

Report on the Article 9 Review Committee March 2010 Meeting

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I. Introduction

A. History

In 2007, the Permanent Editorial Board authorized an Article 9 Review Committee to consider the need for possible statutory modifications or comment amendments to the Official Text of Uniform Commercial Code Article 9. The Review Committee held several telephone conference calls during the spring and summer of 2008 and issued a report in June 2008 of possible modifications that are needed. The Uniform Law Commission (ULC) (formerly known as the National Conference of Commissioners on Uniform State Laws) and the American Law Institute (ALI) then authorized a drafting committee, the Joint Review Committee for Article 9 of the UCC. The drafting committee's charge is to deal only with issues that have arisen in practice, are the subject of nonuniform amendments, or are of sufficient importance that some change needs to be made. The committee is also to consider the difficulties of the transition issues and the ramifications of any change. The drafting committee may initially only propose changes to the statute for those issues discussed in the June 2008 report unless the drafting committee obtains permission from the sponsoring organizations (the ULC and the ALI) to add other items. If the drafting committee recommends changes to the statutory text or comments, those proposed changes will not become official until they have been passed by the ULC at its annual meeting (held in August each year) and by the ALI at its annual meeting (held in May each year).

B. Meetings and drafts

The drafting committee held its first meeting in October 2008 (Chicago), its second meeting in February 2009 (Portland, Oregon), and its third meeting in March, 2009 (Chicago). A draft was read at the ULC annual meeting in July 2009 (Sante Fe). A fourth meeting of the drafting committee was held in September 2009 (Minneapolis). A fifth and final drafting committee meeting was held March 25-27, 2010 (New Orleans). All drafting committee meetings are open to the public. All the drafts are available at the ULC website at www.nccusl.org. The final draft will be presented to the ALI at its May 2010 meeting and at the ULC annual meeting in July 2010.

C. Membership

The drafting committee members are Edwin E. Smith, Chair (Bingham McCutchen LLP), Prof. Steven L. Harris, Reporter (Chicago-Kent College of Law), E. Carolan Berkley (Stradley Ronon Stevens & Young, LLP), Carl Bjerre (University of Oregon School of Law), Thomas J. Buiteweg (Hudson Cook, LLP), Neil B. Cohen (Brooklyn Law School), William H. Henning

(University of Alabama School of Law), Gail Hillebrand (Consumers Union), John T. McGarvey (Morgan & Pottinger, P.S.C.), Charles W. Mooney, Jr. (University of Pennsylvania School of Law), Harry C. Sigman (Law Offices of Harry C. Sigman), Sandra S. Stern (Nordquist & Stern, PLLC), Steven O. Weise (Prosauker Rose, LLP), James J. White (University of Michigan School of Law), Stephen L. Sepinuck, ABA Advisor (Gonzaga University School of Law), John F. Hilson, ABA Business Law Section Advisor (Paul, Hastings, Janofsky & Walker, LLP).

II. March 2010 draft and drafting committee meeting

The following report presents statutory and comment changes based upon the present organization of Article 9 (i.e. section by section), with strike out and underline. These provisions may be subject to some minor editing changes.

In some circumstances, the exact statutory text or comment language cannot be presented in this report because the Reporter, Steve Harris, will be redrafting based upon discussions at the March 2010 meeting. In that event, a summary of the idea will be presented in this report.

9-102. Definitions and Index of Definitions

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

* * *

(7) "Authenticate" means:

(A) to sign; or

(B) ~~to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with the present intent of the authenticating person to identify the person and adopt or accept a record with present intent to adopt or accept a record, to attach to or logically associate with the record an electronic sound, symbol, or process.~~

* * *

(10) "Certificate of title" means a certificate of title with respect to which a statute provides for the security interest in question to be indicated on the certificate as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral. The term includes a record maintained by the governmental unit that issues certificates of title as an alternative to issuing a certificate of title if a statute permits the security interest in question to be indicated on the record as a condition or result of the security interest's obtaining priority over the rights of a lien creditor with respect to the collateral.

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

* * *

(67A) "Public organic record" means:

(A) a record or records composed of the record initially filed with or issued by a State or the United States to form or organize an organization and any record filed with or issued by the State or the United States which effects an amendment or restatement of the initial record, if the record or records are available to the public for inspection;

(B) an organic record or records of a business trust composed of the record initially filed with a State and any record filed with the State which effects an amendment or restatement of the initial record, if a statute of the State governing business trusts

requires that the record or records be filed with the State and the record or records are available to the public for inspection; and

(C) a record or records composed of legislation enacted by the legislature of a State or the Congress of the United States which forms or organizes an organization, any record amending the legislation, and any record filed with or issued by the State or United States which states the name of the organization, if the record or records are available to the public for inspection.

* * *

(70) “Registered organization” means an organization formed or organized solely under the law of a single State or the United States and as to which the State or the United States must maintain a public record showing the organization to have been organized by the filing of a public organic record with, the issuance of a public organic record by, or the enactment of legislation by the State or United States. The term includes a business trust that is formed or organized under the law of a single State if a statute of the State governing business trusts requires that the business trust’s organic record be filed with the State.

Changes to Official Comment to 9-102

Amendment to comment 5(b) regarding chattel paper

The definition of electronic chattel paper does not dictate that it be created in any particular fashion. For example, a record consisting of a tangible writing may be converted to electronic form (e.g., by creating electronic images of a signed writing). Or, records may be initially created and executed in electronic form (e.g., a lessee might authenticate an electronic record of a lease that is then stored in electronic form). In either case the resulting records are electronic chattel paper. Likewise, tangible chattel paper results when chattel paper in electronic form is converted to tangible form.

Amendment to comment 5(d) regarding Commercial Money Center case

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

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

Addition to comment 11

Statutes often require applicants for a certificate of title to identify all security interests on the application and require the issuing agency to indicate the identified security interests on the certificate. Some of these statutes provide that priority over the rights of a lien creditor (i.e., perfection of a security interest) in goods covered by the certificate occurs upon indication of the security interest on the certificate; that is, they provide for the indication of the security interest on the certificate as a “condition” of perfection. Other statutes contemplate that perfection is achieved upon the occurrence of another act, e.g., delivery of the application to the issuing agency, that “results” in the indication of the security interest on the certificate. A certificate governed by either type of statute can qualify as a “certificate of title” under this Article. The statute need not expressly state the connection between the indication and perfection. For example, a certificate issued pursuant to a statute that requires applications to identify security interests, requires the issuing agency to indicate the identified security interests on the certificate, but is silent concerning the legal consequences of the indication would be a “certificate of title” if, under a judicial interpretation of the statute, perfection of a security interest is a legal consequence of the indication.

The first sentence of the definition of “certificate of title” includes both tangible and electronic records. If a state’s certificate-of-title statute provides for both a tangible and an electronic record, the term “certificate of title” should be interpreted in a manner consistent with the effect given to the two records by the certificate-of-title statute.

In many states, a certificate of title covering goods that are encumbered by a security interest is delivered to the secured party by the issuing authority. To eliminate the need for the issuance of a paper certificate under these circumstances, several states have revised their certificate-of-title statutes to permit or require a state agency to maintain an electronic record that evidences ownership of the goods and in which a security interest in the goods may be noted. Such a record is a “certificate of title” if it is in fact maintained as an alternative to the issuance of a paper certificate of title, regardless of whether the certificate-of-title statute provides that the record is a certificate of title and even if the statute does not expressly state that the record is maintained instead of issuing a paper certificate.

Explanation of statutory text and commentary changes to section 9-102.

The definition of “authenticate” now tracks the definition of “sign” in Revised Articles 1 and 7.

The definition of certificate of title and the accompanying addition to comment 11 are designed to accommodate the use of electronic records by certificate of title offices to either supplement or substitute for the paper certificate.

The revised definitions of jurisdiction of organization, public organic record and registered organization are designed to have the concept of registered organization cover entities created by the legislature and to cover business trusts that are formed either through a filing or for which the filing is made after the formation. Additional comments will likely be drafted to accompany the changes to “jurisdiction of organization,” “public organic record” and “registered organization” but no comments have been drafted yet.

The amendment to the comment regarding tangible and electronic chattel paper is designed to accommodate a common practice of printing tangible chattel paper from the electronic record.

The comment regarding *Commercial Money Center* is designed to reject the majority opinion in that case that characterized the assignment of the payment stream arising from chattel paper as a payment intangible.

SECTION 9-105. CONTROL OF ELECTRONIC CHATTEL PAPER.

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

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

- (1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
- (2) the authoritative copy identifies the secured party as the assignee of the record or records;
- (3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;
- (4) copies or ~~revisions~~ amendments that add or change an identified assignee of the authoritative copy can be made only with the ~~participation~~ consent of the secured party;
- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) any ~~revision~~ amendment of the authoritative copy is readily identifiable as an authorized or unauthorized ~~revision~~.

Official Comment

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2. **“Control” of Electronic Chattel Paper.** This Article covers security interests in “electronic chattel paper,” a new term defined in Section 9-102. This section governs how “control” of electronic chattel paper may be obtained. Subsection (a), which derives from Section 16 of the Uniform Electronic Transactions Act, sets forth the general test for control. Subsection (b) sets forth a safe harbor test that if satisfied, results in control under the general test in subsection (a).

A secured party’s control of electronic chattel paper (i) may substitute for an authenticated security agreement for purposes of attachment under Section 9-203, (ii) is a method of perfection under Section 9-314, and (iii) is a condition for obtaining special, non-temporal priority under Section 9-330. Because electronic chattel paper cannot be transferred, assigned, or possessed in the same manner as tangible chattel paper, a special definition of control is necessary. In descriptive terms, this section provides that control of electronic chattel paper is the functional equivalent of possession of “tangible chattel paper” (a term also defined in Section 9-102).

3. **Development of Control Systems.** This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. Systems that evolve for control of electronic chattel paper may or may not involve a third party custodian of the relevant records. As under UETA, a system must be shown to reliably establish that the secured party is the assignee of the chattel paper. Reliability is a high standard and encompasses the general principles of uniqueness, identifiability, and unalterability found in subsection (b) without setting forth strict guidelines as to how these principles must be achieved. However, the standards applied to determine whether a party is in control of electronic chattel paper should not be more stringent than the standards now applied to determine whether a party is in possession of tangible chattel paper. For example, just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its

behalf could wrongfully redeliver the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the possibility that the secured party's interest could be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.

This section and the concept of control of electronic chattel paper are not based on the same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of investment property (Section 9-106), and letter-of-credit rights (Section 9-107). The rules for control of that collateral are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries. Analogous practices for electronic chattel paper are developing nonetheless. The flexible approach adopted by this section, moreover, should not impede the development of these practices and, eventually, legal and regulatory regimes, which may become analogous to those for, e.g., investment property.

34. "Authoritative Copy" of Electronic Chattel Paper. One requirement for establishing control under subsection (b) is that a particular copy be an "authoritative copy." Although other copies may exist, they must be distinguished from the authoritative copy. This may be achieved, for example, through the methods of authentication that are used or by business practices involving the marking of any additional copies. When tangible chattel paper is converted to electronic chattel paper, in order to establish that a copy of the electronic chattel paper is the authoritative copy it may be necessary to show that the tangible chattel paper no longer exists or has been permanently marked to indicate that it is not the authoritative copy.

~~**4. Development of Control Systems.** This Article leaves to the marketplace the development of systems and procedures, through a combination of suitable technologies and business practices, for dealing with control of electronic chattel paper in a commercial context. However, achieving control under this section requires more than the agreement of interested persons that the elements of control are satisfied. For example, paragraph (4) contemplates that control requires that it be a physical impossibility (or sufficiently unlikely or implausible so as to approach practical impossibility) to add or change an identified assignee without the participation of the secured party (or its authorized representative). It would not be enough for the assignor merely to agree that it will not change the identified assignee without the assignee-secured party's consent. However, the standards applied to determine whether a party is in control of electronic chattel paper should not be more stringent than the standards now applied to determine whether a party is in possession of tangible chattel paper. Control of electronic chattel paper contemplates systems or procedures such that the secured party must take some action (either directly or through its designated custodian) to effect a change or addition to the authoritative copy. But just as a secured party does not lose possession of tangible chattel paper merely by virtue of the possibility that a person acting on its behalf could wrongfully redeliver the chattel paper to the debtor, so control of electronic chattel paper would not be defeated by the possibility that the secured party's interest could be subverted by the wrongful conduct of a person (such as a custodian) acting on its behalf.~~

Systems that evolve for control of electronic chattel paper may or may not involve a third party custodian of the relevant records. However, this section and the concept of control of electronic chattel paper are not based on the same concepts as are control of deposit accounts (Section 9-104), security entitlements, a type of investment property (Section 9-106), and letter-of-credit rights (Section 9-107). The rules for control of that collateral are based on existing market practices and legal and regulatory regimes for institutions such as banks and securities intermediaries. Analogous practices for electronic chattel paper are developing nonetheless. The flexible approach adopted by this section, moreover, should not impede the development of these practices and, eventually, legal and regulatory regimes, which may become analogous to those for, e.g., investment property.

Explanation of statutory text and commentary changes to section 9-105

These changes conform to the definition of control used in the Uniform Electronic Transactions Act § 16, and revised Article 7, § 7-106.

SECTION 9-109. SCOPE.

Official Comment

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2. Basic Scope Provision. Subsection (a)(1) derives from former Section 9-102(1) and (2). These subsections have been combined and shortened. No change in meaning is intended. Under subsection (a)(1), all consensual security interests in personal property and fixtures are covered by this Article, except for transactions excluded by subsections (c) and (d). As to which transactions give rise to a “security interest,” the definition of that term in Section 1-201 must be consulted. When a security interest is created, this Article applies regardless of the form of the transaction or the name that parties have given to it. Likewise, the subjective intention of the parties with respect to the legal characterization of their transaction is irrelevant to whether this Article applies, as it was to the application of former Article 9 under the proper interpretation of former Section 9-102.

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Explanation of comment change to section 9-109

From the Reporter’s Note: “Section 9-102(a)(1) provides that Article 9 applies to a transaction that creates a security interest. The addition to the comment emphasizes that this is the case, regardless of the subjective intention of the parties with respect to the legal characterization of their transaction.”

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

Official Comment

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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)).

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b. Fixtures Fixture Filings. ~~Application of~~ Under the general rule in paragraph (1), a security interest in fixtures may be perfected by filing in the office specified by Section 9-501(a) as enacted in the jurisdiction in which the debtor is located. However, application of this rule to perfection of a security interest in fixtures by filing a fixture filing would yield strange results. For example, perfection of a security interest in fixtures located in Arizona and owned by a Delaware corporation would be governed by the law of Delaware. Although Delaware law would send one to a filing office in Arizona for the place to file a financing statement as a fixture filing, see Section 9-501, Delaware law would not take account of local, nonuniform, real-property filing and recording requirements that Arizona law might impose. For this reason, paragraph (3)(A) contains a special rule for security interests perfected by a fixture filing; the law of the

jurisdiction in which the fixtures are located governs perfection, including the formal requisites of a fixture filing. Under paragraph (3)(C), the same law governs priority. Fixtures are “goods” as defined in Section 9-102.

The filing of a financing statement to perfect a security interest in collateral of a transmitting utility constitutes a fixture filing with respect to goods that are or become fixtures. See Section 9-501(b). Accordingly, to perfect a security interest in goods of this kind by a fixture filing, a financing statement must be filed in the office specified by Section 9-501(b) as enacted in the jurisdiction in which the goods are located. If the fixtures collateral is located in more than one State, filing in all of those States will be necessary to perfect a security interest in all the fixtures collateral by a fixture filing. Of course, a security interest in nearly all types of collateral (including fixtures) of a transmitting utility may be perfected by filing in the office specified by Section 9-501(a) as enacted in the jurisdiction in which the transmitting utility is located. However, such a filing will not be effective as a fixture filing except with respect to goods that are located in that jurisdiction.

Explanation of comment change to section 9-301

The modified comment provides guidance on filing against a transmitting utility when the collateral is fixtures. See also the proposed comment to section 9-501.

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

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

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

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

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

Explanation of statutory text change to section 9-301

From the Reporter's Note: “The proposed amendment to the definition of “certificate of title” address the increasingly common practice of electronic notations of liens on goods subject to certificate-of-title statutes. Section 9-311(a) would be amended in light of the amendment to the definition.”

SECTION 9-307. LOCATION OF DEBTOR.

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

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

(2) in the State that the registered organization, branch, or agency designates, if the law of the United States authorizes the registered organization, branch, or agency to designate its State of location, including by designating its main office, home office, or other comparable office; or

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

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Official Comment

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3. Non-U.S. Debtors. Under the general rules of this section, a non-U.S. debtor often would be located in a foreign jurisdiction and, as a consequence, foreign law would govern perfection. When foreign law affords no public notice of security interests, the general rule yields unacceptable results.

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

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Explanation of statutory text change to section 9-307

This change removes doubt as to how a federal registered organization designates its location.

Explanation of comment change to section 9-307

The amendment to the comment makes clear that subsections (b) and (c) do not apply if one of the special rules in the indicated subsections applies.

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

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(b) [**Buyers that receive delivery.**] Except as otherwise provided in subsection (e), a buyer, other than a secured party, of tangible chattel paper, tangible documents, goods, instruments, or a security certificate takes free of a security interest or agricultural lien if the buyer gives value and receives delivery of the collateral without knowledge of the security interest or agricultural lien and before it is perfected.

* * *

(d) [**Licensees and buyers of certain collateral.**] A licensee of a general intangible or a buyer, other than a secured party, ~~of accounts, electronic chattel paper, general intangibles, or~~

~~investment property collateral~~ other than tangible chattel paper, tangible documents, goods, instruments, or a certificated security takes free of a security interest if the licensee or buyer gives value without knowledge of the security interest and before it is perfected.

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Official Comment

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6. Purchasers Other Than Secured Parties.

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Subsection (b) governs goods, as well as intangibles of the type whose transfer is effected by physical delivery of the representative piece of paper (tangible chattel paper, tangible documents, instruments, and security certificates). To obtain priority, a buyer must both give value and receive delivery of the collateral without knowledge of the existing security interest and before perfection. Even if the buyer gave value without knowledge and before perfection, the buyer would take subject to the security interest if perfection occurred before physical delivery of the collateral to the buyer. Subsection (c) contains a similar rule with respect to lessees of goods. Note that a lessee of goods in ordinary course of business takes free of all security interests created by the lessor, even if perfected. See Section 9-321.

* * *

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

Explanation of statutory text and comment change to section 9-317:

The change to subsection (b) is conforming to the changes to revised Article 7 regarding electronic and tangible documents. The change to subsection (d) is expanded to all buyers of collateral that is not subject to physical possession.

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

Official Comment

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

Example 1: On February 1, A files a financing statement covering a certain item of Debtor's equipment. On March 1, B files a financing statement covering the same equipment. On April 1, B makes a loan to Debtor and obtains a security interest in the equipment. On May 1, A makes a loan to Debtor and obtains a security interest in the same collateral. A has priority even though

B's loan was made earlier and was perfected when made. It makes no difference whether A knew of B's security interest when A made its advance.

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

Under a notice-filing system, a filed financing statement indicates to third parties that a person may have a security interest in the collateral indicated. With further inquiry, they may discover the complete state of affairs. When a financing statement that is ineffective when filed becomes effective thereafter, the policy underlying the notice-filing system determines the “time of filing” for purposes of subsection (a)(1). For example, the unauthorized filing of an otherwise sufficient initial financing statement becomes authorized, and the financing statement becomes effective, upon the debtor’s post-filing authorization or ratification of the filing. See Section 9-509, Comment 3. Because the authorization or ratification does not increase the notice value of the financing statement, the time of the unauthorized filing is the “time of filing” for purposes of subsection (a)(1). The same policy applies to the other priority rules in this part.

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8. Proceeds of Non-Filing Collateral: Non-Temporal Priority. Subsection (c)(2) provides a baseline priority rule for proceeds of non-filing collateral which applies if the secured party has taken the steps required for non-temporal priority over a conflicting security interest in non-filing collateral (e.g., control, in the case of deposit accounts, letter-of-credit rights, and investment property). This rule determines priority in proceeds of non-filing collateral whether or not there exists an actual conflicting security interest in the original non-filing collateral. Under subsection (c)(2), the priority in the original collateral continues in proceeds if the security interest in proceeds is perfected and the proceeds are cash proceeds or non-filing proceeds “of the same type” as the original collateral. As used in subsection (c)(2), “type” means a type of collateral defined in the Uniform Commercial Code and should be read broadly. For example, a security is “of the same type” as a security entitlement (i.e., investment property), and a promissory note is “of the same type” as a draft (i.e., an instrument).

* * *

The proceeds of proceeds are themselves proceeds. See Section 9-102 (defining “proceeds” and “collateral”). Sometimes competing security interests arise in proceeds that are several generations removed from the original collateral. As the following example explains, the applicability of subsection (c) may turn on the nature of the intervening proceeds.

Example 11: SP-1 perfects its security interest in Debtor’s deposit account by obtaining control. Thereafter, SP-2 files against inventory, (presumably) searches, finds no indication of a conflicting security interest, and advances against Debtor’s existing and after-acquired inventory. Debtor uses funds from the deposit account to purchase inventory, which SP-1 can trace as identifiable proceeds of its security interest in Debtor’s deposit account, and which SP-2 claims as original collateral. The inventory is sold and the proceeds deposited into *another* deposit account, as to which SP-1 has not obtained control. Subsection (c) does not govern priority in this other deposit account. This deposit account is cash proceeds and is also the same type of collateral as SP-1’s original collateral, as required by subsections (c)(2)(A) and (B). However, SP-1’s security interest

does not satisfy subsection (c)(2)(C) because the inventory proceeds, which intervened between the original deposit account and the deposit account constituting the proceeds at issue, are not cash proceeds, proceeds of the same type as the collateral (original deposit account), or an account relating to the collateral. Stated otherwise, once proceeds other than cash proceeds, proceeds of the same type as the original collateral, or an account relating to the original collateral intervene in the chain of proceeds, priority under subsection (c) is thereafter unavailable. The special priority rule in subsection (d) also is inapplicable to this case. See Comment 9, Example 13, below. Instead, the general first-to-file-or-perfect rule of subsections (a) and (b) apply. Under that rule, SP-1 has priority unless its security interest in the inventory proceeds became unperfected under Section 9-315(d). Had SP-2 filed against inventory before SP-1 obtained control of the original deposit account, the SP-2 would have had priority even if SP-1's security interest in the inventory proceeds remained perfected.

If two security interests in the same original collateral are entitled to priority in an item of proceeds under subsection (c)(2), the security interest having priority in the original collateral has priority in the proceeds.

Explanation of comment change to section 9-322

New addition to Comment 4, in conjunction with the revised comment to section 9-509, deals with retroactive effectiveness of unauthorized filings once they become authorized.

New addition to Comment 8 completes the explanation of the application of the proceeds rules.

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

* * *

Official Comment

* * *

2. Subordination of Security Interests Created by New Debtor. This section addresses the priority contests that may arise when a new debtor becomes bound by the security agreement of an original debtor and each debtor has a secured creditor.

Subsection (a) subordinates the original debtor's secured party's security interest perfected against the new debtor solely under Section 9-508. The security interest is subordinated to security interests in the same collateral perfected by another method, e.g., by filing against the new debtor. As used in this section, "a filed financing statement that is effective solely under Section 9-508" refers to a financing statement filed against the *original debtor* that ~~continues to be~~ is effective under Section 9-508 to perfect a security interest in the collateral in question. It does not encompass a new initial financing statement providing the name of the new debtor, even if the initial financing statement is filed to maintain the effectiveness of a financing statement under the circumstances described in Section 9-508(b). Nor does it encompass a financing statement filed against the original debtor which remains effective against collateral transferred by the original debtor to the new debtor. See Section 9-508(c). Concerning priority contests involving transferred collateral, see Sections 9-325 and 9-507.

Explanation of comment change to section 9-326

The modified comment emphasizes that determining whether the financing statement is effective solely under section 9-508 requires looking at the collateral at issue when making this determination.

SECTION 9-330. PRIORITY OF PURCHASER OF CHATTEL PAPER OR INSTRUMENT.

Official Comment

* * *

3. **Chattel Paper.** Subsections (a) and (b) follow former Section 9-308 in distinguishing between earlier-perfected security interests in chattel paper that is claimed merely as proceeds of inventory subject to a security interest and chattel paper that is claimed other than merely as proceeds. Like former Section 9-308, this section does not elaborate upon the phrase “merely as proceeds.” For an elaboration, see PEB Commentary No. 8.

For a security interest to qualify for priority under subsection (a) or (b), the secured party must “take[] possession of the chattel paper or obtain[] control of the chattel paper under Section 9-105.” When chattel paper comprises one or more tangible records and one or more electronic records, a secured party may satisfy this requirement, and perfect a security interest in the chattel paper, by taking possession of the tangible records and having control of the electronic records.

This section makes explicit the “good faith” requirement and retains the requirements of “the ordinary course of the purchaser’s business” and the giving of “new value” as conditions for priority. Concerning the last, this Article deletes former Section 9-108 and adds to Section 9-102 a completely different definition of the term “new value.” Under subsection (e), the holder of a purchase-money security interest in inventory is deemed to give “new value” for chattel paper constituting the proceeds of the inventory. Accordingly, the purchase-money secured party may qualify for priority in the chattel paper under subsection (a) or (b), whichever is applicable, even if it does not make an additional advance against the chattel paper.

If a possessory security interest in tangible chattel paper or a perfected-by-control security interest in electronic chattel paper does not qualify for priority under this section, it may be subordinate to a perfected-by-filing security interest under Section 9-322(a)(1).

Explanation of comment change to section 9-326

The modified comment accommodates “hybrid” chattel paper (partially electronic and partially paper).

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

* * *

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

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

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

(e) **[Inapplicability of subsection (d) to certain sales.]** Subsection (d) does not apply to the sale, other than a sale pursuant to a disposition under Section 9-610 or an acceptance of collateral under Section 9-620, of a payment intangible or promissory note.

* * *

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

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

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

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

(b) **[Applicability of subsection (a) to sales of certain rights to payment.]** Subsection (a) applies to a security interest in a payment intangible or promissory note only if the security interest arises out of a sale, other than a sale pursuant to a disposition under Section 9-610 or an acceptance of collateral under Section 9-620, of the payment intangible or promissory note.

Explanation of statutory text change to sections 9-406 and 9-408:

The amendment makes clear that a person who purchases the promissory note or a payment intangible through the Article 9 foreclosure process has a right to enforce the obligation against the obligor.

SECTION 9-501. FILING OFFICE.

Official Comment

* * *

5. Transmitting Utilities. The usual filing rules do not apply well for a transmitting utility (defined in Section 9-102). Many pre-UCC statutes provided special filing rules for railroads and in some cases for other public utilities, to avoid the requirements for filing with legal descriptions in every county in which such debtors had property. Former Section 9-401(5) recreated and broadened these provisions, and subsection (b) follows this approach. The nature of the debtor will inform persons searching the record as to where to make a search.

A given State's subsection (b) applies only if the local law of that State governs perfection. As to most collateral, perfection by filing is governed by the law of the jurisdiction in which the debtor is located. See Section 9-301(1). However, the law of the jurisdiction in which goods that are or become fixtures are located governs perfection by fixture filing. See Section 9-301(3)(A). As a consequence, filing in the filing office of more than one State may be necessary to perfect by fixture filing a security interest in fixtures collateral of a transmitting utility. See Section 9-301, Comment 5.b.

Explanation of comment change to section 9-501

This comment provides guidance on filing as to transmitting utilities. See also the comment to section 9-301.

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

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

(1) except as otherwise provided in paragraph (3) and subject to subsection (f), if the debtor is a registered organization or the collateral is held in a trust that is a registered organization, only if the financing statement provides the name of the debtor registered organization indicated on the public organic record of filed with or issued or enacted by the debtor's registered organization's jurisdiction of organization which shows the debtor to have been organized;

(2) if the debtor is a decedent's estate, only if the financing statement provides the name of the decedent and indicates that the debtor is an estate; subject to subsection (w), if the collateral is being administered by the personal representative of a decedent, if the financing statement provides the name of the decedent and, in a separate part of the financing statement, indicates that the collateral is being administered by the personal representative of a decedent;

(3) if the debtor is a trust or a trustee acting with respect to property held in trust, only if the financing statement:

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

(B) indicates, in the debtor's name or otherwise, that the debtor is a trust or is a trustee acting with respect to property held in trust;

collateral is held in a trust that is not a registered organization, only if the financing statement:

(A) provides, as the name of the debtor:

(i) if the organic record of the trust specifies the name of the trust, the name so specified; or

(ii) if the organic record of the trust does not specify a name for the trust, the name of the settlor [or testator] under subsection (x); and

(B) in a separate part of the financing statement:

(i) if the name is provided in accordance with subparagraph (A)(i), indicates that the collateral is held in a trust; or

(ii) if the name is provided in accordance with subparagraph (A)(ii), provides additional information sufficient to distinguish the trust from other trusts having one or more of the same settlors [or testators] and indicates that the collateral is held in trust, unless the additional information so indicates;

[Alternative A-“Only If” Approach]

(4) subject to subsection (g), if the debtor is an individual to whom this State has issued a [driver's license] that has not expired, only if it provides the name of the individual which is indicated on the [driver's license];

(5) if the debtor is an individual as to whom paragraph (4) does not apply, only if it provides the individual name of the debtor or the surname and first personal name of the debtor; and

(4)(6) in other cases:

(A) if the debtor has a name, only if it provides the ~~individual or~~ organizational name of the debtor; and

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

[Alternative B-“Safe Harbor” Approach”]

(4) if the debtor is an individual, only if:

(A) it provides the individual name of the debtor;

(B) it provides the surname and first personal name of the debtor; or

(C) subject to subsection (g), it provides the name of the individual which is indicated on a [driver’s license] that this State has issued to the individual a [driver’s license] and which has not expired; and

(45) in other cases:

(A) if the debtor has a name, only if it provides the ~~individual or~~ organizational name of the debtor; and

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

[End of Alternatives]

(f) **[Name of registered organization.]** For purposes of subsection (a)(1), if the public organic record indicates more than one name of the debtor, “the name of the debtor indicated on the public organic record” means:

(1) if the public organic record is composed of a single record that states the name of the debtor, the name of the debtor which that record states to be the debtor’s name; and

(2) if the public organic record is composed of more than one record, the name of the debtor which is indicated on the most recently filed, issued, or enacted record that purports to amend or restate the debtor’s name.

* * *

[Alternative A- “Only If” Approach]

(g) **[Multiple licenses.]** If this State has issued to an individual more than one [driver’s license] of a kind described in subsection (a)(4), the one that was issued most recently is the one to which the subsection refers.

[Alternative B-“Safe Harbor Approach”]

(g) **[Multiple licenses.]** If this State has issued to an individual more than one [driver’s license] of a kind described in subsection (a)(4)(C), the one that was issued most recently is the one to which the subsection refers.

[End of Alternatives]

(w) **[Name of Decedent.]** The name of the decedent indicated on the order appointing the personal representative of the decedent issued by the court having jurisdiction over the collateral is sufficient as the “name of the decedent” under subsection (a)(2).

(x) The “name of the settlor [or testator]” in subsection (a)(3) means:

(1) if the settlor is a registered organization, the name of the registered organization indicated on the public organic record filed with or issued or enacted by the registered organization’s jurisdiction of organization; and

(2) in other cases, the name of the settlor [or testator] indicated in the trust’s organic record.

Explanation of statutory text changes to section 9-503

The text above is from the March 2010 draft as edited at the March 2010 meeting.

The changes to the registered organization provisions are tied to the changes in the definition of “public organic record” in section 9-102. In addition, the new subsection (f) attempts to

provide an answer for when the records indicate more than one name for the registered organization. Subsection (f) above is from the March 2010 draft and is subject to a redraft before the final draft. That redraft will likely be something like the following: “For purposes of subsection (a)(1), “the name of the debtor indicated on the public organic record” means the name that is stated to be the debtor’s name on the most recently filed record that purports to state, amend, or restate the debtor’s name.”

The amendments to subsection (a)(1) and (3) regarding trusts and the new subsection (x) is designed to solve two problems: (i) the uncertainty of whether the trust or the trustee is the debtor; and (ii) the ambiguity under current law about whether the indication of the trust status should be in the debtor’s name block and thus be part of the name for purposes of section 9-502 sufficiency.

The amendments to subsection (a)(2) and new subsection (w) are proposed because the property rights in collateral of a deceased person may not be in the estate, rather the personal administrator is given power to deal with the collateral regardless of who has the property interest.

The amendments to subsection (4) and new subsection (g) are designed to give more certainty to the debtor’s individual name by using the driver’s license name as the debtor’s name either as required (if the debtor has a driver’s license) or as a safe harbor. An additional safe harbor is provided of the first personal name and surname.

There is likely to be extensive comments proposed to this section to explain the changes but those comments have not yet been drafted.

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

* * *

(c) **[Change in debtor’s name.]** If a name of a debtor which is sufficient under Section 9-503~~se changes its name such~~ that a filed financing statement becomes seriously misleading under Section 9-506:

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

Explanation of statutory text changes to section 9-507

This provision has been redrafted in light of the changes to section 9-503 where the debtor’s name may change even if the debtor takes no action, such as if the driver’s license has expired and thus no longer provides an effective source of the “debtor’s name.”

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

* * *

Official Comment

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3. **Unauthorized Filings.** Records filed in the filing office do not require signatures for their effectiveness. Subsection (a)(1) substitutes for the debtor’s signature on a financing statement the requirement that the debtor authorize in an authenticated record the filing of an initial

financing statement or an amendment that adds collateral. Also, under subsection (a)(1), if an amendment adds a debtor, the debtor who is added must authorize the amendment. A person who files an unauthorized record in violation of subsection (a)(1) is liable under Section 9-625(b) and (e) for actual and statutory damages. Of course, a filed financing statement is ineffective to perfect a security interest if the filing is not authorized. See Section 9-510(a). Law other than this Article, including the law with respect to ratification of past acts, generally determines whether a person has the requisite authority to file a record under this section. See Sections 1-103, 9-502, Comment 3. This Article applies to other issues, such as the priority of a security interest perfected by the filing of a financing statement. See Section 9-322, Comment 4.

* * *

6. Amendments; Termination Statements Authorized by Debtor. Most amendments may not be filed unless the secured party of record, as determined under Section 9-511, authorizes the filing. See subsection (d)(1). However, under subsection (d)(2), the authorization of the secured party of record is not required for the filing of a termination statement if the secured party of record failed to send or file a termination statement as required by Section 9-513, the debtor authorizes it to be filed, and the termination statement so indicates. An authorization to file a record under subsection (d) is effective even if the authorization is not in an authenticated record. Compare subsection (a)(1). However, the person filing the record would be prudent to obtain and retain an authenticated record authorizing the filing.

Explanation of comment change to section 9-509

In conjunction with the addition to comment 4 to section 9-322, the addition to comment 3 to 9-509 is intended to deal with retroactive authorization of an unauthorized filing.

The addition to comment 6 distinguishes the need for an authenticated record under subsection(a)(1) and the oral authorization allowed under subsection (d).

SECTION 9-512. AMENDMENT OF FINANCING STATEMENT.

Official Comment

* * *

4. Amendment Adding Debtor. An amendment that adds a debtor is effective, provided that the added debtor authorizes the filing. See Section 9-509(a). However, filing an amendment adding a debtor to a previously filed financing statement affords no advantage over filing an initial financing statement against that debtor and may be disadvantageous. With respect to the added debtor, for purposes of determining the priority of the security interest, the time of filing is the time of the filing of the amendment, not the time of the filing of the initial financing statement. See subsection (d). However, the effectiveness of the financing statement lapses with respect to added debtor at the time it lapses with respect to the original debtor. See subsection (b).

5. Amendment Adding Debtor Name. Many states have enacted statutes governing the "conversion" of one organization, e.g., a corporation, into another, e.g., a limited liability company. This Article defers to those statutes to determine whether the resulting organization is the same legal person as the initial, converting organization (albeit with a different name) or whether the resulting organization is a different legal person. When the governing statute does not clearly resolve the question, a secured party whose debtor is the converting organization may wish to proceed as if the statute provides for both results. In these circumstances, an amendment adding to the initial financing statement the name of the resulting organization may be preferable to an amendment substituting that name for the name of the debtor appearing on the initial financing statement. In the event the governing statute is construed as providing that

the resulting organization is the same person as the converting organization but with a different name, the timely filing of such an amendment would satisfy the requirement of Section 9-507(c)(2). If, however, the governing statute is construed as providing that the resulting organization is a different legal person, such an amendment would have the effect of adding the resulting organization as a debtor. See Comment 4. Regardless of how the governing statute is construed, the converting and resulting organizations may be organized under the law of different jurisdictions and so may be located in different jurisdictions under Section 9-307. In that case, a filing in the location of the resulting organization may be advisable.

56. Deletion of All Debtors or Secured Parties of Record. Subsection (e) assures that there will be a debtor and secured party of record for every financing statement.

Explanation of comment change to section 9-512

This change recognizes the evolving state law on whether a change in entity form or reincorporation is considered to be a new entity.

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

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

Explanation of text change to section 9-515

The amendment conforms subsection (f) to subsection (b) regarding public finance and manufactured home transactions that require indication of the type of financing on the initial financing statement. This is essential to properly provide for lapse in the financing statement in the filing office.

SECTION 9-516. WHAT CONSTITUTES FILING; EFFECTIVENESS OF FILING.

(b) **[Refusal to accept record; filing does not occur.]** Filing does not occur with respect to a record that a filing office refuses to accept because:

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

(A) in the case of an initial financing statement, the record does not provide a name for the debtor;

(B) in the case of an amendment or ~~correction~~ information statement, the record:

(i) does not identify the initial financing statement as required by Section 9-512 or 9-518, as applicable; or

(ii) identifies an initial financing statement whose effectiveness has lapsed under Section 9-515;

(5) in the case of an initial financing statement or an amendment that provides a name of a debtor which was not previously provided in the financing statement to which the amendment relates, the record does not:

(A) provide a mailing address for the debtor; or

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

(C) ~~if the financing statement indicates that the debtor is an organization, provide:~~

- (i) a type of organization for the debtor;
- (ii) a jurisdiction of organization for the debtor; or
- (iii) an organizational identification number for the debtor or indicate that the debtor has none;

Explanation of statutory text change to section 9-516

The change in terminology in subsection (3) conforms to the change in terminology in section 9-518 from “correction” statement to “information” statement.

From the reporter’s note: “Experience has shown that the benefits afforded by requiring the filer to provide the information specified in [subsection (b)(5)(C)] are less than the costs that the paragraph imposes.”

SECTION 9-518. CLAIM CONCERNING INACCURATE OR WRONGFULLY FILED RECORD.

(a) ~~[Who may file a correction statement with respect to record indexed under person’s name.]~~ A person may file in the filing office ~~a correction~~ an information statement with respect to a record indexed there under the person’s name if the person believes that the record is inaccurate or was wrongfully filed.

[Alternative A]

(b) ~~[Sufficiency Contents of correction statement under subsection (a).]~~ ~~A correction~~ An information statement under subsection (a) must:

- (1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;
- (2) indicate that it is ~~a correction~~ an information statement; and
- (3) provide the basis for the person’s belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person’s belief that the record was wrongfully filed.

[Alternative B]

(b) ~~[Sufficiency Contents of correction statement under subsection (a).]~~ ~~A correction~~ An information statement under subsection (a) must:

- (1) identify the record to which it relates by:
 - (A) the file number assigned to the initial financing statement to which the record relates; and
 - (B) if the ~~correction~~ information statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);
- (2) indicate that it is ~~a correction~~ an information statement; and
- (3) provide the basis for the person’s belief that the record is inaccurate and indicate the manner in which the person believes the record should be amended to cure any inaccuracy or provide the basis for the person’s belief that the record was wrongfully filed.

[End of Alternatives]

(c) [Statement by secured party of record.] A person may file in the filing office an information statement with respect to a record filed there if the person is a secured party of record with respect to the financing statement to which the record relates and believes that the person that filed the record was not entitled to do so under Section 9-509(d).

[Subsection (d)—Alternative A]

(d) [Contents of statement under subsection (c).] An information statement under subsection (c) must:

- (1) identify the record to which it relates by the file number assigned to the initial financing statement to which the record relates;
- (2) indicate that it is an information statement; and
- (3) provide the basis for the person’s belief that the person that filed the record was not entitled to do so under Section 9-509(d).

[Subsection (d)—Alternative B]

(d) [Contents of statement under subsection (c).] An information statement under subsection (c) must:

- (1) identify the record to which it relates by:
 - (A) the file number assigned to the initial financing statement to which the record relates; and
 - (B) if the statement relates to a record filed [or recorded] in a filing office described in Section 9-501(a)(1), the date [and time] that the initial financing statement was filed [or recorded] and the information specified in Section 9-502(b);
- (2) indicate that it is an information statement; and
- (3) provide the basis for the person’s belief that the person who filed the record was not entitled to do so under Section 9-509(d).

[End of Alternatives]

~~(e)~~(e) [Record not affected by correction information statement.] The filing of a ~~correction~~ an information statement does not affect the effectiveness of an initial financing statement or other filed record.

Official Comment

2. ~~Correction~~ **Information Statements.** Former Article 9 did not afford a nonjudicial means for a debtor to correct a financing statement or other record that was inaccurate or wrongfully filed. Subsection (a) affords the debtor the right to file a ~~correction~~ an information statement. Among other requirements, the ~~correction~~ information statement must provide the basis for the debtor’s belief that the public record should be corrected. See subsection (b). These provisions, which resemble the analogous remedy in the Fair Credit Reporting Act, 15 U.S.C. § 1681i, afford an aggrieved person the opportunity to state its position on the public record. They do not permit an aggrieved person to change the legal effect of the public record. Thus, although a filed ~~correction~~ information statement becomes part of the “financing statement,” as defined in Section 9-102, the filing does not affect the effectiveness of the initial financing statement or any other filed record. See subsection (c)(e).

Sometimes a person files a termination statement or other record relating to a financing statement without being entitled to do so. A secured party of record with respect to the financing statement who believes that such a record has been filed may—but need not—file an information statement under subsection (c). If the person filing the record was not entitled to do so, the filed record is ineffective, regardless of whether the secured party of record files an information statement. Likewise, if the person filing the record was entitled to do so, the filed record is effective, even if the secured party of record files an information statement. See Section 9-510(a), 9-518(e).

This section does not displace other provisions of this Article that impose liability for making unauthorized filings or failing to file or send a termination statement (see Section 9-625(e)), nor does it displace any available judicial remedies.

Explanation statutory text and comment changes to section 9-518

The change of terminology from correction statement to information statement is an attempt to reinforce the rule in subsection (e) that the statement has no legal effect. In addition, the new subsections allow the secured party of record to file the statement.

SECTION 9-602. WAIVER AND VARIANCE OF RIGHTS AND DUTIES.

Official Comment

* * *

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

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

Section 9-610(c) limits the circumstances under which a secured party may purchase at its own private disposition. Transactions of this kind are equivalent to “strict foreclosures” and are governed by Sections 9-620, 9-621, and 9-622. The provisions of these sections can be waived only as provided in Section 9-624(b).

Explanation of changes to comment of section 9-602

This comment is added to make it more visible. It is also repeated in a revised comment to 9-610 and is in current comment to 9-624.

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

* * *

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

Explanation of statutory text change to section 9-607

This change is a clarification as to what obligation must be in default. The reporter's note indicates that this is not a change in meaning and thus should have retroactive effect.

SECTION 9-610. DISPOSITION OF COLLATERAL AFTER DEFAULT.

Official Comment

* * *

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

* * *

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

A secured party's purchase of collateral at its own private disposition is equivalent to a "strict foreclosure" and is governed by Sections 9-620, 9-621, and 9-622. The provisions of these sections can be waived only as provided in Section 9-624(b).

Explanation of changes to comment of section 9-610

Comment 2 was amended to make clear that a disposition over the internet may be commercially reasonable.

Comment 7 was amended for the same reason as comment 3 to section 9-602. See note to section 9-602 above.

SECTION 9-611. NOTIFICATION BEFORE DISPOSITION OF COLLATERAL.

Official Comment

* * *

10. Other Law. Other [state or federal] law may contain requirements concerning notification of a disposition of property by a secured party. For example, federal law imposes notification requirements with respect to the enforcement of mortgages on federally

documented vessels. Principles of statutory interpretation and, in the context of federal law, supremacy and preemption determine whether and to what extent law other than this Article supplements, displaces, or is displaced by this Article. See Sections 1-103(b), 1-104, 9-109(c)(1).

Explanation of changes to comment of section 9-611

The committee seemed to feel compelled to state the obvious.

SECTION 9-613. CONTENTS AND FORM OF NOTIFICATION BEFORE DISPOSITION OF COLLATERAL: GENERAL.

Official Comment

* * *

2. Contents of Notification. To comply with the “reasonable authenticated notification” requirement of Section 9-611(b), the contents of a notification must be reasonable. Except in a consumer-goods transaction, the contents of a notification that includes the information set forth in paragraph (1) are sufficient as a matter of law, unless the parties agree otherwise. (The reference to “time” of disposition means here, as it did in former Section 9-504(3), not only the hour of the day but also the date.) Although a secured party may choose to include additional information concerning the transaction or the debtor’s rights and obligations, no additional information is required unless the parties agree otherwise. A notification that lacks some of the information set forth in paragraph (1) nevertheless may be sufficient if found to be reasonable by the trier of fact, under paragraph (2). A properly completed sample form of notification in paragraph (5) or in Section 9-614(a)(3) is an example of a notification that would contain the information set forth in paragraph (1). Under paragraph (4), however, no particular phrasing of the notification is required.

This section applies to a notification of a public disposition conducted electronically. A notification of an electronic disposition satisfies paragraph (1)(E) if it states the time when the disposition is scheduled to begin and states the electronic location. For example, under the technology current in [2010], the Uniform Resource Locator (URL) or other Internet address where the site of the public disposition can be accessed suffices as an electronic location.

Explanation of changes to comment of section 9-613

This addition allows for electronic dispositions.

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

Official Comment

* * *

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

Explanation of changes to comment of section 9-706.

From the Reporter's Note: "The additional sentences would remove any doubt that the "minor error" rule in Section 9-506(a) applies to an initial financing statement, including one that is filed to continue the effectiveness of a financing statement that was filed before revised Article 9 took effect."

The draft will recommend repeal of Article 11.

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

The draft will also correct typos and errors.

In comment 5 to section 9-307, third paragraph, the word "authorized" will be changed to "authorizes."

In comment 2 to section 9-616, the cross reference to subsection (b)(2) will be changed to (b)(1)(B).

In comment 2 to section 9-621, the last sentence of comment 2 will read "The holder of a security interest who is entitled to notification under this section but ~~does not receive it to whom~~ the enforcing secured party does not send notification has the right to recover under Section 9-625(b) any loss resulting from the ~~enforcing~~ secured party's noncompliance with this section."

The caption to section 9-625(c) will be conformed to the statutory text as follows: [Persons entitled to recover damages; statutory damages ~~in consumer goods transaction~~ if collateral is consumer goods.]

III. Redrafts pending based upon the discussion at the March 2010 meeting

March 2010 draft page 63: Comment to 9-102

Section 9-102. A sentence will be added to comment 5 that the definition of account that refers to "rights arising out of the use of a credit or charge card" refers to the obligation of the *cardholder* that arises out of use of the card. The language in the March 2010 draft comment to 5(d) that attempted to state that the other obligations stemming from the use of a credit card, debit card, or pre-paid card were general intangibles was rejected because of the complexity and variety of the contractual relationships that are involved and doubt about the ability to "get it right."

March 2010 draft pages 5-11: Comment to 9-104

Proposed amendments to definition of control in 9-104 regarding deposit accounts and to definition of control for commodity accounts in 9-106 and accompanying changes to 9-327, 9-607, and 9-328. The proposed amendments were designed to follow 8-106(d)(3) which allow a person in control to acknowledge that they had control on behalf of another party. After discussion, it was determined that these changes are not necessary and that a comment that indicated that control could be obtained through an agent, similar to comment 3 to 9-313 regarding bailed goods should be sufficient.

March 2010 draft pages 15-23: Section 9-316, 9-322 and 9-326

At the March 2009 meeting, the drafting committee determined as a policy matter that when a debtor moves from one jurisdiction to another, a secured party who had perfected against the debtor in the old jurisdiction should have a four month period of time to take action in the new jurisdiction without losing perfection as to collateral the debtor acquired within that four month period in the new jurisdiction. (See the rule of 9-507 for intrastate name changes and of 9-508 for new debtors). However, there was concern that a new secured party who has first perfected in jurisdiction two should not have to be concerned about the filing in jurisdiction one as to the collateral acquired while the debtor was located in jurisdiction two. There was also concern about buyers of collateral being protected against the effectiveness of that filing in jurisdiction two. The September 2009 draft contained provisions to that effect and were not discussed to any degree at the September 2009 meeting. At the March 2010 meeting, the committee rethought the policy and directed the reporter to prepare new provisions that would implement the policies of 9-507 and 9-508 as to collateral acquired by a debtor in a new jurisdiction because the provisions as drafted created the possibilities of unavoidable circular priorities and the discussion indicated that the current practice is to inquire after the filings in jurisdiction one as secured parties in jurisdiction two generally are not concerned only about after acquired collateral, but also about existing collateral prior to the move. New provisions will be drafted, presumably as amendments to 9-316 and 9-326 to this effect in both the same debtor and new debtor context.

March 2010 draft pages 28-31: Proposed new section 9-513A

This provision concerns bogus filings against government employees and provides a mechanism whereby the governmental employee can get the bogus filing withdrawn from the record through a summary process by the filing office. The committee decided this should not be in the UCC and thus will not be in the final draft. There was a consensus that the provision should be further refined and developed so in the event a state is interested, the provision would provide guidance to a state.

March 2010 draft pages 53 through 61: Proposed transition rules

The transition rules were briefly discussed and are subject to further revision based upon the discussion and subsequent comments that will be submitted to the reporter and chair, prior to producing the final draft for approval by the ALI and the ULC. They are modeled on the template for the transition rules in Part 7 as adopted in 1999.

SECTION 9-801. EFFECTIVE DATE. This [Act] takes effect on July 1, 2013.

SECTION 9-802. DEFINITION. As used in this part, “pre-effective-date financing statement” means a financing statement filed before this [Act] takes effect.

SECTION 9-803. SAVINGS CLAUSE.

(a) [**Pre-effective-date transactions or liens.**] Except as otherwise provided in this part, this [Act] applies to a transaction or lien within its scope, even if the transaction or lien was entered into or created before this [Act] takes effect.

(b) **[Pre-effective-date proceedings.]** This [Act] does not affect an action, case, or proceeding commenced before this [Act] takes effect.

SECTION 9-804. SECURITY INTEREST PERFECTED BEFORE EFFECTIVE DATE.

[(a) **[Continuing perfection: perfection requirements satisfied.]]** A security interest that is a perfected security interest immediately before this [Act] takes effect is a perfected security interest under [Article 9 as amended by this [Act]] if, when this [Act] takes effect, the applicable requirements for attachment and perfection under [Article 9 as amended by this [Act]] are satisfied without further action.

[(b) **[Continuing perfection: perfection requirements not satisfied.]]** Except as otherwise provided in Section 9-806, if, immediately before this [Act] takes effect, a security interest is a perfected security interest, but the applicable requirements for perfection under [Article 9 as amended by this [Act]] are not satisfied when this [Act] takes effect, the security interest remains perfected thereafter only if the applicable requirements for perfection under [Article 9 as amended by this [Act]] are satisfied within one year after this [Act] takes effect.]

Reporter's Note

Inasmuch as Section 9-806 governs security interests that were perfected by a pre-effective-date filing, the one-year rule in subsection (b) would apply only to security interests that are perfected before the effective date by a method other than by filing but would be unperfected under Article 9 as amended. The Joint Review Committee should consider whether the amendments would give rise to any such cases.

SECTION 9-805. SECURITY INTEREST UNPERFECTED BEFORE EFFECTIVE DATE. A security interest that is an unperfected security interest immediately before this [Act] takes effect becomes perfected:

(1) without further action, when this [Act] takes effect if the applicable requirements for perfection under [Article 9 as amended by this [Act]] are satisfied before or at that time; or

(2) when the applicable requirements for perfection are satisfied if the requirements are satisfied after that time.

SECTION 9-806. EFFECTIVENESS OF ACTION TAKEN BEFORE EFFECTIVE DATE.

(a) **[Pre-effective-date filing effective.]** The filing of a financing statement before this [Act] takes effect is effective to perfect a security interest to the extent the filing would satisfy the applicable requirements for perfection under [Article 9 as amended by this [Act]].

(b) **[When pre-effective-date filing becomes ineffective.]** This [Act] does not render ineffective an effective financing statement that, before this [Act] takes effect, is filed and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [Part 3 of Article 9 in force immediately prior to the effective date of this Act]. However, except as otherwise provided in subsections (c) and (d) and Section 9-807, the financing statement ceases to be effective at the earliest of:

(1) if the financing statement is filed in this State, the time the financing statement would have ceased to be effective had this [Act] not taken effect; or

(2) if the financing statement is filed in another jurisdiction, the time the financing statement would have ceased to be effective under the law of that jurisdiction; or

(3) June 30, 2018.

(c) **[Continuation statement.]** The filing of a continuation statement after this [Act] takes effect does not continue the effectiveness of the financing statement filed before this [Act] takes effect. However, upon the timely filing of a continuation statement after this [Act] takes effect

and in accordance with the law of the jurisdiction governing perfection as provided in Part 3 [of Article 9 in force immediately prior to the effective date of this Act], the effectiveness of a financing statement filed in the same office in that jurisdiction before this [Act] takes effect continues for the period provided by the law of that jurisdiction.

(d) **[Application of subsection (b)(3) to transmitting utility financing statement.]** Subsection (b)(3) applies to a financing statement that, before this [Act] takes effect, is filed against a transmitting utility and satisfies the applicable requirements for perfection under the law of the jurisdiction governing perfection as provided in [Part 3 of Article 9 in force immediately prior to the effective date of this Act], only to the extent that Part 3 as amended by this [Act] provides that the law of a jurisdiction other than the jurisdiction in which the financing statement is filed governs perfection of a security interest in collateral covered by the financing statement.

(e) **[Application of Part 5.]** A financing statement that includes a financing statement filed before this [Act] takes effect and a continuation statement filed after this [Act] takes effect is effective only to the extent that it satisfies the requirements of Part 5 as amended by this [Act] for an initial financing statement.

SECTION 9-807. WHEN INITIAL FINANCING STATEMENT SUFFICES TO CONTINUE EFFECTIVENESS OF FINANCING STATEMENT.

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

- (1) the filing of an initial financing statement in that office would be effective to perfect a security interest under [Article 9 as amended by this [Act]];
- (2) the pre-effective-date financing statement was filed in an office in another State or another office in this State; and
- (3) the initial financing statement satisfies subsection (c).

(b) **[Period of continued effectiveness.]** The filing of an initial financing statement under subsection (a) continues the effectiveness of the pre-effective-date financing statement:

- (1) if the initial financing statement is filed before this [Act] takes effect, for the period provided in [former Section 9-515] with respect to an initial financing statement; and
- (2) if the initial financing statement is filed after this [Act] takes effect, for the period provided in Section 9-515 as amended by this [Act] with respect to an initial financing statement.

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

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

SECTION 9-808. AMENDMENT OF PRE-EFFECTIVE-DATE FINANCING STATEMENT.

(a) **[Applicable law.]** After this [Act] takes effect, a person may add or delete collateral covered by, continue or terminate the effectiveness of, or otherwise amend the information provided in, a pre-effective-date financing statement only in accordance with the law of the jurisdiction governing perfection as provided in Part 3 as amended by this [Act]. However, the

effectiveness of a pre-effective-date financing statement also may be terminated in accordance with the law of the jurisdiction in which the financing statement is filed.

(b) **[Method of amending: general rule.]** Except as otherwise provided in subsection (c), if the law of this State governs perfection of a security interest, the information in a pre-effective-date financing statement may be amended after this [Act] takes effect only if:

(1) the pre-effective-date financing statement and an amendment are filed in the office specified in Section 9-501;

(2) an amendment is filed in the office specified in Section 9-501 concurrently with, or after the filing in that office of, an initial financing statement that satisfies Section 9-807(c); or

(3) an initial financing statement that provides the information as amended and satisfies Section 9-807(c) is filed in the office specified in Section 9-501.

(c) **[Method of amending: continuation.]** If the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement may be continued only under Section 9-806(c) and (e) or 9-807.

(d) **[Method of amending: additional termination rule.]** Whether or not the law of this State governs perfection of a security interest, the effectiveness of a pre-effective-date financing statement filed in this State may be terminated after this [Act] takes effect by filing a termination statement in the office in which the pre-effective-date financing statement is filed, unless an initial financing statement that satisfies Section 9-807(c) has been filed in the office specified by the law of the jurisdiction governing perfection as provided in Part 3 as amended by this [Act] as the office in which to file a financing statement.

SECTION 9-809. PERSONS ENTITLED TO FILE INITIAL FINANCING STATEMENT OR CONTINUATION STATEMENT. A person may file an initial financing statement or a continuation statement under this part if:

(1) the secured party of record authorizes the filing; and

(2) the filing is necessary under this part:

(A) to continue the effectiveness of a financing statement filed before this [Act] takes effect; or

(B) to perfect or continue the perfection of a security interest.

SECTION 9-810. PRIORITY.

This [Act] determines the priority of conflicting claims to collateral. However, if the relative priorities of the claims were established before this [Act] takes effect, [pre-amendment Article 9] determines priority.

March 2010 draft page 61: Highland Capital

The draft provides for the following amendment to Article 8 and the comment. At the March 2010 meeting, it was determined that the change in statutory language would be only for New York and the official UCC would have a revised comment that would be added to the comment to section 8-103.

SECTION 8-103. RULES FOR DETERMINING WHETHER CERTAIN OBLIGATIONS AND INTERESTS ARE SECURITIES OR FINANCIAL ASSETS.

* * *

(h) An obligation, share, participation, or interest does not satisfy Section 8-102(a)(13)(ii) or 8-102(a)(15)(i) merely because the issuer or a person acting on its behalf:

- (1) maintains records of the owner thereof for a purpose other than registration of transfer; or
(2) could, but does not, maintain books for the purpose of registration of transfer.

Official Comment

* * *

9. Subsection (h) rejects the holding of *Highland Capital Management LP v. Schneider*, 8 N.Y.3d 406 (2007). The registrability requirement in the definition of “registered form,” and its parallel in the definition of “security,” are satisfied only if books are maintained by or on behalf of the issuer for the purpose of registration of transfer, including the determination of rights under Section 8-207(a) (or if, in the case of a certificated security, the security certificate so states). It is not sufficient that the issuer records ownership, or records transfers thereof, for other purposes. Nor is it sufficient that the issuer, while not in fact maintaining books for the purpose of registration of transfer, could do so, for such is always the case. Subsection (h) is declaratory of the proper interpretation of the definitions of “registered form” and “security,” not a change in law.