbia.

9 **Official Comment**

10 * * *

11 3. **Non-U.S. Debtors.** Under the general rules of ~~this section~~ subsection (b), a non-U.S.
12 debtor ~~normally~~ often would be located in a foreign jurisdiction and, as a consequence, foreign
13 law would govern perfection. When foreign law affords no public notice of security interests,
14 the general rule yields unacceptable results.

15 Accordingly, subsection (c) provides that the ~~normal~~ general rules for determining the
16 location of a debtor (~~i.e., the rules in subsection (b)~~) apply only if they yield a location that is “a
17 jurisdiction whose law generally requires information concerning the existence of a
18 nonpossessory security interest to be made generally available in a filing, recording, or
19 registration system as a condition or result of the security interest’s obtaining priority over the
20 rights of a lien creditor with respect to the collateral.” The phrase “generally requires” is meant
21 to ~~include~~ describe legal regimes that generally require notice in a filing or recording system as a
22 condition of perfecting nonpossessory security interests in the relevant collateral in transactions
23 of the type involved, but which permit perfection by another method (e.g., control, automatic
24 perfection, temporary perfection) in limited circumstances. A jurisdiction that has adopted this
25 Article or an earlier version of this Article is such a jurisdiction. If the rules in subsection (b)
26 yield a jurisdiction whose law does not generally require notice in a filing or registration system
27 with respect to the relevant collateral in transactions of the type involved, and if none of the
28 special rules in subsections (e), (f), (i), and (j) applies, the debtor is located in the District of
29 Columbia with respect to the relevant collateral.

30 **Example 1:** Debtor is an English corporation with 7 offices in the United States
31 and its chief executive office in London, England. Debtor creates a security
32 interest in its accounts. Under subsection (b)(3), Debtor would be located in

1 England. However, subsection (c) provides that subsection (b) applies only if
2 English law generally conditions perfection of a security interest in accounts on
3 giving public notice in a filing, recording, or registration system for purposes of
4 perfecting a security interest in the accounts. Otherwise, Debtor is located in the
5 District of Columbia. Under Section 9-301(1), perfection, the effect of perfection,
6 and priority are governed by the law of the jurisdiction of the debtor's
7 location—here, England or the District of Columbia (depending on the content of
8 English law).

9 **Example 2:** Debtor is an English corporation with 7 offices in the United States
10 and its chief executive office in London, England. Debtor creates a security
11 interest in equipment located in London. Under subsection (b)(3) Debtor would
12 be located in England. However, subsection (c) provides that subsection (b)
13 applies only if English law generally conditions perfection on giving public notice
14 in a filing, recording, or registration system for perfection of a security interest in
15 equipment. Otherwise, Debtor is located in the District of Columbia. Under
16 Section 9-301(1), perfection is governed by the law of the jurisdiction of the
17 debtor's location, whereas, under Section 9-301(3), the law of the jurisdiction in
18 which the collateral is located—here, England—governs priority.

19 Under this rule, a debtor may be located in one jurisdiction for purposes of a security interest in
20 one type of collateral and a different jurisdiction for a security interest in another type of
21 collateral.

22 The foregoing discussion assumes that each transaction bears an appropriate relation to
23 the forum State. In the absence of an appropriate relation, the forum State's entire UCC,
24 including the choice-of-law provisions in Article 9 (Sections 9-301 through 9-307), will not
25 apply. See Section 9-109, Comment 9.

26 **SECTION 9-101. SHORT TITLE.**

27 * * *

28 **Official Comment**

29 * * *

30 **4. Summary of Revisions.**

31 * * *

32 **c. Choice of Law.**

1 § 9-307(c) test should be interpreted in the context of the particular transaction so that
2 satisfaction of the “generally requires” criterion would be measured by reference only to
3 collateral of the type in the secured transaction. This interpretation has the advantage of
4 not “disqualifying” a foreign jurisdiction that requires filing in a transaction of the sort at
5 hand (and has an available filing system) just because, with respect to other types of
6 property not present in the transaction, filing is not required.

7 Should the “generally requires” test be interpreted even more narrowly so as to
8 refer to the foreign jurisdiction’s filing rules with respect to the transaction collateral in
9 the type of transaction at hand?

10 Construing the “generally applies” test so as to apply only to the type of
11 collateral involved in the deal may not solve all problems, though. There are some types
12 of collateral as to which, even under Article 9, the necessity of filing depends on the
13 nature of the transaction (e.g., filing is required for a non-PMSI in consumer goods, but
14 not for a PMSI; filing is required for security interest in payment intangibles securing an
15 obligation, but not for a security interest that is the interest of a buyer of payment
16 intangibles.)

17 In view of this difference in filing requirements depending not only on the nature
18 of the collateral but also on the nature of the transaction, does the phrase “generally
19 applies” mean that it is sufficient if the foreign filing system covers the type of collateral
20 (without regard to the nature of the transaction involved) or whether the foreign filing
21 system must also cover the type of the collateral and the type of transaction involved.
22 Examined from a different perspective, does a jurisdiction fail the “generally applies” test
23 if other transactions involving the collateral at hand do not require a filing for perfection,
24 but the jurisdiction’s law requires a filing for perfection for the collateral at hand in the
25 sort of transaction at hand. The Review Committee’s initial determination was that the
26 criterion was to be applied at the level of the type of collateral involved.

27 Several scenarios can be imagined in which a different result would obtain
28 depending on the interpretation of the “generally requires” criterion. Three are presented
29 below. The Review Committee may wish to consider whether, in light of the following
30 scenarios, to recommend an interpretation of the criterion that is specific both to the
31 collateral and the transaction type:

32 1. Non-PMSI security interest in consumer goods. Assume that the
33 transaction is a non-PMSI security interest in consumer goods and that the law in the
34 foreign jurisdiction, like Article 9, requires a filing for that collateral in this sort of
35 transaction but does not require a filing for the same type of collateral in a different sort
36 of transaction (such as a PMSI in consumer goods):

37 1.1. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if
38 “generally” is interpreted to mean something like “almost always”, then the foreign

1 jurisdiction would be “disqualified” as the debtor’s location because other transactions in
2 the same property (PMSI security interest in consumer goods or sale of payment
3 intangibles) would not require a filing in the foreign jurisdiction and the debtor would be
4 located in DC, even though a filing could have been made in the foreign jurisdiction.

5 1.2. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if
6 “generally” is interpreted to mean something like “a bunch of the time”, then the foreign
7 jurisdiction would be “qualified” as the debtor’s location because there are enough
8 circumstances involving that type of collateral where a filing is required. The debtor
9 would be located in the foreign jurisdiction and a filing would occur there.

10 1.3. If 9-307(c) is a rule that is specific to the collateral and the transaction and
11 if the “generally requires” criterion is interpreted so as to require filing for the type of
12 collateral and transaction in the foreign jurisdiction only if filing is required for the type
13 of collateral and transaction under Article 9, then the jurisdiction would qualify as the
14 debtor’s location and it would not matter whether “generally” means “almost always” or
15 “a bunch of the time”.

16 1.4. If 9-307(c) is a collateral/deal-specific rule and if “generally” is
17 interpreted to mean that filing is “required” in the foreign jurisdiction (for the collateral
18 in this deal) whether or not filing is “required” under Article 9, then the jurisdiction
19 would qualify as the debtor’s location and it would not matter whether “generally” means
20 “almost always” or “a bunch of the time”.

21
22 2. Security interest arising from the sale of a payment intangible. Assume
23 that the transaction is the sale of a payment intangible and that, under the law of the
24 foreign jurisdiction, like Article 9, filing is not required for perfection, but other secured
25 transactions involving the same collateral (such as a security interest securing an
26 obligation) require a filing:
27

28 2.1. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if
29 “generally” is interpreted to mean something like “almost always”, then the foreign
30 jurisdiction would be “disqualified” as the debtor’s location (as in scenario #1) because
31 there are too many secured transactions involving the same property as to which the
32 foreign jurisdiction does not require a filing (e.g., sale of payment intangibles) and the
33 debtor would be located in DC, even Article 9, like the foreign jurisdiction does not
34 require a filing in the context of this transaction.
35

36 2.2. If 9-307(c) is a collateral-specific (but not transaction-specific) rule and if
37 “generally” is interpreted to mean something like “a bunch of the time”, then the foreign
38 jurisdiction would be “qualified” as the debtor’s location because there are enough
39 transactions in the same property (e.g., security interest in payment intangibles to secure
40 an obligation) that do require a filing in the foreign jurisdiction. Thus, the debtor would
41 be located in the foreign jurisdiction, which does not require a filing for the transaction at

1 hand.

2
3 2.3. If 9-307(c) is a rule that is specific to the collateral and the transaction
4 and if “generally” is interpreted so as to require filing for the type of collateral and
5 transaction in the foreign jurisdiction only if filing is required for the type of collateral
6 and transaction under Article 9, then the jurisdiction would qualify as the debtor’s
7 location because neither jurisdiction requires filing for the type of transaction. The
8 debtor would be located in the foreign jurisdiction, which does not require a filing for the
9 transaction at hand.

10
11 2.4. If 9-307(c) is a collateral/deal-specific rule and if the “generally requires”
12 criterion is interpreted to mean that filing is “required” in the foreign jurisdiction (for the
13 collateral in this deal) whether or not filing is “required” under Article 9, then the
14 jurisdiction would not qualify as the debtor’s location because there is no filing there.
15 The debtor would be located in DC, which does not require a filing.

16 3. A foreign jurisdiction whose law is partially like Article 9. Assume that
17 the transaction is a sale of accounts and the foreign jurisdiction requires filing when there
18 is a security interest in accounts to secure an obligation, but not for a sale of accounts.:

19 3.1. If 9-307(c) is a collateral-specific specific (but not transaction-specific)
20 rule and if “generally” is interpreted to mean something like “almost always”, then the
21 foreign jurisdiction would be “disqualified” as the debtor’s location because there are too
22 many secured transactions involving the same type of collateral as to the foreign
23 jurisdiction does not require a filing (e.g., sale of accounts) and the debtor would be
24 located in DC, where a filing would be required under Article 9.

25 3.2. If 9-307(c) is a collateral-specific specific (but not transaction-specific)
26 rule and if “generally” is interpreted to mean something like “a bunch of the time”, then
27 the foreign jurisdiction would be “qualified” as the debtor’s location because there are
28 enough transactions in the same type of collateral (e.g., security interest in accounts to
29 secure an obligation) that do require a filing. Thus, the debtor would be located in the
30 foreign jurisdiction, which does not require a filing in the transaction at hand even though
31 Article 9 requires a filing.

32 3.3. If 9-307(c) is a rule that is specific to the collateral and the transaction and
33 if “generally” is interpreted so as to required filing for the type of collateral and
34 transaction in the foreign jurisdiction only if filing is required for the type of collateral
35 and transaction under Article 9, then the jurisdiction would not qualify as the debtor’s
36 location because the Article 9 jurisdiction does require a filing, but the foreign
37 jurisdiction does not require a filing, for the type of collateral and transaction. The
38 debtor would be located in DC, where a filing would be required.

39 3.4. If 9-307(c) is a collateral/deal-specific rule and if the “generally requires”

1 criterion is interpreted to mean that filing is “required” in the foreign jurisdiction (for the
2 collateral in this deal) whether or not filing is “required” under Article 9, then the
3 jurisdiction would not qualify as the debtor’s location because there is no filing there.
4 The debtor would be located in DC, where a filing would be required.

5 *[Agenda Item XVIII.E.]*

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

7 * * *

8 (f) **[Location of registered organization organized under federal law; bank**
9 **branches and agencies.]** Except as otherwise provided in subsection (i), a registered
10 organization that is organized under the law of the United States and a branch or agency of a
11 bank that is not organized under the law of the United States or a State are located:

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

14 (2) in the State that the registered organization, branch, or agency designates, if
15 the law of the United States authorizes the registered organization, branch, or agency to
16 designate its State of location; ~~or~~

17 (3) in the State in which the designated office of the registered organization,
18 branch, or agency is located, if the law of the United States authorizes the registered
19 organization, branch, or agency to designate its main office, home office, or other comparable
20 office; or

21 (3)~~(4)~~ in the District of Columbia, if ~~neither paragraph (1) nor paragraph (2)~~
22 ~~applies~~ none of the preceding paragraphs applies.

23 * * *

1 **Official Comments**

2 **5. Registered Organizations Organized Under Law of United States; Branches and**
3 **Agencies of Banks Not Organized Under Law of United States.** Subsection (f) specifies the
4 location of a debtor that is a registered organization organized under the law of the United States.
5 It defers to the law of the United States, to the extent that that law determines, or authorizes the
6 debtor to determine, the debtor’s location. Thus, if the law of the United States designates a
7 particular State as the debtor’s location, that State is the debtor’s location for purposes of this
8 Article’s choice-of-law rules. Similarly, if the law of the United States authorizes the registered
9 organization to designate its State of location, the State that the registered organization
10 designates is the State in which it is located for purposes of this Article’s choice-of-law rules.
11 The law of the United States authorizes certain registered organizations to designate a main
12 office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22 and 1464(a); 12
13 C.F.R. Section 552.3. Where the registered organization designates an office pursuant to such an
14 authorization, the State in which the designated office is located is the location of the debtor for
15 purposes of Section 9-307(f). In other cases, the debtor is located in the District of Columbia.

16 ~~———— In some cases, the law of the United States authorizes the registered organization to~~
17 ~~designate a main office, home office, or other comparable office. See, e.g., 12 U.S.C. Sections 22~~
18 ~~and 1464(a), 12 C.F.R. Section 552.3. Designation of such an office constitutes the designation~~
19 ~~of the State of location for purposes of Section 9-307 (f)(2).~~

20 Subsection (f) also specifies the location of a branch or agency in the United States of a
21 foreign bank that has one or more branches or agencies in the United States. The law of the
22 United States ~~authorized~~ authorizes a foreign bank (or, on behalf of the bank, a federal agency)
23 to designate a single home state for all of the foreign bank’s branches and agencies in the United
24 States. See 12 U.S.C. Section 3103(c) and 12 C.F.R. Section 211.22. As authorized, the
25 designation constitutes the State of location for the branch or agency for purposes of Section 9-
26 307(f), unless all of a foreign bank’s branches or agencies that are in the United States are
27 licensed in only one State, in which case the branches and agencies are located in that State. See
28 subsection (i).

29 In cases not governed by subsection (f) or (i), the location of a foreign bank is determined
30 by subsections (b) and (c).

31 *[Agenda Item XVIII.F.]*

32 *[no draft]*

33 *[Agenda Item XVIII.G]*

1 [no draft]

2 [Agenda Item XVIII.H.]

3 **SECTION 9-509. PERSONS ENTITLED TO FILE A RECORD.**

4 (a) **[Person entitled to file record.]** A person may file an initial financing statement,
5 amendment that adds collateral covered by a financing statement, or amendment that adds a
6 debtor to a financing statement only if:

7 (1) the debtor authorizes the filing in an authenticated record or pursuant to
8 subsection (b) or (c); or

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

12 * * *

13 (d) **[Person entitled to file certain amendments.]** A person may file an amendment
14 other than an amendment that adds collateral covered by a financing statement or an amendment
15 that adds a debtor to a financing statement only if:

16 (1) the secured party of record authorizes the filing; or

17 (2) the amendment is a termination statement for a financing statement as to
18 which the secured party of record has failed to file or send a termination statement as required by
19 Section 9-513(a) or (c), the debtor authorizes the filing, and the termination statement indicates
20 that the debtor authorized it to be filed.

21 * * *

1 **Official Comment**

2 * * *

3 **6. Amendments; Termination Statements Authorized by Debtor.** Most amendments
4 may not be filed unless the secured party of record, as determined under Section 9-511,
5 authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization
6 of the secured party of record is not required for the filing of a termination statement if the
7 secured party of record failed to send or file a termination statement as required by Section 9-
8 513, the debtor authorizes it to be filed, and the termination statement so indicates. Although
9 prudence usually dictates that an authorization to file be evidenced by an authenticated record,
10 an authorization under subsection (d) is effective even if it is not in an authenticated record.
11 Compare subsection (a)(1).

12 * * *

13 *[Agenda Item XIV.I.]*

14 **SECTION 9-706. WHEN INITIAL FINANCING STATEMENT SUFFICES TO**
15 **CONTINUE EFFECTIVENESS OF FINANCING STATEMENT.**

16 (a) **[Initial financing statement in lieu of continuation statement.]** The filing of an
17 initial financing statement in the office specified in Section 9-501 continues the effectiveness of
18 a financing statement filed before this [Act] takes effect if:

19 (1) the filing of an initial financing statement in that office would be effective to
20 perfect a security interest under this [Act];

21 (2) the pre-effective-date financing statement was filed in an office in another
22 State or another office in this State; and

23 (3) the initial financing statement satisfies subsection (c).

24 * * *

25 (c) **[Requirements for initial financing statement under subsection (a).]** To be
26 effective for purposes of subsection (a), an initial financing statement must:
27

- 1 (1) satisfy the requirements of Part 5 for an initial financing statement;
- 2 (2) identify the pre-effective-date financing statement by indicating the office in
3 which the financing statement was filed and providing the dates of filing and file numbers, if
4 any, of the financing statement and of the most recent continuation statement filed with respect
5 to the financing statement; and
- 6 (3) indicate that the pre-effective-date financing statement remains effective.

7 **Official Comment**

8 * * *

9 **2. Requirements of Initial Financing Statement Filed in Lieu of Continuation**

10 **Statement.** Subsection (c) sets forth the requirements for the initial financing statement under
11 subsection (a). These requirements are needed to inform searchers that the initial financing
12 statement operates to continue a financing statement filed elsewhere and to enable searchers to
13 locate and discover the attributes of the other financing statement. The notice-filing policy of
14 this Article applies to the initial financing statements described in this section. Accordingly, an
15 initial financing statement that substantially satisfies the requirements of subsection (c) is
16 effective, even if it has minor errors or omissions, unless the errors or omissions make the
17 financing statement seriously misleading. See Section 9-506.

18 A single initial financing statement may continue the effectiveness of more than one
19 financing statement filed before this Article's effective date. See Section 1-102(5)(a) (words in
20 the singular include the plural). If a financing statement has been filed in more than one office in
21 a given jurisdiction, as may be the case if the jurisdiction had adopted former Section 9-401(1),
22 third alternative, then an identification of the filing in the central filing office suffices for
23 purposes of subsection (c)(2). If under this Article the collateral is of a type different from its
24 type under former Article 9—as would be the case, e.g., with a right to payment of lottery
25 winnings (a “general intangible” under former Article 9 and an “account” under this Article),
26 then subsection (c) requires that the initial financing statement indicate the type under this
27 Article.

28 *[Agenda Item XIV.J.]*

29 **SECTION 9-503. NAME OF DEBTOR AND SECURED PARTY.**

30 (a) **[Sufficiency of debtor’s name.]** A financing statement sufficiently provides the

1 name of the debtor:

2 * * *

3 (4) in other cases:

4 (A) except as provided in subsection (g), if the debtor has a name, only if
5 it provides the individual or organizational name of the debtor; and

6 (B) if the debtor does not have a name, only if it provides the names of the
7 partners, members, associates, or other persons comprising the debtor.

8 * * *

9 (g) **[Exception for individual debtor's name.]** Subject to subsection (h), a financing
10 statement that does not provide the individual name of the debtor nevertheless sufficiently
11 provides the name of a debtor who is an individual if:

12 (1) it provides the name of the individual which is indicated on a [driver's license]
13 or [identification card] that, at the time the financing statement is filed, has been issued to the
14 individual by this State and has not yet expired or [been cancelled]; and

15 (2) the filing office indexes the financing statement in such a manner that a search
16 of the records of the filing office under the name indicated, using the filing office's standard
17 search logic, if any, would disclose the financing statement.

18 (h) **[Multiple licenses or cards.]** If this State has issued to an individual more than one
19 [driver's license] or [identification card] of a kind described in subsection (g)(1), the one that
20 was issued most recently is the one to which the subsection refers.

21
22 **SECTION 9-506. EFFECT OF ERRORS OR OMISSIONS.**

1 (a) **[Minor errors and omissions.]** A financing statement substantially satisfying the
2 requirements of this part is effective, even if it has minor errors or omissions, unless the errors or
3 omissions make the financing statement seriously misleading.

4 (b) **[Financing statement seriously misleading.]** Except as otherwise provided in
5 subsection (c), a financing statement that fails sufficiently to provide the name of the debtor in
6 accordance with Section 9-503(a) or (g) is seriously misleading.

7 (c) **[Financing statement not seriously misleading.]** If a search of the records of the
8 filing office under the debtor's correct name, using the filing office's standard search logic, if
9 any, would disclose a financing statement that fails sufficiently to provide the name of the debtor
10 in accordance with Section 9-503(a) or (g), the name provided does not make the financing
11 statement seriously misleading.

12 (d) **[“Debtor's correct name.”]** For purposes of Section 9-508(b), the “debtor's correct
13 name” in subsection (c) means the correct name of the new debtor.

14 (e) **[Individual “debtor's correct name.”]** If a debtor who is an individual changes his
15 or her name by virtue of Section 9-507(d), the “debtor's correct name” in subsection (c) means
16 the name of the debtor indicated on the [driver's license] or [identification card] that indicates a
17 name different from the name provided on the financing statement.

18 **SECTION 9-507. EFFECT OF CERTAIN EVENTS ON EFFECTIVENESS OF**
19 **FINANCING STATEMENT.**

20 * * *

21 (b) **[Information becoming seriously misleading.]** Except as otherwise provided in

1 subsection (c) and Section 9-508, a financing statement is not rendered ineffective if, after the
2 financing statement is filed, the information provided in the financing statement becomes
3 seriously misleading under Section 9-506.

4 (c) **[Change in debtor’s name.]** If a debtor so changes its name that a filed financing
5 statement becomes seriously misleading under Section 9-506:

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

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

12 (d) **[Name sufficient only under Section 9-503(g).]** If, after the filing of a financing
13 statement that provides a name that is sufficient only under Section 9-503(g), this State issues to
14 the debtor a [driver’s license] or [identification card] that indicates a name different from the
15 name provided, the debtor changes his or her name for purposes of subsection (c).

16 **Reporter’s Note**

17 1. New Section 9-503(g) would provide an exception to Section 9-503(a)(4): the name
18 on the debtor’s driver’s license or identification card would be sufficient as the name of the
19 debtor on a financing statement. New Section 9-503(h) would cover the case where the State has
20 issued more than one qualifying license or identification card to the same debtor.

21 2. Different States use different terms for the driver’s licenses and identification cards
22 they issue. Accordingly, the words “driver’s license” and “identification card” appear in
23 brackets. If the Joint Review Committee finds the approach of Section 9-503(g) appropriate, a
24 Legislative Note should be added to explain the brackets.

25 3. The phrase “or [been cancelled]” in Section 9-503(g) is a placeholder. The Joint
26 Review Committee should consider what events, other than expiration of a license or ID card,

1 should result in the document's no longer providing a sufficient name for the debtor.
2 Possibilities include the State's confiscation of the document, the State's taking action that
3 makes clear on the face of the document that the document no longer is in effect, and the State's
4 cancellation of the document (which event may or may not be evidenced on the license).
5 Inasmuch as different States may use different terms for these events, bracketed language
6 together with a Legislative Note may be appropriate.

7 4. To satisfy Section 9-503(g), the name provided on the financing statement must be the
8 same as the name indicated on the license. For example, a filing against "Joseph A. Jones" or
9 "Joseph Jones" would not satisfy Section 9-503(g) if Jones's driver's license shows his name to
10 be "Joseph Allan Jones." Determining whether the name provided on the financing statement is
11 the same as the name indicated on the license must not be done mindlessly. For example, the
12 order in which the components of an individual's name appear on a driver's license differs
13 among the States. Some States, such as Illinois, put the individual's "last name" (as the term is
14 used on the financing statement form in Section 9-521) last, e.g., "Joseph Allan Jones." But
15 even where the driver's license puts the individual's "last name" first, the driver's license may
16 indicate that the name appearing first is the debtor's "last name" for the purpose of the financing
17 statement. This would be the case, for example, with a driver's license on which the debtor's
18 name appears as "Jones, Joseph Allan."

19 If the filing office is unable to input the name indicated on the license, the name on the
20 license would be insufficient under Section 9-503(g) unless the financing statement would be
21 disclosed by a search under the name indicated on the license, using the filing office's standard
22 search logic. Likewise, if the filing office does not allow a search to be conducted under the
23 name indicated on the license, a financing statement providing that name would be insufficient
24 under Section 9-503(g), even if the filing office can and does input the exact name provided.

25 5. The draft refers to a license or ID card issued by "this State." Perfection of a security
26 interest by filing is determined by the law of the jurisdiction in which the debtor is located. See
27 Section 9-301(1). A debtor who is an individual is located at the individual's principal
28 residence. Thus, a given State's Section 9-503 will apply during any period when the debtor
29 maintains his principal residence in that State. Consider the following example:

30 Debtor, who resides in Illinois, grants a security interest to SP in certain business
31 equipment. SP files a financing statement with the Illinois filing office. The
32 financing statement provides the name appearing on Debtor's Illinois driver's
33 license ("Joseph Allan Jones"). Illinois' Section 9-503(g) would make this filing
34 sufficient to satisfy subsection (a)(4), even though Debtor's correct middle name
35 is Alan, not Allan. As long as Illinois remains Debtor's principal residence,
36 Debtor's acquisition of a driver's license or ID card from another State would not
37 affect the effectiveness of the Illinois filing.

38 6. Where the debtor relocates by changing his principal residence, perfection will be
39 governed by the law of the debtor's new location. As a consequence of the application of that

1 State's Section 9-316, a security interest that is perfected by filing under the law of the debtor's
2 former location will remain perfected for four months after the relocation, and thereafter if the
3 secured party perfects under the law of the debtor's new location. Consider the following
4 example:

5 Debtor, who resides in Illinois, grants a security interest to SP in certain business
6 equipment. SP files a financing statement in Illinois that provides a name that is
7 sufficient under Illinois' Section 9-503(g). On January 1, Debtor relocates to
8 Indiana. Upon the relocation, the governing law changes from the law of Illinois
9 to the law of Indiana. However, under Indiana's Section 9-316, a security interest
10 perfected by the Illinois filing remains perfected for four months, i.e., through the
11 end of April. If SP does not file in Indiana before the four-month period expires,
12 then the security interest will become unperfected and will be deemed never to
13 have been perfected as against a purchaser of the collateral for value. See
14 Indiana's Section 9-316(b).

15 In the example, the name on Debtor's Illinois driver's license would be irrelevant for
16 purposes of Indiana's Section 9-503(g), inasmuch as it was not issued by "this State," i.e.,
17 Indiana. (Of course, a financing statement providing that name might satisfy Indiana's Section
18 9-503(a)(4) (i.e., it might be the individual name of the debtor) or might be effective under
19 Section 9-506 (i.e., it might not be seriously misleading).

20 7. A financing statement satisfying Section 9-503(g) would have the same priority as it
21 would have had, had it provided the individual name of the debtor under Section 9-503(a).

22 8. The rule in Section 9-503(g) has been drafted as an exception to the rule in Section 9-
23 503(a)(4). The Joint Review Committee may wish to consider whether the rule should appear
24 instead as an alternative.

25 9. After the filing of a financing statement satisfying Section 9-503(g), the issuing State
26 may issue a duplicate, substitute, or additional license or ID card to the debtor. Where the name
27 on the new document differs from that provided by the financing statement, the issuance of the
28 new document would be constitute a change of the debtor's name. See new Section 9-507(d).
29 The effect of a name change under Section 9-507(d) would be the same as if the debtor actually
30 changed names.

31 The Joint Review Committee may wish to consider whether the effectiveness of a
32 financing statement should be affected by the cancellation of a license or similar event.

33 10. In some cases, Section 9-503(a) may require a financing statement to provide the
34 name of an individual as debtor, even if the debtor is not an individual. See Sections 9-503(a)(2)
35 (debtor that is a decedent's estate), (a)(3) (debtor that is a trust whose organic documents do not
36 specify a name for the trust). If the approach of Section 9-503(g) is acceptable, the Joint Review
37 Committee should consider whether it should be expanded to cover the name of all individuals

1 shown as debtor, even those that are not themselves the debtor. Any such expansion would
2 likely require changes to Section 9-503(g) as well as to other sections.

3 Regardless of the approach it decides to take towards specifying the name of an
4 individual debtor, the Joint Review Committee may wish to consider whether to clarify that,
5 where the debtor is not an individual but the financing statement must provide the name of an
6 individual as debtor, the financing statement must provide the name in the field designated for
7 the name of an individual debtor.

8 11. Adoption of the exception in Section 9-503(g) would change current law. A
9 financing statement that is effective under Section 9-503(g) and is filed before the subsection's
10 effective date should take effect on the effective date, which would be the "time of filing" for
11 purposes of Section 9-322(a)(1). Additional text will be necessary for implementation.